# HOW FAR CAN THE TE AWA TUPUA (WHANGANUI RIVER) PROPOSAL BE SAID TO REFLECT THE RIGHTS OF NATURE IN NEW ZEALAND?

**A DISSERTATION FOR THE DEGREE OF LLB(HONS)**


**BY**

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# TABLE OF CONTENTS

**INTRODUCTION** ..... **5**

**CHAPTER I: THE HISTORICAL CONTEXT IN THE TREATY OF WAITANGI, AND THE WAITANGI TRIBUNAL'S ANALYSIS** ..... **8**

A THE TREATY OF WAITANGI ..... 8
B THE WAITANGI TRIBUNAL ..... 9
C THE CLAIM BY ATIHAUNUI ..... 10
*1 Early Litigation* ..... *11*
*2 Resource Consent-related Litigation* ..... *11*
*3 The Mana of Atihaunui* ..... *12*
D THE FINDINGS OF THE WAITANGI TRIBUNAL ..... 12
*1 Grounding of Māori understanding in key concepts and the Māori world view* ..... *13*
*2 Māori concepts of property* ..... *13*
*3 The link between the people and the river* ..... *14*
*4 Māori owned the River* ..... *14*
*5 The River was taken* ..... *15*
*6 The dissenting opinion* ..... *16*
E THE RECOMMENDATIONS OF THE WAITANGI TRIBUNAL IN WAI 167 ..... 16
*1 TAT as a political response to Wai 167* ..... *17*
*2 The options for remedy* ..... *17*
*3 Te Awa Tupua* ..... *18*

**CHAPTER II: THE AWA TUPUA PROPOSAL** ..... **19**

A PRELIMINARY MATTERS ..... 19
B REFERENCE TO THE FINDINGS OF THE WAITANGI TRIBUNAL ..... 20
C POLITICAL TENSIONS ARE EVIDENT IN THE AIP ..... 20
D THE TERMS OF THE PROPOSAL ..... 20
*1 The principles upon which the settlement is based* ..... *20*
*2 The key elements of the proposal* ..... *21*
E THE STATUTORY RECOGNITION OF TAT ..... 21
F A LEGAL ENTITY WITH LEGAL PERSONALITY AND LEGAL STANDING ..... 22
*1 Personhood as a neutral resolution to the question of ownership* ..... *22*
G TE POU TUPUA – THE GUARDIANS ..... 23
*2 "Held in the name of"* ..... *24*
H A SET OF RIVER VALUES TO GUIDE DECISION MAKING ..... 24
I THE WHOLE OF RIVER STRATEGY – A COMPLEMENT TO EXISTING RMA DOCUMENTS ..... 25

**CHAPTER III: WHAT DO WE MEAN BY THE RIGHTS OF NATURE?** ..... **27**

A THE RIGHTS OF NATURE IS ENVIRONMENTAL PHILOSOPHY GENERALLY, AND DOES NOT ALWAYS ENTAIL "RIGHTS" ..... 27
B THE ROLE OF ENVIRONMENTAL ONTOLOGY ..... 28

