

The Potential for Improved Water Management Using a Legal Social Contract

Dr Mark L. Shephard

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Lincoln University, Canterbury, New Zealand

Reviewed by:



Dr Ann Brower
Senior Lecturer
Lincoln University

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Contacts - email: leap@lincoln.ac.nz

web: <http://www.lincoln.ac.nz/leap>

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Chapter 1

Introduction

This review examines the proposed social contract to improve water management in the Canterbury Region of New Zealand. This contract defines expectations of resource access and use, forming a boundary of responsibility between entitlement holder and society. The type of expectations may range from community wellbeing to freedom of private interests. In effect, this creates a tension between other regarding action for resource stewardship and the freedom to self-manage a resource entitlement with minimal accountability. The tension is embedded in western liberal legal frameworks that simultaneously seek enforcement of stewardship obligations while protecting the freedom of private interests in resources. In Canterbury a collaborative resource management strategy for water, supporting a legal social contract shows the tension in practice.

Recent reforms for improved water management will be discussed to show how the tension between stewardship and private interests is likely to affect the social contract as a boundary of responsibility. The analysis is based on a view that the law should be considered along with popular perceptions, social norms and political pressures as necessary to understanding conflict about access and use obligations.¹ In resolving such conflict, examples show that the legal framework is likely to favour the protection of private interests.²

The main stated resource management purpose of the *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* (NZ), known as the ECan Act, is to address serious concerns about the allocation, use and management of water in the Canterbury Region.³ This legislation has emerged amid increasing demands upon the region's water resources and a national interest in reforming water management.⁴ Its principle tool for achieving improvement is to adopt the Canterbury Water Management Strategy and its preference for obligations defined by a social contract. However, it is unclear to what extent this will reinforce the freedoms of private interest or emphasise the other regarding actions of stewardship.

The review is based on the following propositions:

- (1) The legal and institutional framework for water management favours the protection of private interests with minimal accountability;
- (2) This competes with the other regarding expectations of sustainability and stewardship contained in environmental protection law and policy;

1 Ann Brower et al, 'The Cowboy, the Southern Man and the Man from Snowy River: The Symbolic Politics of Property in Australia, the United States and New Zealand.' (2009) 21 *The Georgetown International Environmental Law Review* 3.

2 Shephard, Mark L, 'Some legal and social expectations of a farmer's duty of care' (02/10, CRC for Irrigation Futures, 2010) <www.irrigationfutures.org.au/imagesDB/news/IM0210-web.pdf> at 4 December 2010; Shephard, Mark L and Paul Martin, 'The political discourse of land stewardship, reframed as a statutory duty' in Kim Rubenstein and Brad Jessup (eds), *Environmental Discourses in International and Public Law* (Cambridge University Press, Forthcoming 2011).

3 *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010*, s 3(b)

4 NZ Cabinet Paper "New Start for Fresh Water" (8 June 2009) CABMin (09) 20/12 Para 14 and 15 <www.mfe.govt.nz/issues/water/freshwater/new-start-for-fresh-water-paper.pdf> at 12 January 2011; Land and Water Forum, 'A Fresh Start for Fresh Water' (Report of the Land and Water Forum, 2010); Raewyn Peart, Kate Mulcahy and Natasha Garvan, *Managing Freshwater-An EDS Guide* (Environmental Defence Society Incorporated, 2010); Nick Smith, 'A Blue green Vision for New Zealand: Discussion paper by the National Party Environment Spokesman.' (The Office of the Leader of the Opposition, NZ House of Representatives, 2006) <<http://www.national.org.nz/bluegreens/a%20bluegreen%20vision%20for%20new%20zealand.pdf>> at 28 November 2010, p 12; Turnbull Group, 'Governance of water' (Water NZ, 2009) <http://www.waternz.org.nz/documents/comment_and_submissions/090730_governance_of_water.pdf> at 19 November 2010.

- (3) Virtue ethics provides an alternative approach for specifying statutory water management principles and minimise the risk of policy failure from the unintended consequences of competing interpretations of water management. Addressing this requires analysis of the following questions:
- (i.) What is the legal framework for water use and management in Canterbury?
 - (ii.) What are the multiple meanings concealed by a social contract for water use and management?
 - (iii.) What version of improved is the ECan Act likely to deliver?

The first section below will describe the key terms and concepts for this discussion. That will be followed by an overview of the legal framework for water management in Canterbury. The social contract is then analysed for its effectiveness. This analysis will be used to draw some conclusions about the version of improved water management that is likely to be favoured by the ECan Act.

1.1 Key terms and concepts for freshwater access and use

My interpretation of the legal framework and tension about resource access and use relies on several key concepts associated with water management. Resource access and use will be defined as a relationship between the giver and receiver of a right/entitlement that specifies the conditions for ongoing access. The relationship under examination here is between irrigators and 'society' about the terms of access to water in a social contract.

1.2 A property entitlement

Property is about the rules governing access to and control of resources.⁵ In practice consent to access and use water is a form of property,⁶ introducing the language of rights and reinforcing their importance within the water management debate. This is a relationship between the giver and receiver of a water right, about the obligations of access and use.⁷ The relationship may be formally specified by rules governing access and use. These rules include limits upon a property owner's freedom to exploit. The process of defining these bounds represents a framework through which ecologically and socially feasible behavioural norms are developed.⁸

Such obligations are a contested boundary of responsibility between private benefit and public good. The boundary may be defined to encompass norms of behaviour and notions of property (both formalised in law), and notions of legitimacy and trust in the social contract. These all contribute to defining what a right to access and use water entails and represent dimensions of responsibility that help to interpret the conflict surrounding water access, use and management.⁹

5 Mark Stallworthy, *Sustainability, land use and environment. A legal analysis* (Cavendish Publishing Limited, 2002) p 77-78; Anthony Scott, 'Concepts in resource property rights' in Anthony Scott (ed), *The evolution of resource property rights* (Oxford University Press, 2008) p 49; Barry Barton, 'Property Rights Created under Statute in Common Law Legal Systems' in Aileen McHarg (ed), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010) p 98.

6 Ali Memon and Peter Skelton, 'Institutional Arrangements and Planning Practices to Allocate Freshwater Resources in New Zealand: A Way Forward' (2007) 11(1) *New Zealand Journal of Environmental Law* 241; Leigh Raymond, *Private rights in public resources: equity and property allocation in market-based environmental policy* (RFF Press, 2003).

7 Anthony Scott and Georgina Coustalin, 'Rights over Flowing Water' in Anthony Scott (ed), *The Evolution of Resource Property Rights* (Oxford University Press, 2008); Stallworthy, above n 5.

8 Maarten A Hajer, *The Politics of Environmental Discourse. Ecological Modernization and the Policy Process* (Oxford University Press, 1995) p 294.

9 Mark L Shephard and Paul Martin, 'Social Licence to Irrigate: The Boundary Problem' (2008) 27(3) *Social Alternatives* 32.

Benefiting from property requires that the community as a whole supports, and defends, an owner's 'right' to exploitation. For communities to invest in support and defence, they must feel comfortable that property owners will provide something beneficial to the community in return. That is, there must be a form of consensus about responsibility from and to the community.¹⁰ Thus, the relationship between the giver and receiver of the right, and how it influences expectations of performance is very important.¹¹

Where the community is dissatisfied, it can either take away the 'right' or impose constraints through statutes, or it can apply force or sanctions to ensure that the collective interest is not ignored.¹² It is normal for property rights to be subject to constraint. Land zoning, natural resource management legislation, and industry or supply chain codes of practice are all partly expressions of the social consensus about responsibility. It is also a reality that the 'boundary' between public and private interests is often implicit and it is not fixed across time.

Inclusions of 'sustainability' into statutes dealing with water, suggest a re-defining of the boundaries of responsibility. For example:

"...to address issues relevant to the efficient, effective, and sustainable management of fresh water"¹³

"To enable present and future generations to gain the greatest social, economic, recreational and cultural benefits from our water resources within an environmentally sustainable framework"¹⁴

"...to promote the sustainable management of natural and physical resources. In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing..."¹⁵

"...to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and, in particular: (a) to apply the principles of ecologically sustainable development, and (b) to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, and (c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water..."¹⁶

"...to promote the use and management of the Basin water resources in a way that optimises economic, social and environmental outcomes; and ...(i) to ensure the return to environmentally sustainable levels of extraction for water resources that

10 Paul Martin and Miriam Verbeek, 'Property Rights and Property Responsibility' in *Property: Rights and Responsibilities* (Land and Water Australia, 2002).

11 Barton, above n 5, p 99.

12 Stallworthy, above n 5, p 79; Sean Coyle and Karen Morrow, *Philosophical foundations of environmental law, property, rights and nature* (HART Publishing, 2004); Murray Raff, 'Toward an Ecologically Sustainable Property Concept' in Elizabeth Cooke (ed), *Modern Studies in Property Law* (2005).

13 Environment Canterbury Act 2010, s 3.

14 Ibid, Sch 1.

15 Resource Management Act 1991, s 5.

16 Water Management Act 2000 (NSW), s 3.

are over allocated or overused; and (ii) to protect, restore and provide for the ecological values and ecosystem services of the Murray-Darling Basin...”¹⁷

These statutory statements seek to import concepts of ethical responsibility or ‘virtue’ into responsibilities of water access and use.¹⁸ They implicitly define permit holders as stewards of natural resources, providing little certainty about what this means in practice.

1.3 A boundary of responsibility

There is uncertainty between water entitlement holders and society about where the boundary lies between private benefit and community wellbeing. It is one function of law to clearly define the boundary as obligations of access and use. However the tendency of law to uphold freedom of rights means that legal responsibility reflects a minimum level of accountability.¹⁹ Yet political aspirations and social expectations about sustainable use and stewardship of water (such as those embodied in the statutory statements at 1.1 above) suggest a boundary that defines a concern with stewardship of water systems. Such elements reflect the importance of social responsibility (in the social contract) when defining water access and use obligations.