1 *Anthropocentric environmental philosophy* ... *29*
2 *Ecocentric environmental philosophy* ... *29*
3 *Ecocentric environmental philosophy embraces human concern for humans, as well as non-human nature* ... *29*
4 *"How ought we live?"* ... *30*
C THE GOOD LIFE ... 30
D THE RIGHTS OF NATURE DOES NOT NECESSARILY ENTAIL MORAL OR LEGAL RIGHTS ... 31
E AN INSISTENCE ON "RIGHTS" IS PROBLEMATIC IN THIS HOLISTIC PERSPECTIVE AND SHOULD BE REJECTED ... 31
1 *Objection based on liberalism and environmentalism* ... *32*
2 *Objection based on the content of rights* ... *33*
3 *An objection based on the role of rights in the NZ legal system* ... *33*
4 *Conclusion on the use of moral or legal rights* ... *34*
F THE USE OF ECOLOGICAL SCIENCE IN ETHICS ... 35
1 *The naturalistic (or "is-ought") fallacy* ... *35*
2 *Our understanding of nature is socially constituted* ... *36*
3 *The use of science can be defended in the search for environmental ethics.* ... *37*
G THE PROBLEM OF ETHICAL PLURALISM ... 37
1 *Ethical monism* ... *38*
2 *The demise of metaphysical ethics* ... *38*
3 *The monist race to the bottom* ... *38*
4 *The use of reason and evidence* ... *39*
5 *Ethical pluralism as on-going development* ... *40*
6 *The role of ethical pluralism in Rights of Nature law* ... *40*
H AN ALTERNATIVE TO NATURE AS ETHICAL STANDARD: THE "LET'S JUST SAY" APPROACH ... 41
I CONCLUSION ... 41
**CHAPTER IV: IS TE AWA TUPUA AN EXAMPLE OF THE RIGHTS OF NATURE IN LAW? ... 43**
A DOES THE TE AWA TUPUA PROPOSAL RECOGNISE THE RIGHTS OF NATURE IN LAW? ... 43
B WE DO NOT NEED A DECLARATION OF RIGHTS ... 44
C THE PERSONHOOD OF TE AWA TUPUA ... 44
1 *Resolution of the ownership question* ... *44*
2 *What was Stone's proposal?* ... *45*
3 *The position of nature at common law* ... *45*
4 *Stone's proposal* ... *46*
5 *The question of the merits* ... *46*
D EVOLUTIONARY LEGAL PROCESSES AND SYSTEMS GOVERNANCE ... 47
1 *The lessons of ethical pluralism for environmental law* ... *47*
E THE RESOURCE MANAGEMENT ACT 1991 IS A RIGHTS OF NATURE STATUTE ... 48
1 *Part II of the RMA* ... *48*
2 *Cascading instruments* ... *49*
3 *Sections 13-15 of the RMA* ... *49*
4 *Definitions under the RMA* ... *50*

*5 The RMA as RON statute* ... *51*
*6 The RMA's institutionalisation of Guardians* ... *51*
F THE OVERALL JUDGMENT APPROACH ... 52
*1 The meaning of "while" in section 5* ... *53*
G ONTOLOGICAL REDEFINITION AND ECOLOGICAL CONSCIOUSNESS ... 54
H WILL TAT SHIFT OUR RELATIONSHIP TO NATURE? ... 55

**CHAPTER V: CONCLUSION ... 56**

**BIBLIOGRAPHY ... 59**
A TREATIES ... 59
B LEGISLATION ... 59
C INTERNATIONAL INSTRUMENTS, RESOLUTIONS, AND DECLARATIONS ... 59
D JUDICIAL DECISIONS ... 60
*1 New Zealand* ... *60*
*2 United States of America* ... *60*
E PUBLIC DOCUMENTS ... 61
F TEXTS ... 61
G CHAPTERS IN EDITED BOOKS ... 62
H LECTURES AND PRESENTATIONS ... 63
I JOURNAL ARTICLES ... 63
J NEWS MATERIALS ... 68
K WEBSITES ... 69
L REPORTS ... 68
M THESES AND DISSERTATIONS ... 68
N WAITANGI TRIBUNAL REPORTS ... 60

## *Introduction*

> *Te Awa Tupua* comprises the Whanganui River as an indivisible and living whole, from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements.[1]

The river is a person. The River is a person. The river 'is' a person. The 'river' is a person. The River is a 'person'. The 'River' is a 'person'. No matter how this sentence is written in English it involves some kind of gloss on what might be brazenly said to be the common meaning of these two words: 'river' and 'person'. By contrast, to the people of Atihaunui-a-Paparangi ("Atihaunui"), the idea can be simply conveyed by a single name: Te Awa Tupua. The reason for this is clear upon an understanding of Te Ao Māori (the Māori world view), which defines the human relationship with nature as just that: a relationship. Now, Te Awa Tupua ("TAT") is to be given recognition as a legal entity, with legal personality, and legal standing[2] in a forthcoming settlement under the Treaty of Waitangi. The settlement comes as some recognition of the nearly 150 years of NZ legal history over which Atihaunui have asserted their authority over the Whanganui River.

The personhood of the Whanganui River comes at a time when many worldwide are advocating for the legal recognition of the Rights of Nature ("RON"). This has led some commentators to already claim[3] that the TAT proposal is evidence of human recognition of the RON, in the vein of international instruments such as the Universal Declaration on the Rights of Mother Earth,[4] and the Ecuadorean constitutional protection of *Pachamama* Mother Earth.[5] The claim generally is that human beings are (or should be) progressing to a higher moral understanding, whereby nature will cease to be conceived of as property, valued only for its role in satisfying human wants. Instead, Mother Nature will be conceived of as a person, worthy of moral concern, and a holder of her own legal and moral rights.

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[1] Tutohu Whakatupua (Agreement between Whanganui Iwi and the Crown, 30 August 2012) at 2.4.

[2] Ibid, at 2.6-2.9.

[3] See Elaine C Hsiao "Whanganui River Agreement – Indigenous Rights and Rights of Nature" (2012) 42 Environmental Policy and Law 371; Michelle Maloney "Wild Law and the Rights of Nature" (Public Seminar, Perth, Australia, 9 February 2013); Cormac Cullinan "The Rights of Nature" (Address to 10th World Wilderness Congress, Salamanca, Spain, 6 October 2013) available from <http://www.ustream.tv/recorded/39576317>.

[4] Universal Declaration of the Rights of Mother Earth 2010 (World People's Conference on Climate Change and the Rights of Mother Earth, Bolivia, 22 April 2010).

[5] Constitution of the Republic of Ecuador (2008) available from <http://pdba.georgetown .edu/Constitutions/Ecuador/english08.html>.

The question of interest for this dissertation is how far the TAT proposal can be said to reflect legal recognition of "the Rights of Nature" in NZ. The goal is to answer this question with as much rigour as the scope of this dissertation allows so that environmentalists (including myself), acting with the best of intentions, do not overstate their claims. As Peter Burdon has noted, "if the idea of earth rights is to command reasoned loyalty and gain broader political acceptance then it must be built on a secure intellectual footing."[6]

I will adopt the following plan. Firstly, TAT needs to be considered in its historical and political context, as this context fundamentally affects how TAT is conceived and understood. Accordingly, I will outline how the proposal came to be. TAT is both a guarantee of property (or possessory) rights made by the Crown under the Treaty of Waitangi, and a natural entity according to Māori cosmology that has been incorporated in the settlement documents. This presents an interesting conflict at TAT's foundations. Second, the TAT proposal itself will need to be outlined in light of this context, in order to compare it to a RON concept. Although details of the proposal are currently limited, it is clear[7] that TAT will operate within the confines of the Resource Management Act 1991 ("the RMA"), which governs the sustainable management of natural and physical resources in NZ.[8] Thirdly, I will attempt to explain the concept of the RON. The RON can be understood in both a legal and an ethical sense. This will therefore involve a consideration of both the environmental ethics that supports the RON, and a consideration of how this ethical content could be operationalised in law. Fourthly, I will apply this concept of the RON to TAT proposal, to assess to what extent RON are reflected in the NZ legal system. Finally, I will use the results of this analysis to propose some possible effects of my conclusions on how TAT will govern itself.

I conclude that TAT does represent an innovative approach in its application of personhood to joint management of natural resources in NZ. It adopts Christopher Stone's 1972 model[9] to a significant extent, and poses interesting possibilities in using its personhood status. In contrast, however, I conclude that it does not reflect a commitment to the RON in NZ in the way that some might claim.

The proposal is directed more at recognising the legal rights of Atihaunui than the RON. The settlement can more accurately be said to privilege Atihaunui's conception of the RON, but only to an extent. In particular, I argue that the RON can more accurately be seen as being recognised in Part II of the RMA. I assert that "the RON"

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[6] Peter Burdon "Earth Rights: The Theory" (2011) 1 IUCN e-Journal 1 at 2.