Social responsibility debates are important to irrigation farming.²⁰ Reforms relying on market-based approaches to water allocation and use are changing how the water resources are shared, making the tradeoffs between the environment, and urban areas and farming more apparent.²¹ Society is increasingly expecting water entitlement holders to justify their access to and use of water, suggesting that in the longer term the exercise of private property interests is materially constrained by accountability to the community.²² For example, approval to access and use water for irrigation involves a (potentially tradable) permit, under the RMA, to extract some percentage of the available water. Such entitlements are increasingly subject to scrutiny and adjustment through political, legal and administrative processes. These include development of new water sharing arrangements and decisions about allocations, the development of laws to determine the priority of water access, and public investment in water infrastructure. These processes determine the conditions for trading, use and the availability of water, generating changes in access to water with limited regard to the apparent security (or property right) that a tradable entitlement to water suggests.

There is a general expectation that farmers will act responsibly and meet social expectations through environmental stewardship.²³ This typically entails not causing avoidable harm and honouring legal obligations.²⁴ Performance is judged by acting consistently with specified legal obligations and unspecified behavioural norms.²⁵ Farmers may be held accountable (formally or informally) should

17 Water Act 2007 (Cth of Aust), s 3.

18 A particular example of this trend occurs more broadly with a statutory duty of care for environmental protection, as documented in Mark L Shephard and Paul Martin, 'Multiple meanings and practical problems: The duty of care and stewardship in agriculture' (2009) 6 *Macquarie Journal of International and Comparative Environmental Law* 191.

19 *Ibid.*

20 Neil Gunningham, 'Cotton, Health and Environment: A case study of self-regulation' (2004) 9(2) *The Australasian Journal of Natural Resources Law and Policy* 189.

21 Alex Gardner, Richard Bartlett and Janice Gray, *Water Resources Law* (LexisNexis Butterworths, 2009).

22 Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social Licence and Environmental Protection' (Centre for Analysis of Risk and Regulation at the London School of Economics and Political Science, 2002) p 7.

23 N Bowie, 'New directions in corporate social responsibility (moral pluralism and reciprocity)' (1991) 34(4) *Business Horizons* 56; L Moir, 'What do we mean by corporate social responsibility?' (2001) 1(2) *Corporate Governance* 16; Alison Warhurst, 'Future roles of business in society: The expanding boundaries of corporate responsibility and a compelling case for partnership' (2005) 37 *Futures* 151.

24 Bowie, *ibid.*

25 E.M. Epstein, 'The corporate social policy process: Beyond business ethics, corporate social responsibility and, corporate social responsiveness' (1987) XXIX(3) *California Management Review* 99.

they transgress their boundaries of responsibility.²⁶ The boundary is partly fluid reflecting minimum accountability (against defined legal obligations) or more ambiguous expectations of virtue.²⁷ Conceptions of stewardship in law and policy attempt to define a boundary of responsibility in terms of virtue using terms like 'good practice'. What is not clear is the extent that a new boundary of responsibility expands minimal accountability.

A number of factors determine expectations of what is ecologically and socially feasible (Table 1).²⁸ They help shape a social discourse wherein boundaries of responsibility are constantly being renegotiated.

Table 1
Factors defining a boundary of responsibility

Factors	Description
Norms of Behaviour	Social 'norms' influence the expectations of industry behaviour. ²⁹ Morals, ethics and values help define norms. ³⁰ Morals refer to personal standards of behaviour and distinguishing between right and wrong. Ethics is broader including formal and informal rules of conduct, while values are beliefs about what is valuable or important. ³¹ Converting expectations to practice requires some correlation between the social norms, business culture and operating rules. ³² This is more likely when there is a mechanism to hold decision-makers accountable for their performance against the norms. ³³
Exploitative Freedom of Property	The social and legal expectation is that a property right carries a substantially un-attenuated freedom to exploit for private gain, subject to strictly delimited rights of the Crown applied through regulation and the obligation to avoid harm to other legal interests. ³⁴
Legitimacy	Legitimacy arises from accepted roles or from a dialogue with stakeholders reflecting genuine intent. ³⁵ It helps to ensure a focus on what is expected under the social contract rather than trying to address an open-ended range of socio-economic and environmental concerns.
Trust	Social trust is a key consideration in the maintenance of social contract. ³⁶ During resource access conflicts partisan arguments are weighed in the light of what is known about the social performance of the sector. Perceived failures of responsibility undermine credibility relative to other interest groups.

26 To bear responsibility requires acknowledgement of the potential to be called to account. This may be to a formal institution like a tribunal, commission or court; or an informal (but no less concrete) group like parents, children or a circle of friends; or to a metaphysical forum such as God or human kind. Mark Bovins, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, 1998) p 28.

27 Ibid.

28 Shephard, above n 2.

29 Bridget M Hutter, 'The role of non-state actors in regulation' (Report No. 37, London School of Economics and Political Science, 2006).

30 Bowie, above n 23; A B Carroll, 'The pyramid of corporate social responsibility: Toward the moral management of organisational stakeholders' (1991) 34(4) *Business Horizons* 39; Epstein, above n 25; Moir, above n 23.

31 Judy Pearsall and Bill Trumble (eds), *Oxford English Reference Dictionary* (Oxford University Press, 2nd revised ed, 2001).

32 Shephard and Martin, above n 9.

33 Bovins, above n 26.

34 For an overview see Raff, above n 12.

35 M Muller and B Siebenhuner, 'Policy instruments for sustainability oriented organisational learning' (2007) 16 *Business Strategy and the Environment* 232.

36 John F Dovidio, *The Social Psychology of Prosocial Behaviour* (Lawrence Erlbaum Associates, 2006); Michael Siegrist, Carmen Keller and Henk A L Kiers, 'A New Look at the Psychometric Paradigm of Perception of Hazards' (2005) 25(1) *Risk Analysis* 211; Matthias Weber and Jens Hemmelskamp, *Towards Environmental Innovation Systems* (Lavoisier, 2005).

This range of factors alludes to the difficulty of formally specifying expectations for good stewardship of natural resources in law. Particularly when the bias of the legal system is to uphold norms of exploitive freedom within a defined level of minimum accountability. Such standards are unlikely to satisfy legitimacy and social trust concerns about stewardship of natural resources. These factors generate competing expectations of behaviour, which suggests that clear boundaries between freedom to exploit for private gain, and constraints on exploitation in the public interest, will not be set by law alone.

Boundaries of responsibility ought to reflect genuine dialogue with stakeholders over the relevant social and environmental issues associated with a social contract, and investment of resources to meet expectations. Critical evaluation of water management performance occurs through social networks such as local communities, environmental stakeholders, or networks of competing water users. Preparedness to act on responsibilities is likely to arise through awareness of community wellbeing and dialogue within such networks. These are likely to be the 'place' where criticism acquires political power, and are relevant for the social contract as they can foster shared norms and support cooperation that leads to changes in wellbeing.³⁷

Wellbeing is described as an overall satisfaction with life³⁸. This has been proposed as a basis for developing expectations of performance associated with natural resource management generally,³⁹ and for improved water management in NZ.⁴⁰ This approach suggests that boundaries of responsibility for water management may be best refined through a process where water users develop networks with relevant communities, through which they explore their specific contribution to wellbeing. Attention to the welfare concerns of relevant networks makes it more likely that specific issues, circumstances and power relations will be reflected in a tacit agreement about social responsibilities. This would lead to reporting against specific contributions to the welfare of specific networks, rather than ill-defined generalities about impact on the environment. Adequate definition of the social contract as a boundary of responsibility (amid a policy framework of changing responsibility expectations) can help clarify the obligations of access and use.

1.4 Stewardship versus minimum accountability

Sustainability suggests obligations reflecting needs, limits, equity and systems management.⁴¹ These are intended to avoid harm and promote a neighbourly ethos, a state of wellbeing. Such expectations can be translated into concepts of 'stewardship' – the guardian of place, holding a position of responsibility⁴² – that has become important in modern conceptions of natural resource access, use and management.⁴³ In relation to natural resources, the core duties of stewards are conservation to keep resources for posterity and protection to save resources from harm.⁴⁴ This is

37 Organisation for Economic Cooperation and Development (OECD), 'The wellbeing of nations, the role of human and social capital, education and skills' (Centre for Educational Research and Innovation, 2001).

38 Australian Bureau of Statistics, 'Measuring social capital, an Australian framework and indicators' (ABS Information Paper No 1378.0, Australian Bureau of Statistics, 2004).

39 Stewart Lockie et al, 'Capacity for change, testing a model for the inclusion of social indicators in Australia's national land and water resources audit' (2002) 45(6) *Journal of Environmental Planning and Management* 813.

40 Canterbury Mayoral Forum, 'Canterbury Water Management Strategy - Strategic Framework with Updated Targets, Provisional July 2010' (Canterbury Water, 2009); Land and Water Forum, above n 4.

41 Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2nd ed, 2003)

42 Pearsall and Trumble, above n 31.

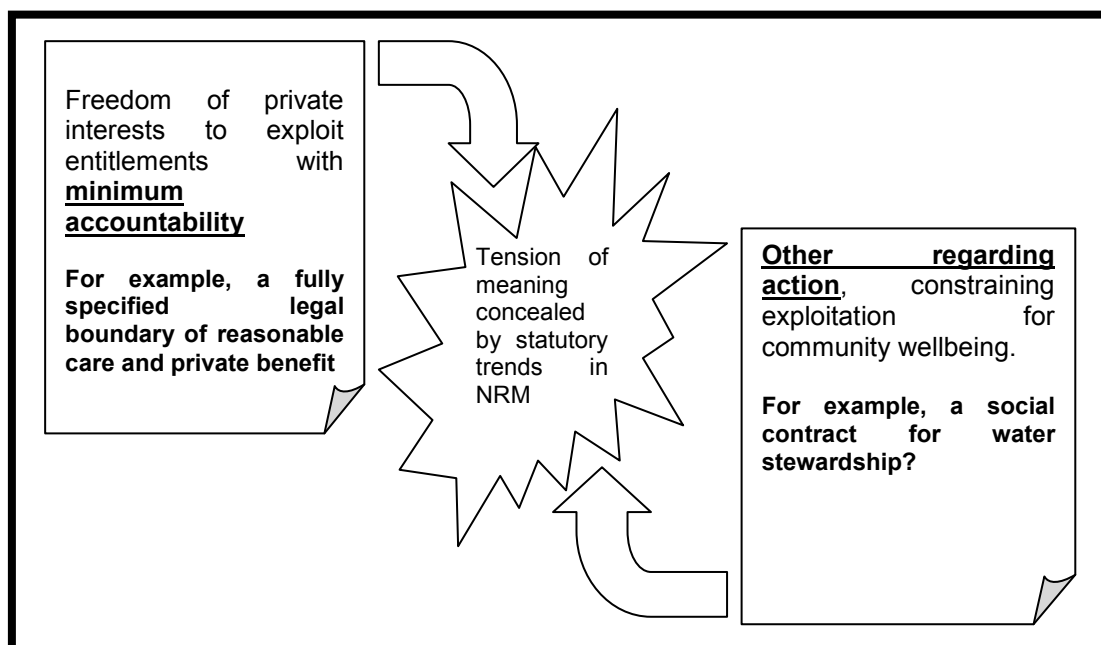
43 Richard Barnes, *Property Rights and Natural Resources*, *Studies in International Law* (HART Publishing, 2009); Anna Carr, *Grass Roots and Green Tape. Principles and Practices of Environmental Stewardship*. (The Federation Press, 2002); Don Curry, 'Farming & Food. A Sustainable Future.' (The Policy Commission on Farming and Food, 2002) <www.cabinet-office.gov.uk/farming>

44 Barnes, *Ibid*.

recognised relative to water in NZ.⁴⁵ Stewardship provides a conception of prudent or right behaviour to limit or reverse environmental harm.⁴⁶ Prudence is about ends: how to make important choices using a mixture of foresight, morals and self understanding; in effect a demonstration of virtue.⁴⁷ This is a contrast to the expectations of minimum accountability traditionally associated with property rights.

The minimum accountability⁴⁸ associated with private interests is that farmers' responsibilities are a mixture of compliance with specific laws and obligations to neighbours not to infringe their exploitative property right.⁴⁹ Property is considered a largely un-attenuated right to exploit⁵⁰, with constraints imposed only where Parliament has clearly specified in statute or where exploitation may unjustifiably interfere with the interests of another property owner (or the physical well being of other people). This emphasises minimum accountability for environmental protection with farmers' freedom to exploit their property rights paramount.⁵¹ Within this traditional paradigm, freedom is supported by a level of accountability that is less onerous than the responsibilities that may be implicit in virtue-based expectations of the responsibility.⁵² Figure 1 illustrates this distinction between minimum accountability and virtue.

Figure 1
Tension between competing expectations for natural resource management



45 Turnbull Group, above n 4, see Appendix B. This reflects the duty under s 17 Resource Management Act 1991.
 46 Maria Lee, EU Environmental Law: Challenges, Change and Decision-Making, Modern Studies in European Law (HART Publishing, 2005) ; Parliamentary Commissioner for the Environment, 'Change in the High Country: Environmental Stewardship and Tenure Review' (Parliament of New Zealand, 2009) <http://www.pce.parliament.nz/assets/Uploads/Reports/pdf/Change_in_the_high_country.pdf> at 28 November 2010, p 77.
 47 Bernard E Jacob, 'Ancient Rhetoric, Modern Legal Thought, and Politics: A Review Essay on the Translation of Viehweg's "Topics and Law"' (1995) 89 Northwestern University Law Review 1622.
 48 Bovins, above n 26.
 49 Shephard and Martin, above n 18.
 50 Lee Godden, 'Governing common resources: Environmental markets and property in water' in Aileen McHarg (ed), Property and the Law in Energy and Natural Resources (Oxford University Press, 2010) p 414.
 51 Shephard, Mark. 'Some legal and social expectations of a farmer's duty of care' (02/10, CRC for Irrigation Futures, 2010) <www.irrigationfutures.org.au/imagesDB/news/IM0210-web.pdf> at 4 December 2010.
 52 Tucker LJ in Latimer v AEC Ltd [1953] AC 643.

The practical implication of a failure to resolve the tension in Figure 1 is a range of competing meanings about the legally enforceable boundaries for natural resource management.⁵³ Achieving the desire for increased care requires refinement of words with multiple meanings and connotations to create clear accountabilities within the context of private access and use rights. Examples include 'sustainability', 'precaution', 'stewardship' and 'wellbeing' and 'social contract'. All are terms that may be readily identified within debate about water access and use. These words have different meanings in different contexts, and general pronouncements of statutory intent do not provide all the guidance needed for defining them,⁵⁴ leading to confusion and misunderstanding about what constitutes a breach, or conformity with rules.

1.5 The social contract

The concept of a social contract as resource consent is to provide a focus for specifying the boundary of responsibility between the private freedoms of minimal accountability and the other regarding action of stewardship. It is used as an attempt to provide a bridge between private interests and community wellbeing overcoming the tension illustrated in Figure 1 above.

A social contract is about satisfying interacting legal and social expectations as a guide to human behaviour in natural resource management.⁵⁵ The concept highlights that ownership of a legal right to resources does not guarantee community support for the exercise of that right. Rather the maintenance of a social contract depends on elements of law, beliefs, relationships, administration and expectations.⁵⁶ Many of these are inherently political.

The actual exploitative interest of the entitlement holder can be a result of both well-defined property rights and poorly defined social expectations acted out in the form of restriction or expansion of the social contract to use that resource. What constitutes a social contract can be difficult to specify⁵⁷ because social expectations cover a diversity of concerns about economic, political, ecological, social and cultural consequences.⁵⁸ The underlying issues are often expressed vaguely and, for natural resources, are couched as arguments about environmental stewardship and ecologically sustainable development.⁵⁹ They do not provide precise practical guidance, are not constrained by legal rights or obligations and do not necessarily respect private ownership.⁶⁰

53 Chris Cocklin, Naomi Mautner and Jacqui Dibden, 'Public policy, private landholders: Perspectives on policy mechanisms for sustainable land management' (2007) 85 *Journal of Environmental Management* 12; Jim Crosthwaite, *Farmer Land Stewardship: A pillar to reinforce natural resource management?* (2001) <www.agrifood.info/connections/summer_2001/Crosthwaite.html> at 25 May 2007; Shephard and Martin, above n 18.

54 Barton, above n 5, see p 99.

55 Gunningham et al. above n 22, see p 13; Gary Lynch-Wood and David Williamson, 'The Social Licence as a Form of Regulation for Small and Medium Enterprises' (2007) 34(3) *Journal of Law and Society* 321; Turnbull Group, above n 4, see p 12.

56 K Lyons and K Davies, 'The Need to Consider the Administration of Property Rights and Restrictions Before Creating Them' in Alex Smajgl and Silva Larson (eds), *Sustainable Resource Use: Institutional Dynamics and Economics* (2007); Murray Raff, *Private property and environmental responsibility: A comparative study of German real property law* (Kluwer Law International, 2003); Hon. S Robertson, 'Property rights, responsibility and reason' (Speech delivered by the Queensland Minister for Natural Resources and Mines, 8 April 2003); WWF Australia, 'Native Vegetation Regulation: Financial impact and policy issues.' (2005); Phillip Hone and Iain Fraser, 'Resource Management and Duty of Care' (2004) 11(3) *Agenda* 195. Alex Gardner, 'The Duty of Care for Sustainable Land Management' (1998) 5(1) *The Australasian Journal of Natural Resources Law and Policy* 29.

57 Hutter, above n 29.

58 Epstein, above n 25.

59 Warhurst, above n 23; Jenifer McKay, 'Issues for CEO's of water utilities with implementation of Australia's water laws.' (2006) 135 *Journal of Contemporary Water Research and Education* 115.

60 Lynch-Wood and Williamson, above n 55.

A legal framework for use and management of water puts access and use arrangements into effect. This requires clearly defined responsibilities that meet policy outcomes. Contracts are an increasingly utilised to provide clarity about responsibilities in market based resource management.⁶¹ This brings an expectation that self-interest rather than moral or other forms of accountability will be effective and efficient in achieving public good outcomes.⁶² There are implications for defining the resource access and use rights as a social contract; it hinges success on the people and politics on a particular situation.⁶³ This makes the social contract a focus for examining the tensions in legal arrangements that seek stewardship for community wellbeing within a market based policy setting that favours private benefit.⁶⁴

1.6 The social contract as a boundary of responsibility for water stewardship

A social contract to define water stewardship appears to suggest limits to the exploitive freedoms implicit in property rights by introducing other regarding action as an obligation.⁶⁵ This should help to form norms of conservation practice, and protect legitimacy and social trust in return for environmentally benign farming practice.⁶⁶ These are virtuous conceptions of performance that provide a means to review the effectiveness of the social contract for water stewardship.

The term 'virtue' refers broadly to action directed at the realisation of goals beyond self-interest i.e. 'other regarding action'. I contend that this provides an alternative framework for defining rights and responsibility rather than market-driven notions of efficiency that emphasise self-interest. The practical significance is that it will remain difficult if not impossible to instantiate effective stewardship of water (and natural resources generally) if the legal framework governing access and use remains too focused on individual rights and interests.