[7] Tutohu Whakatupua, above n 1, at 2.26.

[8] Resource Management Act 1991, ss 2, 5.

[9] Christopher Stone "Should Trees Have Standing?" (1972) 45 Southern California Law Review 450.

is an umbrella term for environmental philosophy generally. The key question of environmental philosophy is how humanity ought to define its relationship with nature. Through the philosophy of ontology, as influenced by ecological science, humanity can be defined as being constituted of nature, and part of nature, in a shift away from the Cartesian dualism of subject and object and man outside of nature. The question of environmental philosophy then becomes "how ought we relate to everything, including humans?" Environmental philosophy becomes a comprehensive question of the good life – how ought we to live?

The RON in law becomes a need to deal with the problem of ethical pluralism, where we enact processes with a political content to enable our holistic and developing sense of ethics to become law. The use of "rights" in this context does not create a useful legal standard, and simply obscures important decisions about substantive political content. Instead, according to the methods of ethical pluralism, substantive political decisions must be made on a case-by-case basis according to the needs of local communities and ecosystems on the basis of scientific evidence. For this reason, I argue that the balancing process undertaken by decision-makers under the Resource Management Act presents a good operational legal protection for Nature's Rights.

The result is that any legal protection of the intrinsic RON largely comes from existing legal mechanisms, and not TAT. A shortfall remains between our aspirational legal protections and the environmental consciousness necessary to give these protections their full effect. My conclusions regarding TAT's status as a RON structure may have the effect of limiting its ability to serve as a general environmental advocate in defence of "nature's rights" at large. TAT is just as much about the rights of Atihuanui as the RON. Importantly, the personification of natural entities is not likely to be the ideal standard for environmental law beyond an institutional novelty. I conclude with an open mind, in noting that between Stone's article in 1972, and the Resource Management Act's enactment in 1991, the radical idea of nature's intrinsic value has become mainstream. Perhaps, in giving TAT personhood, New Zealand law will again surge forward.

## *Chapter I: The Historical Context in the Treaty of Waitangi, and the Waitangi Tribunal's Analysis*

> The essential contention is that the people's status in matters concerning use of the river should be acknowledged for the future. It is a question of recognition and mana.[10]

The TAT Proposal cannot be viewed in isolation from its foundations – as a settlement of disputes arising between Atihaunui-a-Paparangi (the Māori people of the Whanganui River) and the Crown of New Zealand ("NZ") under the Treaty of Waitangi 1840. The claim by Atihaunui against the Crown for multiple breaches of the terms of the Treaty of Waitangi constitute NZ's longest running legal action, with petitions in protest being made as early as 1873.[11] The legislation that grants legal personhood to the Whanganui River as TAT will be enacted primarily to satisfy recommendations made by NZ's Waitangi Tribunal as to how the Crown ought to remedy these breaches of the Treaty of Waitangi. In order to assess to what extent the proposal reflects a shift towards the RON in NZ law, it is necessary to examine this context. The point is that this development in law is based on a legal claim by the people of the Whanganui. It is not a claim by the river in its own right, even though Atihaunui regard themselves as interdependent kaitiaki of the Whanganui's interests. The NZ legal system recognises that it is Atihaunui that have a guarantee of protection under the Treaty of Waitangi, not the river itself, and it is Atihaunui's rights that form the basis for the proposal.

### *A The Treaty of Waitangi*

The Treaty of Waitangi ("the Treaty") can be regarded as the founding document of NZ, in the sense that it allowed for settlement by European interests in a manner that was meant to allow for cohabitation with Māori as NZ's indigenous people. It comprises a preamble and only three articles. Its form reflects its function as a comprehensive cure-all measure designed to extend law and order to both indigenous and immigrant New Zealanders. It is a document founded on the idea of a mutually dependent partnership,[12] reflecting the reality of early settlers' dependence on Māori. As Michael Belgrave explains it:[13]

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[10] Waitangi Tribunal *The Whanganui River Report: Wai 167* (GP Publications, Wellington, 1999) at 2.