Conceptualising access and use (property) rights in the context of countervailing values is an approach that runs counter to the legal detachment of property rights from environmental values to facilitate resource transfer. For example, the preference for market-based regulation of water resources has reinforced the separation of property rights in land from those in water, developing separate commodities or interests despite the physical and ecological connections between them.⁶⁷ The purpose of introducing countervailing values is to develop and enhance a model of property that is based on both responsibility and right, rather than right alone. This model incorporates virtue as a necessary part of a just and efficient legal order,⁶⁸ into water law so that the action of resource managers may be directed by motivations other than self-interest.

⁶¹ Paul Martin et al, *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers'* (Research Report, Australian Farm Institute, 2007), p 43.

⁶² Mike Young et al, 'Duty of care: An instrument for increasing the effectiveness of catchment management.' (Department of Sustainability and Environment, 2003), p 8.

⁶³ Adrienne Lomax, Ali Memon and Brett Painter, 'The Canterbury Water Management Strategy as a Collaborative Planning Initiative: a preliminary assessment' (Lincoln Ventures Ltd, 2010). See p 28.

⁶⁴ Neil Gunningham, 'Innovative Governance and Regulatory Design: Managing Water Resources.' (Landcare Research, 2008); Sandra Postel, *Pillar of sand: Can the irrigation miracle last?* (W.W. Norton & Co., 1999); Sheppard and Martin, above n 9.

⁶⁵ Canterbury Mayoral Forum, above n 40, p 15.

⁶⁶ Mark L Sheppard and Paul Martin, 'Using the moot court to trial legislation about land stewardship.' (2011) 28(2) *Land Use Policy* 371.

⁶⁷ Douglas E Fisher, 'Rights of property in water: confusion or clarity' (2004) 21 *Environment and Planning Law Journal* 200 ; Godden, above n 50.

⁶⁸ Peter Koller, 'Law, Morality, and Virtue' in Rebecca L Walker and Philip J Ivanhoe (eds), *Working Virtue. Virtue Ethics and Contemporary Moral Problems* (Clarendon Press, 2007).

Virtue ethics can increase the other regarding element of law by providing a focus for establishing water stewardship as part of moral character, a habit of action and character trait.⁶⁹ This can be achieved when specific virtues such as fair and judicious usage, honesty and a concern for the water systems in question are identified as the ideals of stewardship.⁷⁰

I suggest that the legal bias to protecting rights of access and use with minimal accountability risks stifling the potential of a social contract to deliver stewardship outcomes. Thus without reform to provide a legal basis for virtuous performance, the social contract is only likely to define norms of behaviour and exploitative freedom as minimum accountability. This is unlikely to meet the legitimacy and social trust concerns that advocates of a social contract anticipate.

⁶⁹ Rosalind Hursthouse, 'Are Virtues the Proper Starting Point for Morality?' in James Dreier (ed), *Contemporary Debates in Moral Theory* (Wiley-Blackwell, 2005).

⁷⁰ Adrian Walsh and Mark Shephard, 'The Role of Virtue in Natural Resource Management' in Jacqueline Williams and Paul Martin (eds), *A Social Licence and the Regulation of Natural Resources* (CSIRO Publishing, Forthcoming 2011).

Chapter 2

Water management in Canterbury

Recent debates about water in Canterbury, NZ are largely conflicts about access and use between competing uses and unresolved debate about long-term water resource allocation and management. In response to these challenges, a language of stewardship has emerged within the legal and policy framework for water. This is evident in terms such as; 'well-being',⁷¹ 'social contract',⁷² 'balance',⁷³ 'sustainability',⁷⁴ and 'good practice'.⁷⁵ These have multiple interpretations that can be problematic for defining clear water management obligations.

Water reform in New Zealand is founded on achieving efficient water use.⁷⁶ This has technical, economic and dynamic elements, to achieve beneficial uses with optimal outcomes for the environment and community.⁷⁷ The particular circumstances of Canterbury have generated systemic shortcomings for water allocation management and provided the impetus to find a better way.⁷⁸ The Canterbury Mayoral Forum proposes statutory social contracts as a tool for implementation of reform.⁷⁹

Improving on the current adversarial processes is anticipated to provide an alternative approach to water management that is representative, operable, trusted and accepted by the Canterbury community.⁸⁰ This is effectively a conception of other regarding action or virtue, reliant on community consensus to resolve conflict early in the planning process before it gets to court.⁸¹ There is also a strong emphasis in the water strategy that legal processes should not undermine the consensus expressed in agreed and statutory social contracts.⁸² I foresee four problems with this approach: defining clear obligations in a social contract;⁸³ excluding courts from enforcement;⁸⁴ the extent that multiple meaning in community consensus around a social contract is likely to generate further dispute,⁸⁵ and tension of private interest fostered by a market based approach to water allocation and use versus the other regarding expectations of stewardship.⁸⁶

Specified obligations, or 'boundaries of responsibility' are a necessary part to develop practical meaning for wellbeing and stewardship of water. The CWMS promotes the social contract as an effective way to define those obligations.⁸⁷

71 Land and Water Forum, above n 4, for example p 7 (with several other references to wellbeing throughout the document).

72 Canterbury Mayoral Forum, above n 40, p 15.

73 Ibid, p 8.

74 Canterbury Mayoral Forum, *ibid*, p 20; Land and Water Forum, above n 4, p 11; Environment Canterbury Act 2010, above n 3, s 3(b) and Sch 1.

75 Land and Water Forum, above n 4, p 28.

76 Land and Water Forum, above n 4, see pp IX - XIII.

77 Ibid, see 'efficiency,' p 63.

78 Ibid, Management of water has been marked by conflict, litigation, cost and uncertainty under a first in first served approach to allocation with an absence of limits, p 13.

79 Canterbury Mayoral Forum, above n 40, p 41.

80 Environment Canterbury Regional Council, 'Draft Canterbury Regional Policy Statement' (Report No R10/65, Environment Canterbury, 2010), p 52.

81 Land and Water Forum, above n 4, p V.

82 Canterbury Mayoral Forum, above n 40, see p 15.

83 Shephard and Martin, above n 9.

84 Shephard and Martin, above n 18.

85 Ibid.

86 Shephard and Martin, above n 66.

87 Canterbury Mayoral Forum, above n 40, p 7 and 15.

2.1 Sustainability and Water Management

The *Resource Management Act 1991*, abbreviated to RMA, provides the statutory framework for sustainable freshwater management in New Zealand. It separates responsibilities between three levels of government and water users. The Minister for the Environment and Minister for Conservation hold responsibility for national policy statements, creating environmental standards and assessing water conservation orders. Regional Councils such as Environment Canterbury, called ECan, hold principal responsibility for regional water planning and consents to use water. Territorial Councils hold responsibility for implementation of management plans in their areas, make decisions about land-use planning and hold responsibility for economic development. Finally those holding consents to use water hold responsibility to operate subject to the terms of their consent.

The purpose of the RMA is to provide for sustainable management of resources.⁸⁸ The vagaries of such statutory terms have given rise to disputes about its interpretation.⁸⁹ Interpreting sustainable management is complex,⁹⁰ and in the absence of clear policy guidance from central government has relied on court interpretation of statutory rights of access and use.⁹¹ This has emphasised the tension between stewardship and minimum accountability of an entitlement at the core of conflict about water management. For example, The High Court has identified that an access entitlement to water is akin to a right that brings with it legitimate expectations for exclusive use,⁹² but also that a narrow preoccupation with property rights is out of keeping with popular and holistic notions of sustainability in the RMA.⁹³ This contrast emphasises the contested nature of sustainable management within an institutional framework that upholds freedom of property rights.⁹⁴

Sustainable management, as applied by the courts under the RMA, allows decision makers to balance development within its environmental context.⁹⁵ Known as a 'broad overall judgement' approach,⁹⁶ it provides that weight be given to the (social, cultural, economic and environmental) elements of sustainable management in the context of particular circumstances.⁹⁷ This requires decision-makers to consider how management of natural and physical resources will enable "people and communities to provide for their social, economic and cultural well-being, health and safety" and how the statutory goals of intergenerational equity, safeguarding ecosystem services and a precautionary approach regarding potential environmental effects can be met.⁹⁸

The broad statutory "language, meanings and connotations" are intended,⁹⁹ to account for the diversity of values about the environment as a basis for resource allocation and management

⁸⁸ Resource Management Act 1991, s 5(2).

⁸⁹ Peter Skelton and Ali Memon, 'Adopting Sustainability as an Overarching Environmental Policy: a Review of section 5 of the RMA' (2002) X(1) *Resource Management Journal*, p 8.

⁹⁰ Neil Deans, 'Freshwater values: duties and responsibilities under the RMA' in Rob Harris (ed), *Handbook of Environmental Law* (Royal Forest and Bird Protection Society of NZ Inc, p 208.

⁹¹ For an analysis of the cases see Barry Barton, 'The nature of resource consents: Statutory permits or property rights' in Derek Nolon (ed), *Environmental Law: National issues* (New Zealand Law Society, 2009), pp 51-60 and 71-77.

⁹² *Aoraki Water Trust v Meridian Energy Limited* [2005] 2 NZLR 268

⁹³ *Barker J in Falkner v Gisborne District Council* [1995] 3 NZLR 622

⁹⁴ Skelton and Memon, above n 89, see page 2.

⁹⁵ *Ibid.*

⁹⁶ The 'broad overall judgement' cases are reviewed by Skelton and Memon, above n 89, including; *NZ Rail v Marlborough District Council* [1994] NZRMA 70, *Trio Holdings Ltd v Marlborough District Council* [1997] NZRMA 97, *North Shore City Council and others v Auckland Regional Council (Okura)* [1997] NZRMA 59, and *Falkner v Gisborne District Council* [1995] 3 NZLR 622.