[11] Ibid.

[12] See generally Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012); *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

[13] Michael Belgrave "Negotiations and Settlements" in Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) at 33.

> Rangatira signed or they refused to sign, depending on their own understanding of their tribal needs. They certainly held the military power and could have used it either to prevent NZ from becoming a British colony or at the very least to inflict a heavy price on any European invader. However, they chose not to do so, and even those leaders who did not sign the Treaty … did not turn their concerns into active resistance.

### *B The Waitangi Tribunal*

Throughout NZ's legal history, the Treaty has been undermined as "a simple nullity"[14] and its provisions were not enforceable in domestic law without statutory incorporation.[15] However in line with the mainstreaming of Treaty issues, and increasing political agitation by Māori in line with the civil rights awakening of the 1960s and 1970s,[16] the Waitangi Tribunal was constituted under s 4 of the Treaty of Waitangi Act 1975. Its jurisdiction includes investigating claims for breaches of the Treaty back to 1840, making authoritative interpretations of the Treaty, investigating Treaty claims, and making non-binding (but morally authoritative) recommendations as to how those disputes could be resolved.[17]

The TAT proposal can be seen as heavily influenced by the terms of the Treaty. The terms of the Treaty frame the Waitangi Tribunal's analysis, and therefore form a conceptual foundation for the proposal. The overall question to be addressed is whether the treaty has been breached. The key point to draw from the text of the Treaty is that rights of governance were given to the British Crown in exchange for a guarantee of Māori continued Chieftainship over their lands, estates and taonga,[18] and that Māori would be protected according to the same rights and duties of citizenship as the people of England.[19]

Significantly, the Treaty of Waitangi grounds the TAT proposal in a guarantee of property rights by the Crown toward Māori and indicates a grounding of the Treaty within a particular Western paradigm prevalent at the time it was signed.[20] In the

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[14] *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur (NS) SC 72.

[15] *Hoani Te Heuheu Tukino* [1941] AC 308.

[16] Wheen and Hayward, above n 12, at 17.

[17] Treaty of Waitangi Act 1975, s 5.

[18] Taonga can be translated as "treasures". It extends to both physical and metaphysical treasures, including protection of sacred sites, customs, and the protection of Te Reo Māori as a language.

[19] Wheen and Hayward, above n 12, at 16.

[20] Stuart Banner "Two Properties, One Land: Law and Space in Nineteenth Century NZ" (1999) 24 Law and Social Inquiry 807 at 817-818; Ulrich Klein "Belief-Views on Nature – Western Environmental Ethics and Māori World Views" (2000) 4 NZ J Envtl L 81. These conflicting views of Māori property were still apparent in Crown Counsel's submissions before the Waitangi Tribunal in Wai 167, above n 10, at 24.

English language version of the Treaty, the property connection was even more explicit, granting "full exclusive and undisturbed possession … so long as it is their wish and desire to retain the same".[21] As a statement of property, it can be seen as similar to Blackstone's paradigmatic statement of property as "sole and despotic dominion".[22]

Because of these terms, the legal analysis conducted by the Tribunal has a strong property focus.[23] The question in this particular claim is whether Māori held the Whanganui River in their possession at 1840. If they did hold it, was their Treaty right to retain it in their possession maintained? As the Tribunal phrased it:[24]

> The question here is whether extinguishment was consistent with the principles of the Treaty of Waitangi. The central issue is whether Māori knowingly and willingly relinquished their river interests or their traditional authority over the river as a whole.

### *C The claim by Atihaunui*

The history of the treatment of "the whole of the traditional river people"[25] comprising Atihaunui by the Crown and its representatives is documented in the Waitangi Tribunal's report known as Wai 167,[26] which concluded that Crown conduct has violated the Treaty of Waitangi.[27] It is also important to recognise that Whanganui objection to treatment by the Crown has been longstanding. Any claim that the proposal is to be regarded as a recognition of the RON, overlooks the lengthy litigation pursued by Māori in seeking to have *their* rights recognised. The following can be seen as a history of the Whanganui River/TAT as an object of property according to the NZ legal system.

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[21] The Treaty of Waitangi 1840, article 2.

[22] William Blackstone *Commentaries on the Laws of England* (University of Chicago ed 1979, Chicago) vol 2 at 2: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."

[23] In particular, see the tribunal's reference to "a tenet of English law as old as the Magna Carta that private property interests are respected"; Wai 167, above n 10, at 329.

[24] Wai 167, above n 10, at 232.

[25] Ibid, at 2. See p 30 for the Tribunal's explanation of the differing sub-groups within Te Atihaunui-a-Paparangi.

[26] Ibid.

[27] Ibid.

### *1 Early Litigation*

Māori have long claimed ownership of TAT. Prior to 1860 they charged tolls for European use of the river for transport.[28] Formal objection to European actions began with parliamentary petitions from 1873.[29] These were followed by protests, and direct action, including "obstruction of channel clearance work".[30] By 1927, Whanganui's claim grew to cover "the use of the river by a steamer company, the taking of gravel, the release of trout, and the destruction of fishing weirs."[31] This protest became formal litigation in 1938 beginning NZ's longest legal proceedings. The legal hurdles have been significant, and were tenaciously pursued in the face of obstinacy by the Crown.[32] In the course of those proceedings,

> seven judges of the Native Land court, one of the Supreme Court, and three of the Court of Appeal were all to conclude that, as a matter of law, Māori *had* owned the riverbed.[33] [added emphasis]

Ultimately however, the Native Land Court process of individual title was found to have alienated the River from tribal ownership. Atihaunui disagreed with the Court's ultimate findings that the river had been alienated and continued to pursue compensation outside of the judicial process. This resulted in the establishment of the Whanganui River Māori Trust Board ("WRMTB") in 1988.[34]

### *2 Resource Consent-related Litigation*

The WRMTB became involved in "the minimum flow litigation"[35] the same year that it was constituted regarding the Electricity Corporation of NZ's reapplication for resource consent to continue to abstract water from the river for power generation. This required the WRMTB to be involved in litigation for four years. It was followed by the Royal Forest and Bird Protection Society's application for a water conservation order over the Whanganui River and its tributaries. Significantly, section 199 of the RMA establishes the purpose of water conservation orders as being to recognise and

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[28] Wai 167, above n 10, at 4.

[29] Ibid.

[30] Ibid, with detailed examination of this at pp 179-194. These unsuccessful attempts led to recourse to the Native Land Court.

[31] Ibid.

[32] Wai 167, above n 10: The claim proceeded from the Native Land Court to the Supreme Court, was referred to a Royal Commission, appealed via special legislation (Māori Purposes Act 1951) to the Court of Appeal, sent back to the Māori Appellate Court, and then appealed again to the Court of Appeal.

[33] Wai 167, above n 10, at 195.

[34] Whanganui River Trust Board Act 1998, s 4(1).

[35] Wai 167, above n 10, at 315.

sustain "outstanding amenity or intrinsic values"[36] in bodies of water. Atihaunui's opposition to such an order is surely relevant to the claim that TAT involves *primarily* a recognition of the RON. The opposition to this application does not necessarily indicate Māori opposition to the intrinsic values of TAT,[37] however it does indicate that the proposal resulting from claim to the Tribunal is as much founded on the status of Atihaunui as the status of TAT. It was this application for a water conservation order that led Atihaunui to their urgent claim before the Waitangi Tribunal.[38]

#### *3 The Mana of Atihaunui*

Whanganui claims for control and authority over TAT through legal mechanisms that treat it as property have been longstanding. The Iwi were required to establish their connection to the Whanganui River under a Western paradigm at all stages of this legal process, and a substantial purpose of the TAT proposal is to provide legal recognition of Atihaunui's connection to TAT.[39] As the Tribunal noted:[40]

> … [U]nless the Māori right in the river is settled … the people will be always on the back foot ... They seek more than the right to be heard[41] … They challenge the power of others to make decisions and say that the power should be vested in them.