⁹⁷ Skelton and Memon, above n 89; Also where the elements of sustainable management are described in the Resource Management Act 1991, ss 5(2)(a) to (c).

⁹⁸ Resource Management Act 1991 (NZ), see s 5

⁹⁹ *NZ Rail*, above n 96.

decisions.¹⁰⁰ Such statutory principles provide a guide to important values.¹⁰¹ These are adopted and expanded upon within the ECan Act as fundamental principles for the Canterbury Water Management Strategy,¹⁰² supporting the notion of sustainable management as an ethic, representing virtuous behaviour, constantly adjusting with social values in the circumstances.¹⁰³

2.2 Emergence of the ECan Act

The *Environment Canterbury Act 2010* has emerged amid concerns that the *Resource Management Act 1991* has not been implemented effectively for sustainable management of water.¹⁰⁴ Constraints identified include:¹⁰⁵ inadequate water allocation via plans and consents that focus only on environmental impacts; lack of statutory reference to the precautionary principle; an underlying statutory philosophy that rural land use should not be constrained; and a narrow interpretation of cumulative environmental effects by the courts. Such challenges suggest an interpretation based on minimal accountability rather than the virtuous approach developed and applied by the courts. Such challenges have led to the call for a new collaborative governance water management paradigm for Canterbury.¹⁰⁶

A lack of policy and standards about water at national level has meant regional councils have struggled with determining and implementing policy for water allocation and management.¹⁰⁷ This situation has contributed to tension in Canterbury, evident in public debate between interests favouring water management for environmental protection and those favouring water management for economic development.¹⁰⁸

Farmers' commitment to their economic wellbeing generally means that their environmental responsibilities; obligations to future generations; and the extent that the ethos of sustainability trumps economic development are contested issues.¹⁰⁹ Such conflicting positions have generated a water management planning impasse at the regional level, with draft plan objectives criticised as too broad and not sufficiently quantified, leaving many unconvinced of the need for regulation and others concerned about not enough protection.¹¹⁰

With increasing concern about the state of water management in Canterbury, the NZ government, during 2009, launched an inquiry into the adequacy of Environment Canterbury's water management planning.¹¹¹ This identified that water management planning in Canterbury as

100 Skelton and Memon, above n 89, p 9.

101 Royden Somerville, 'Phantom environmental risks and environmental decision-making' (New Zealand Law Society, 2003), p 58. For guiding principles see Resource Management Act 1991, ss (6) to (8).

102 Environment Canterbury Act 2010, Sch 1 Vision and Principles for the Canterbury Water Management Strategy.

103 Somerville, above n 101, p 70 "relevant material...recording the national community of interest's ethical approach to such matters."

104 For an account of some concerns about "institutional inertia" in regional councils see Memon and Skelton, above n 6, p 243.

105 Gunningham, above n 64, p 44.

106 Ibid, p 34.

107 Memon and Skelton, above n 6, p 243.

108 Water is causing disputes, often with sub optimal outcomes, Land and Water Forum, above n 4, p V. For example, Fish and Game have been active in supporting the water conservation order process in Canterbury, such as for the Hurunui River, in order to protect it from further allocation for irrigation. Alternately, irrigation interests such as Central Plains Water and supporters have been actively promoting the need for further irrigation storage and infrastructure development.

109 Gunningham, above n 64, p 30.

110 Ibid.

111 See 'terms of reference' in Wyatt Creech et al, 'Investigation of the Performance of Environment Canterbury under the Resource Management Act & Local Government Act' (Report commissioned by the Minister for the Environment and Minister for Local Government into the performance of Environment Canterbury, 2010)

dysfunctional;¹¹² where the statutory planning process under the RMA has suffered prolonged delays at the hands of elected ECan councillors.¹¹³ The enquiry recommended options for overcoming the planning impasse about water management, to which the government responded by passing the *Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010* (NZ):

“I find it extraordinary that 18 years after the passage of the Resource Management Act we still do not have an operative plan in Canterbury to manage its water;”¹¹⁴ and

“The regional council has failed to properly look after water management in our area. It has failed to control water quality deterioration, it has certainly failed to have a plan for strategic economic development, and it has failed, after nearly 19 years of the Resource Management Act, to even come up with a natural resources plan that is operative.”¹¹⁵

2.3 The ECan Act and Canterbury Water Management Strategy

The ECan Act seeks “to address issues relevant to the efficient, effective, and sustainable management of fresh water.”¹¹⁶ This reaffirms sustainable management as a statutory principle relative to freshwater resources, and offers the vision and principles of the Canterbury Water Management Strategy (CWMS) for its interpretation (Appendix 1).¹¹⁷

The Canterbury Water Management Strategy (CWMS) aims to establish a new paradigm of allocation and management for water in the Canterbury Region.¹¹⁸ This is to recognise prospects for further water resource development and realise improved water use, involving; water brokerage, reconfigured allocation and transfer regimes, and introducing water use charges to “drive efficiency of water use”.¹¹⁹ Simultaneously the new approach will address environmental impacts and achieve environmental restoration, specify performance criteria and avoid over prescription.¹²⁰ The tension embedded within the new approach reflects the problem of conflict between a market-based approach favouring private interests and minimal accountability, versus delivery of water stewardship with other regarding action.¹²¹

2.4 CWMS and the social contract

Central to implementation of the new paradigm is a social contract: described as an agreed balance between all parties to deliver wellbeing and safeguard ecosystems.¹²² Interestingly the strategy also highlights that social contracts will need legal status,¹²³ but that the legal processes “should not be

112 Ibid; Gunningham, above n 87.

113 Creech, above n 111.

114 New Zealand, Parliamentary Debates, House of Representatives, 30 March 2010, 9928 (Nick Smith, Minister for the Environment).

115 New Zealand, Parliamentary Debates, House of Representatives, 30 March 2010, 9941 (Amy Adams, Member for Selwyn)

116 Environment Canterbury Act 2010, s 3(b).

117 Ibid, Sch 1; Canterbury Mayoral Forum, ‘ECan Act’ implications for the Strategy <www.canterburywater.org.nz> accessed 23 October 2010.

118 Canterbury Mayoral Forum, above n 40, p 7.

119 Ibid, p 11.

120 Ibid.

121 Refer to section 1 above.

122 Canterbury Mayoral Forum, above n 40, p 15.

123 Ibid, p 41.

allowed to undermine this balanced, holistic approach to managing water.”¹²⁴ This presents a social contract as a legal boundary of responsibility between resource users, regulators and society to achieve sustainability.

A key element of this is a social contract that “will adapt and evolve to changing circumstances.”¹²⁵ This is potentially a problem for legal use of a social contract since it is a fundamental element of regulation that people have a right to know what they are obliged to do in a way that is clearly pre-stated.¹²⁶ A contract of shifting social expectations may leave water entitlement holders with uncertainty about their obligations.

2.5 Linking CWMS to the RMA

The CWMS vision and principles are given statutory status as relevant to the efficient, effective and sustainable management of fresh water in the Canterbury region.¹²⁷ This includes application to regional policy statements and plans under the *Resource Management Act 1991 (NZ)*¹²⁸, an acknowledgement of the CWMS success in providing collaboration over water management.¹²⁹ Statutory statements are important for defining statutory rights to access and use public resources.¹³⁰ The commissioners will need to heed this status of the CWMS in developing an effective operational water plan “to draw on the wisdom and opinions of the mayors of Canterbury”¹³¹ as they progress statutory policy and planning under the RMA.¹³² The CWMS is identified as a regional strategy to advance the sustainable management of freshwater,¹³³ and that will drive change to the Natural Resources Regional Plan.¹³⁴

The main statutory plan for sustainable management of water in Canterbury is the Natural Resources Regional Plan, made under the RMA. The current plan has been a source of conflict regarding water management and the inability of the Canterbury Regional Council to bring a functioning water plan to fruition. The current plan brings the 1998 Regional Policy Statement, also made under the RMA, into effect. Amendments during 2010 included water management chapters.¹³⁵ Introductory comments in the current plan highlight that it will continue to change, reflecting community-driven priorities developed through the CWMS and zone water management committees.¹³⁶

A draft regional policy statement to replace the 1998 policy was released during 2010. It provides an overview of the significant resource management issues facing the region and a framework for management over 10-15 years. The current regional plan may need to be changed to implement the

¹²⁴ Ibid, p 15.

¹²⁵ Ibid, p 17.

¹²⁶ Doreen McBarnet and Christopher Whelan, ‘The Elusive Spirit of the Law: Formalism and the struggle for Legal Control’ (1991) 54(6) *The Modern Law Review* 848, p 857.

¹²⁷ Environment Canterbury Act 2010, s 3(b) and Sch 1.

¹²⁸ Ibid, s 63.

¹²⁹ Creech et al, above n 111.

¹³⁰ Barton, above n 91.

¹³¹ New Zealand, Parliamentary Debates, House of Representatives, 30 March 2010, 9929 (Nick Smith, Minister for the Environment).

¹³² Draft Regional Policy Statement, above n 80, p 6.

¹³³ Ibid, p 46.

¹³⁴ Environment Canterbury Regional Council, Natural Resources Regional Plan Update, October 2010 <<http://ecan.govt.nz/publications/Plans/nrrp-newsletter-update-001010.pdf>> at 5 October 2010.

¹³⁵ Variation 1, notified on 23 October 2010, amended the Canterbury Natural Resources Regional Plan, including Chapter 4 Water Quality, Chapter 5 Water Quantity, Chapter 6 Beds and Margins of Lakes and Rivers, and Chapter 7 Wetlands. See <<http://ecan.govt.nz/our-responsibilities/regional-plans/nrrp/Pages/variation-one.aspx>> accessed 30 January 2011.