### ***D The Findings of the Waitangi Tribunal***

The Tribunal acknowledged that Māori and European concepts of property do not neatly match up, and so it was recognised that the question of whether Māori held the river at 1840 must be answered "in the context of the social framework of the affected Māori people, and not in the context of any alien structure to which Māori norms do not relate".[42] It acknowledged, however, that Māori had been forced to convey these concepts in English law terms in the past,[43] and the Tribunal itself explicitly reverts to the use of English concepts to explain where necessary.[44]

The findings of the Waitangi Tribunal ground the proposal in the concept of "river as possession/property" according to the terms of the Treaty of Waitangi. By contrast,

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[36] This is of particular relevance to my later discussion below in Chapter III.
[37] As recognised by the Waitangi Tribunal; Wai 167, above n 10, at 312-313.
[38] Wai 167, above n 10, at 8.
[39] Ibid, at 5.
[40] Ibid, at 6.
[41] Here the tribunal was referring to the consultation procedures in the Resource Management Act 1991.
[42] Wai 167, above n 10, at 16.
[43] Ibid, at 197.
[44] Ibid, at 28.

the findings *also* ground the proposal in Atihaunui's concept of "river as entity" but also the concept of "river as resource". Throughout the Tribunal's analysis, and reflected in its recommendations, the river is multiply conceptualised as a resource, a thing of property, and a being.

### *1 Grounding of Māori understanding in key concepts and the Māori world view*

An understanding of Māori property concepts derives from Māori "cosmology" generally.[45] This cosmology is highly relevant for my later analysis of TAT's RON status.[46]

The two key concepts at the heart of the Māori relationship to nature are identified as whanaungatanga (kinship) and kaitiakitanga (stewardship, but with "a core spiritual dimension").[47] Whanaungatanga relates to the Māori[48]

> conception of the creation, [whereby] all things in the universe, animate or inanimate, have their own genealogy. These each go back to Papatuanuku, the mother earth, through her offspring gods. Accordingly, for Māori the works of nature – the animals, plants, rivers, mountains, and lakes – are either kin, ancestors, or primeval parents according to the case, with each requiring the same respect as one would accord a fellow human being.

The concepts of whanaungatanga and kaitiakitanga are interrelated:[49]

> Kaitiakitanga is really a product of whanaungatanga – that is, it is an intergenerational obligation that arises by virtue of the kin relationship. It is not possible to have kaitiakitanga without whanaungatanga. In the same way, whanaungatanga always creates kaitiakitanga obligations.

### *2 Māori concepts of property*

Maori therefore define themselves ontologically as being part of the natural order, and in a relationship with the environment, rather than standing outside of and in control

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[45] Linda Te Aho "Nga Whakataunga Wiamaori: Freshwater Settlements" in Nicola Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) at 103.

[46] This is not an area in which I claim expertise, and it is not the primary focus of this dissertation. Because I am acutely aware of the insensitivity with which I may describe a culture that is not my own, I adhere strongly to the words of the Waitangi Tribunal in the following discussion. Like the Tribunal, I also acknowledge that this cultural description is not comprehensive, or necessarily subscribed to by all who identify as Māori.

[47] Waitangi Tribunal *Ko Aotearoa Tenei: Te Taumata Tuatahi - A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (Wai 262, 2011) at 105.

[48] Wai 167, above n 10, at 38.

[49] Wai 262, above n 47, at 105.

of it. "It is through those relationships that the Māori culture evolved".[50] Just as the centrality of liberal autonomy has shaped the common law's conception of private property and individualised title, Māori ontology was integral in shaping an ethic of collective stewardship rather than ownership over natural resources. The Tribunal provided an example of how this would shape a confrontation over rights to natural resources between Māori and Europeans in colonial times:[51]

> A European might inquire of their territorial rights. A Māori would inquire of the relationship between the Tuwharetoa and Atihaunui people.