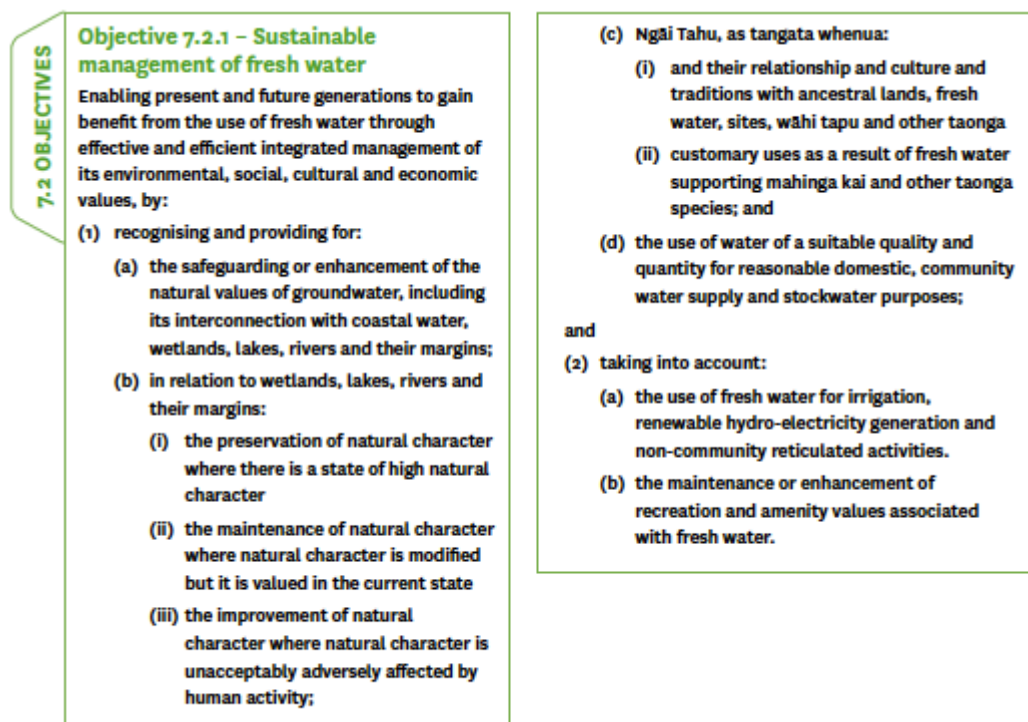
¹³⁶ Environment Canterbury Regional Council, Natural Resources Regional Plan Update, above n 134.

new regional policy statement, once it is complete. It is for this reason that I will emphasise the approach to water management being described in the draft regional policy statement.

The draft policy statement acknowledges the CWMS as a valuable strategic input,¹³⁷ critical for resolution of freshwater management issues within the regional natural resources planning and management framework.¹³⁸ This places the water strategy sanctioned under the ECan Act, within the RMA planning framework, and meets the ECan Act requirements that the water strategy vision and principles be regarded by the Regional Council in planning decisions.¹³⁹ Doing this reinforces 'sustainable management' as the statutory purpose to which the water strategy is directed.¹⁴⁰ For freshwater, the Canterbury Draft Regional Policy Statement seeks sustainable management, use, development and protection to provide for wellbeing (Figure 2).¹⁴¹ Sustainable management provides an enabling framework, where the environment is the basis for social, cultural and economic wellbeing.¹⁴²

Figure 2

Proposed objectives for sustainable freshwater management in Canterbury.¹⁴³



Introducing wellbeing places the performance of a water user into a context of social obligation, where water management is viewed and evaluated as a contribution to economic, cultural and environmental systems within a region. This is a multiple-bottom-line approach to defining obligations that aim for other regarding action, consistent with the legislated vision and principles of

137 Draft Regional Policy Statement, above n 80, p 21.

138 Ibid, p 51.

139 Canterbury Mayoral Forum, ECan Act Implications for the Strategy (2010) <<http://www.canterburywater.org.nz>> at 23 October 2010; Environment Canterbury Act 2010, s3(b).

140 ECan Draft Regional Policy Statement, above n 80, p 46;

141 ECan Draft Regional Policy Statement, ibid, p 45.

142 Ibid p 6; Evan Christen et al, 'Triple Bottom Line Reporting to Promote Sustainability of Irrigation in Australia' (2006) 20 Irrigation and Drainage Systems 329.

143 ECan Draft Regional Policy Statement, above n 80, see p 50.

the CWMS.¹⁴⁴ But how realistic is it to expect that such aspirations will be converted into practice using a social contract? That requires the social contract to form a clear boundary of responsibility for the implementation of other regarding action. A clear statutory basis for is required for interpreting and enforcing such obligations.

144 Environment Canterbury Act 2010, Sch 1.

Chapter 3

The social contract as a legal tool for improved water management

The potential uncertainty associated with a social contract may be overcome by strategic planning that engages with the relevant networks and clearly incorporates the issues of significance as the basis for setting obligations in a contract for a defined period. This allows both parties to the contract—the regional council (on behalf of society) and an entitlement holder—to be clear about where the boundary of responsibility lies and what is expected for making a contribution to sustainable management of water within a particular zone and region.¹⁴⁵ This appears to be the process being followed under the CWMS. Whether this can overcome the obstacles to using a social contract as a clear boundary of responsibility remains to be seen as the regional and local planning processes unfold.

A legal framework can provide guiding principles for water management, such as equitable and reasonable use, and an obligation not to harm neighbours.¹⁴⁶ I contend that such principles, reliant on notions of ‘reasonable’ and ‘harm between neighbours’ in the context of a market to maximise private interests, are only likely to oblige a minimum level of accountability.¹⁴⁷

Stewardship requires legal principles to encourage norms, rights and obligations that emphasise other regarding action as an element for ongoing legal access to resource entitlements. I suggest this may be achieved if virtue ethics can be used to provide a focus for establishing water stewardship as part of moral character, i.e. a habit of action and character trait.¹⁴⁸ For example, specific virtues such as fair and judicious usage, honesty and a concern for water systems might provide suitable principles of stewardship that increase this other regarding element of law.¹⁴⁹

I return now to the principal question: what version of improved water management is the ECan Act likely to deliver? In answering this I will identify the likely effectiveness of a social contract for providing norms of conservation behaviour, legitimacy and trust that curb exploitation of water entitlements and reflect a virtuous conception of wellbeing. These four components combine to determine if a social contract can effectively specify practical obligations of access and use for stewardship of water. That is to chart a path from a virtuous conception of wellbeing to water access entitlements, via useful laws.¹⁵⁰

The rights and responsibilities of a water entitlement, rely on defining what legal obligations would be useful for NZ society.¹⁵¹ The social contract as an effective boundary of responsibility for water management becomes subject to its usefulness as a way to achieve society’s expectations of water entitlement holders as resource stewards. Such expectations are frequently expressed as other regarding actions in law and policy about sustainable natural resource management and environmental protection. This approach to defining responsibilities of water access presents the virtues of sustainability and resource stewardship as counter to a market-based approach. The market has legally detached property entitlements to water from the environmental values of the

¹⁴⁵ Shepherd and Martin, above n 9.

¹⁴⁶ Postel, above n 64, see p 149.

¹⁴⁷ Shepherd and Martin, above n 18; Shepherd and Martin, above n 66.

¹⁴⁸ Hursthouse, above n 69.

¹⁴⁹ Walsh and Shepherd, above n 70.

¹⁵⁰ Rosalind Hursthouse, ‘Hume on Justice’ in Charles R Pigden (ed), *Hume on Motivation and Virtue*, *Philosophers in Depth* (Palgrave MacMillan, 2009) pp 274-275.

¹⁵¹ Ibid.

land despite the physical and ecological connections between the two.¹⁵² The purpose of introducing countervailing values is to develop and enhance a model of entitlement that is based on both responsibility and right, rather than right alone. This model incorporates virtue as a necessary part of a just and efficient legal order,¹⁵³ into water law so that the action of resource managers may be directed by motivation other than self-interest. This reinforces the function of law as a body of rules and norms at the core of an access entitlement.¹⁵⁴

I will now examine the legal and policy framework for improving water management in Canterbury relative to each component of the boundary of responsibility (norms, entitlements, legitimacy, and trust). In doing so I will identify which version of improved the social contract for water access and use is likely to favour: the minimal accountability of private interest or other regarding actions of resource stewardship. This will help evaluate the effectiveness of the social contract as a boundary of responsibility to define water stewardship obligations.

3.1 Norms of behaviour

Norms represent social expectations upon water entitlement holders, balancing self-interest with community wellbeing.¹⁵⁵ They have a critical role in helping resolve disputes when attempts to achieve a balance are brought to an impasse.¹⁵⁶ To be effective, this requires a correlation between norms and operating rules so that entitlement holders can be held accountable for performance against the norms.

Norms based on stewardship emphasise the obligation to take care.¹⁵⁷ This resonates in political and legal declarations about sustainability and resource stewardship.¹⁵⁸ For example, sustainable management in the RMA is value laden with a multitude of ethical indicators.¹⁵⁹ These need to be interpreted with guiding principles and community norms about stewardship that are often incompatible with principles and norms about the freedoms of private property.¹⁶⁰ Only the state has the capacity to designate the principles and rules for broader governance arrangements.¹⁶¹ But to be effective these must be developed out of local and regional decision making processes.¹⁶²

There are several sources for developing norms of water stewardship in Canterbury. The CWMS has a regional emphasis that is intended to link with RMA policies and plans (see ... above). The Land and Water Forum and Water NZ propose national principles intended to emphasise water stewardship. These will now be reviewed for their effectiveness in contributing to the development of norms that provide a distinction between right and wrong conduct, and values about what's important for water stewardship in developing the social contract as a clear boundary of responsibility.

The CWMS aims for present and future generations to gain the greatest benefits from water resources within an environmentally sustainable framework.¹⁶³ The Canterbury Mayoral Forum expects that success in achieving this vision will involve:¹⁶⁴ fairness, inclusive decision-making, extra

¹⁵² Fisher, above n 67; Godden, above n 50.

¹⁵³ Koller, above n 68.

¹⁵⁴ Godden, above n 50, see p 414.

¹⁵⁵ Raymond, above n 6, see p 27.

¹⁵⁶ Ibid p 198.

¹⁵⁷ Somerville, above n 101, see p 61.

¹⁵⁸ Barnes, above n 43, p 159; Shephard and Martin, above n 2.

¹⁵⁹ Somerville, above n 101, see p 56; Skelton and Memon, above n 89.

¹⁶⁰ Skelton and Memon, *ibid*, see p 2; Barnes, above n 43, see p 160.

¹⁶¹ Stephen Bell and John Quiggin, 'The limits of markets: the politics of water management in rural Australia' (2008) 17(5) *Environmental Politics* 712.

¹⁶² Gunningham, above n 64; Postel, above n 64.

¹⁶³ Environment Canterbury Act 2010, Sch 1.

¹⁶⁴ Canterbury Mayoral Forum, above n 40, see p 20.

judicial dispute resolution, audited self-management, environmental protection and restoration, healthy water quality, active cultural custodianship and management, improved recreational amenity, reliability of supply, increasing economic value of irrigation realised, economic value of water based tourism realised, renewable and efficient energy in irrigation infrastructure, rural community cohesion and viability improved, increased understanding and empathy across the rural and urban water use divide, an adaptable water management system for climate change. This is a complex range of expectations that reinforces the tension between private interests and stewardship concerns.

The Mayoral Forum expectations draw on potentially competing norms and in practice may not be complimentary. For example, can we expect fairness from an extra-judicial decision-making process? Is audited self-management consistent with environmental protection? Does an increase in supply reliability and the economic value of irrigation conflict with cultural custodianship? It is likely to be difficult to find a common conception of right and wrong conduct and beliefs about what is important, that are consistent enough to define water stewardship norms. Particularly if such norms are to underpin operating rules that will be used to hold people to account.

The Land and Water Forum position society's stewardship concerns as the norms of water management decision-making.¹⁶⁵ Their recommendation is to balance competing values using the basic issues of fairness, reasonableness, justice and morality.¹⁶⁶ Such statements seem to be directed at other regarding actions, but further reading reveals proposals for water allocation based on: Efficiency of use, even-handedness between users and, consistency of practice.¹⁶⁷ Efficiency of use is ensuring the allocation is for a justifiable purpose and uses a reasonable quantity of water.¹⁶⁸ This assessment comprises 'beneficial use' relative to amount taken, 'optimal use' for the environment and society-with allocation to the 'highest value'-and temporal adjustment of use relative to allocation.¹⁶⁹The market basis of this approach¹⁷⁰ is anticipated to emphasise private rights.¹⁷¹

Water NZ has identified norms for private use of water that generate resource management in the public good.¹⁷² An approach favoured by the Primary Sector Water Partnership as norms of 'good practice' for wellbeing.¹⁷³ The Land and Water Forum and CWMS are supportive of good practice norms in meeting the social contract.¹⁷⁴ However, the risk of this approach is that disputes between private interests and public good will be reduced to questions of reasonableness, as has occurred with fisheries in NZ.¹⁷⁵ When this occurs, the standard is likely to favour common practice and freedom of private interest over increased care.¹⁷⁶

For the CWMS, Land and Water Forum or Water NZ proposals to be truly effective in overcoming competing norms, requires a basis in law to establish water access and use entitlements as a contribution to water stewardship, dependant on other regarding action.

¹⁶⁵ Land and Water Forum, above n 4, see p 12.

¹⁶⁶ Ibid, see p 65.

¹⁶⁷ Ibid, see p xi.

¹⁶⁸ Helen Atkins, 'The Environmental Implications of Primary Production - Water Allocation' (New Zealand Law Society, 2007) p 93.

¹⁶⁹ Land and Water Forum, above n 4, see p 64.

¹⁷⁰ Ibid, see p 24.

¹⁷¹ Laura Fraser, 'Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991' (2008) 12 *New Zealand Journal of Environmental Law* 145 at 193.

¹⁷² Turnbull Group, above n 4.

¹⁷³ Primary Sector Water Partnership, 'Water Partnership Leadership Document' (2008) <http://www.fedfarm.org.nz/f184,17642/17642_Water_Partnership.pdf> at 8 December 2010, p 2.

¹⁷⁴ Canterbury Mayoral Forum, above n 40; Land and Water Forum, above n 4.

¹⁷⁵ Following NZ Fishing Industry Association (inc) v Minister of Fisheries CA82/97, as cited in Barnes, above n 43, see p 362.

¹⁷⁶ Shepheard, above n 51.

3.2 Resource access entitlements

Statutory changes to resource access entitlements represent a shift in property characteristics and rely on the courts to reinterpret and reconcile how right holders are affected (within the scope of upholding justice).¹⁷⁷ Improved water management in Canterbury favours a social contract as a means to specify resource access entitlements.¹⁷⁸ It is likely that this new form of access right will at some point be disputed to determine the extent that the contract represents a private property interest. This re-emphasises property as a relationship between entitlement holder and society with the key concern being whose rights are likely to prevail in the event of dispute.¹⁷⁹

Defining the boundary between private use rights and the public good obligations associated with access and use of water emphasises the legal tension,¹⁸⁰ where a focus on the private rights of access is expected to emphasise minimal accountability over stewardship expectations.¹⁸¹ For example, with water management in Canterbury, the giver is the regional council (on behalf of society) seeking resource stewardship and the receiver may be a dairy farmer, seeking certainty of entitlement and clarity of individual rights in the water resource. Such certainty is important for the commercial framework within which the farmer operates, as access to water is a valuable economic right that brings legitimate commercial expectations.¹⁸² These are important considerations for the version of improved water management likely to emerge from social contracts.

Resource allocation is a fundamental but hotly contested issue for water governance.¹⁸³ It may be affected by norms of behaviour, regulations and market-based approaches.¹⁸⁴ A market for the allocation and trade of water stimulates private interests and the baggage of property reinforces those,¹⁸⁵ heightening tension between private interest goals and public sustainability outcomes. A narrow preoccupation with personal property rights is at odds with the holistic policy of sustainability and sustainable management of resources in the RMA.¹⁸⁶ But statutory signals within the act do not help to overcome this: One example is identifying that a permit to access resources is not property in the RMA, but then defining the nature of the consent using property law notions as if it were private property.¹⁸⁷ Use of the market to create a value and facilitate transfer of water entitlements is only likely to reinforce private interests.¹⁸⁸ Thus a social contract for access to water might preside over a hardening of private interests in resource consent.

Good practice, wellbeing and stewardship are important notions of performance that affect new models of resource access, where property rights are subject to adjustment in the interests of sustainability.¹⁸⁹ They represent an elevated boundary of responsibility, with variable characteristics dependant on location in the landscape and type of farming system. This variability is a problem if good practice is to become a legally enforceable normative standard for performance.

¹⁷⁷ Scott, above n 5, see p 50.

¹⁷⁸ Canterbury Mayoral Forum, above n 40, see p 15.

¹⁷⁹ Barton, above n 5, see p 96.

¹⁸⁰ Turnbull Group, above n 4, see appendix B.

¹⁸¹ Fraser, above n 171.

¹⁸² As confirmed in *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268.

¹⁸³ Gunningham, above n 64; Raymond, above n 6, see p 18.

¹⁸⁴ Raymond, above n 6, see pp 12-13.

¹⁸⁵ Lee Godden, above n 50, see p 418.

¹⁸⁶ *Barker J in Falkner v Gisborne District Council* [1995] 3 NZLR 622.

¹⁸⁷ Barton, above n 91.

¹⁸⁸ Atkins, above n 168.

¹⁸⁹ Christopher P Rodgers, 'Agenda 2000, land use, and the environment: Towards a theory of 'environmental' property rights?' in Jane Holder and Carolyn Harrison (eds), *Law and Geography: Current Legal Issues 2002* (Oxford University Press, 2003), p 249.

Such variation may be temporarily achieved in a contract, provided a landholder agrees. But that does not address the fundamental issue that an access entitlement comes with the freedom of a private interest protected by law with minimal accountability.¹⁹⁰ For example, the nature of water rights under the RMA is to provide commercial certainty and safeguard the ongoing entitlement of an existing water right.¹⁹¹ This is a bias to ignore a social contract and sustainable management obligations as public goods beyond the level of responsibility that an ordinary holder of a private resource access entitlement should have to bear. Effective incorporation of stewardship into resource consents needs a permanent reassignment of property rights recognising that social and environmental wellbeing are integral parts of the access entitlement.¹⁹² This approach requires recognition in consents that access to resources arises out of civil society, with boundaries dictated by the priorities and concerns of modern society,¹⁹³ but without being subject to the constantly changing whims of social expectation.¹⁹⁴

Such a model founded on other regarding action might succeed in bringing legitimacy to a social contract by defining the water access entitlement (right) in terms of stewardship rather than private interest.

3.3 Legitimacy

Collaboration in water management planning anticipates legitimacy.¹⁹⁵ This occurs when private use rights are socially accepted on the assurance that resource stewardship is delivered.¹⁹⁶ Verifying performance is done using the rules, processes and norms that interact to form the social contract. This provides a useful connection between community stakeholders and the resource entitlement holder, legitimising activity by providing a focal point for cooperation that transcends self-interest.¹⁹⁷ This connection is a prerequisite to laws that genuinely support wellbeing,¹⁹⁸ where law provides standards and decision-making processes for acting on sustainable natural resource management.¹⁹⁹ Over time, debate about uncertain and evolving social expectations may develop precise meaning for a social contract and associated obligations. But in the interim it seems unlikely to reduce uncertainty about responsibilities.²⁰⁰

There remains a very likely risk that such a process will only legitimise 'common' rather than 'good' or 'best' resource management practice. This is due to the power of political interests within the collaborative process, where private interests are likely to be strongly advocated rather than public

¹⁹⁰ Stallworthy, above n 5, see pp 71-73.

¹⁹¹ *Aoraki Water Trust v Meridian Energy Limited* [2005] 2 NZLR 268, with a water allocation to be protected against other potential users of the resource (non derogation of right); Ken Palmer, 'An analysis of recent case law developments' in Derek Nolan (ed), *Environmental Issues-insight and inspiration* (New Zealand Law Society, 2005) ; *Kemp v Dart River Safaries Ltd* [2000] NZRMA 440; Jo Appleyard, 'Has the Resource Management Act Replaced the Property Law Act?' (New Zealand Law Society, 2007); Atkins, above n 168.

¹⁹² Rodgers, above n 189, see p 250; A statutory duty of care has been promoted as the basis for a stewardship ethic in Australia, see Gardner, above n 56. However, this is unlikely to offer an immediate solution, see Shephard and Martin, above n 18.

¹⁹³ Rodgers, *Ibid*, see p 257.

¹⁹⁴ Shephard and Martin, above n 9.

¹⁹⁵ Gunningham, above n 64; Sandra Postel and Brian Richter, *Rivers for life: Managing water for people and nature* (Island Press, 2003) p 169.

¹⁹⁶ Turnbull Group, above n 4, see appendix B.

¹⁹⁷ Judith R Blau, *Social Contracts and Economic Markets* (Plenum Press, 1993) p 18.

¹⁹⁸ Hursthouse, above n 150.

¹⁹⁹ James Woodhill and Niels G Roling, 'The second wing of the eagle: the human dimension in learning our way to more sustainable futures' in Niels G Roling and M Annemarie E Wagemakers (eds), *Facilitating Sustainable Agriculture* (Cambridge University Press, 1998) p 57.

²⁰⁰ Shephard and Martin, above n 9.

good interests in relation to property entitlements.²⁰¹ For Canterbury primary production interests will likely prevail over public good stewardship concerns.²⁰² Thus what is favoured as legitimate is minimal accountability, upholding the freedom to manage an entitlement as a commodity on the market.

3.4 Trust

Trust has two roles in relation to an effective social contract. First is trust in the strategic management process underpinning a social contract; second is trust in the relationship between different interests within that process.

Confidence in a community process for specifying credible access and use arrangements stems from the trust of all stakeholders (in the process and each other). But this is easily eroded when that process is held up by political decisions of government and/or overtaken by Ministerial intervention.²⁰³ Trust in the face of central government intervention has been an issue for collaborative water management in Canterbury. The ECan Act and installation of commissioners with a clear mandate for improved water management occurred over the top of the established CWMS process and relationships.²⁰⁴ However, the ECan Act does place the CWMS framework as central to improved water management, which different stakeholders like the Water Rights Trust and Federated Farmers both support.²⁰⁵

Trust is a factor for the primary sector as it seeks improved understanding and alignment with the community about its freshwater management expectations.²⁰⁶ This is strongly linked to reputation. Building trust revolves around sharing water between irrigation and other uses, but water sharing is also the most likely issue for breakdown of trust and harm to reputation.²⁰⁷ The two sources of debate are indicative of this general conflict. For example, the primary sector claims to have shaped NZ, to be central to ongoing economic performance of the nation and maintenance of quality of life.²⁰⁸ The sector promotes self-management as the best way to address decline in the natural capital base for continued wellbeing and economic prosperity.²⁰⁹ Acknowledgement of declining natural capital is not enough for community interests, who claim that the best way forward is for full cooperation of the rural sector to work within environmental constraints and adapt so that economic imperatives will not prevail over environmental ones.²¹⁰

Whether a social contract can meet both community wellbeing expectations and the self-management expectations of primary sector entitlement holders remains to be seen. I suggest it will be complicated to reconcile the private interests of self-management within the primary sector with public good outcomes. The use of private interest to support the public good of the nation is likely to

²⁰¹ Brower et al, above n 1.

²⁰² N A Kirk and Ali Memon, 'Reflections on the causes and solutions to the Canterbury water management crisis: A Gramscian perspective' (Paper presented at the New Zealand Political Studies Association Conference, University of Waikato, 2-3 December 2010. 2010)

²⁰³ Kathleen Bowmer, 'Learning from existing practice. Reflections on developing a water sharing plan.' (Paper presented at the Fenner Conference, Agriculture for the Australian Environment, Johnstone Centre, Charles Sturt University, Albury, 2002) <<http://www.csu.edu.au/special/fenner/papers/ref/16> Bowmer Kath.pdf > at 7 December 2010.

²⁰⁴ Lomax et al, above n 63.

²⁰⁵ Water Rights Trust, Why is Canterbury so special? (2003) <www.waterrightstrust.org.nz/> at 8 December 2010; Federated Farmers of NZ, Friday Flash, 6 November 2009 (2009) Federated Farmers <<http://www.fedfarm.org.nz/n1748.html>> at 8 December 2010.

²⁰⁶ Primary Sector Water Partnership, above n 173.

²⁰⁷ Bowmer, above, n 203.

²⁰⁸ Primary Sector Water Partnership, above n 173, p 1.

²⁰⁹ Ibid, p 2.

²¹⁰ Water Rights Trust, above n 205.

succeed politically in debate about resource allocation.²¹¹ Thus economically powerful primary sector interests are likely to prevail over others in the demand for water,²¹² posing a threat to the process of collaboration and a loss of trust in the value of a social contract.

²¹¹ Brower et al, above n 1.

²¹² Kirk and Memon, above n 202.

Chapter 4

Conclusions about the effectiveness of a social contract as a legal boundary of responsibility for improved water management

There is strong support for norms of good practice to put a social contract into effect and meet wellbeing expectations for improved water management. The risk of this approach is that debate between private interests and public good over norms of practice will be reduced to questions of reasonableness, as has occurred with fisheries in NZ.²¹³ When this occurs, the standard is likely to favour common practice and freedom of private interest over increased stewardship for the public good.

A fundamental issue for improved public good water management is that an access entitlement comes with the freedom of a private interest protected by law with minimal accountability. For example, the nature of water rights under the RMA is to provide commercial certainty and safeguard the ongoing entitlement of an existing water right.²¹⁴ This is a bias to ignore a social contract and sustainable management obligations as public goods beyond the level of responsibility that an ordinary holder of a private resource access entitlement should have to bear.

Economically powerful primary industries interests supporting such freedoms of self-management are likely to prevail in a collaborative process.²¹⁵ The effect of this will be to prioritise private benefit over resource stewardship in water management by reliance on reasonable practice, thus legitimising minimal standard of common practice. The use of private interest to support the wellbeing of the nation is likely to succeed politically in debate about resource allocation. Thus economically powerful primary sector interests are likely to prevail over others in the demand for water, posing a threat to environmental outcomes and a loss of trust in the value of a social contract.

Legal processes will, by necessity, shape the management of water by a statutory social contract. If the balanced and holistic approach envisaged for a social contract is not clearly defined, then the law will look to make sense of the obligations in the face of ongoing conflict and confusion. The above analysis of a social contract as a legal boundary of responsibility suggests that, without a clear statutory basis for a higher standard of care in the access and use of water, collaborative processes and the legal framework are only likely to support a minimum level of accountability. The social contract has potential to specify improved water stewardship, but that requires obligations to be defined in virtuous terms, if laws are to be of any use in providing for water stewardship based on other regarding action rather than private interest. This is not to suggest that water entitlement holders should be subject to ever shifting social expectations, rather that a clear and enforceable statement of stewardship obligation is required in law so that entitlement holders can operate in knowledge of what the public good interest is in their resource management practice. A social contract is unlikely to provide such clarity without statutory reform to specify improved water management as stewardship rather than minimal accountability. Effective change needs a permanent reassignment of property rights to incorporate a stewardship ethic, recognising that social and environmental wellbeing is an integral part of an access entitlement. This will allow the social contract to be a useful legal tool in moving water management to an improved level that goes beyond the status quo.

²¹³ Above n 175.

²¹⁴ Above n 186; Barker, above n 91.

²¹⁵ Kirk and Memon, above n 202; Lomax et al, above n 63.

The ECan Act is unlikely to improve water management by relying on a statutory social contract unless it can practically embed virtue into a legal framework for access and use of water. This would be founded on clear statutory stewardship principles to overcome the dominant institutional bias toward minimal accountability. Then, as suggested by this review, it is possible to provide a clear foundation for improved water management, including: A market that operates in clear knowledge of stewardship expectations; access rights with clear stewardship obligations; a boundary of responsibility to build consensus around virtue, rather than minimal accountability; and clear basis for legal enforcement within the checks and balances of the courts rather than behind the closed doors of administrators.

Chapter 5

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- *Aoraki Water Trust v Meridian Energy Limited [2005] 2 NZLR 268*.
- *Falkner v Gisborne District Council [1995] 3 NZLR 622*.
- *NZ Rail v Marlborough District Council [1994] NZRMA 70*.
- *Trio Holdings Ltd v Marlborough District Council [1997] NZRMA 97*.
- *North Shore City Council and others v Auckland Regional Council (Okura) [1997] NZRMA 59*.
- *Falkner v Gisborne District Council [1995] 3 NZLR 622*.
- *NZ Fishing Industry Association (inc) v Minister of Fisheries CA82/97*.
- *Kemp v Dart River Safaries Ltd [2000] NZRMA 440*.