*3 The link between the people and the river*

In addition to this general centrality of nature to Māori culture and property, the Tribunal indicated this was especially the case for TAT and Atihaunui.[52]

*4 Māori owned the River*

An understanding of the concepts underlying Māori relationships to natural resources leads to a conception of property rights fundamentally different to those of English property concepts.[53] The Tribunal thought that the deliberate use of the word "possession" rather than "owned" (or similar) in Article 2 of the Treaty indicated that the English appreciated this fact when the Treaty was signed.[54] Whatever Māori possessed at 1840, they were guaranteed under the Treaty. Given the clarification of what Māori possessed in terms of property rights in the River, the Tribunal was able to state what was guaranteed:[55]

> [U]se rights were most regularly in the form of a licence to access a particular resource in a certain way, at a prescribed time. They were rarely in the form known to Europeans of an individual right to access all the resources of a prescribed area, in any way, and at any time. … Rights to access resources were rarely absolute. The personal use of resources was surrounded by social obligations to contribute to the hapu according to its laws, and was conditioned

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[50] Ibid, at 106.

[51] Wai 167, above n 10, at 35.

[52] Ibid, at 31: "In Whanganui, the river adds significantly to common descent as a unifying force, together with the fact that the dispersal of the people was not broadly across the ancestral territory but narrowly throughout the length of a long river flowing through precipitous terrain. … The river was thus a ready link between the various sections of a relatively homogenous descent group … just as an ancestor brings people together, so also does the river. … The river was little different from the land … as both a resource and a source of identity."

[53] Banner, above n 20, at 817.

[54] Wai 167, above n 10, at 49.

[55] Ibid, at 28. See Banner's analysis (above n 20) which supports these findings.

> by the ethic that mana came not from the aggregation of property rights for personal gain but from one's contribution to the community.

The River was a taonga, and had characteristics flowing from the Māori world view that meant it was not wholly reducible to English property concepts:[56]

> [T]hough they had possession and control in fact, they did not see it in those terms; rather, they saw themselves as users of something controlled and possessed by gods and forebears. It was a taonga made more valuable because it was beyond possession. … On this view of things, the river was not a commodity, not something to be traded. It was inconceivable that such a thing could be done or that anything other than the pre-existing order could continue to prevail.

It is important to note that the spiritual and personified characteristics of the river did not exclude its use as a resource, only that "the use of resources … was conditional upon contribution to the hapu"[57] and customary law. Use rights "include the incidences of English ownership, save those of free transferability or escheat to the State."[58]

*5 The River was taken*

The Tribunal found that the bed of the river had been alienated from Māori.[59] Rights of authority and control over the river had been removed "primarily through the operation of NZ statutes[60] … culminating in the Resource Management Act 1991."[61]

Of even greater significance for the ultimate shape of the TAT proposal, the Tribunal found that Māori interests in the river included the *water* in the river itself:[62]

> We consider that, if the river is regarded as a whole, as we think it must be in terms of Māori possessory concepts. The water is an integral part of the river that was possessed, and was possessed as well. Though its molecules may pass by, as a water regime it remains.

[56] Wai 167, above n 10, at 46.
[57] Ibid, at 48.
[58] Ibid, at 50.
[59] Ibid, at 179. Section 14 of the Coal-mines Act Amendment Act 1903 meant that "all beds of navigable rivers were deemed to be and to have always been vested in the Crown."
[60] See Wai 167, above n 10, at 166 for a full list of these statutes.
[61] Ibid, at 165.
[62] Ibid, at 50.

Traditionally, the common law never recognised ownership in fresh water,[63] even though it recognised riparian interests in the bed of the river itself.[64] This finding was revolutionary enough to result in a dissenting opinion in the Tribunal.

### *6 The dissenting opinion*

The grounds for dissent were firstly, that ownership of water was not a "practical political option".[65] Secondly, the member referred to the ontological problem[66] of defining where a river begins:[67]

> In a modern river management regime, a river begins at the apex of a watershed, so that all the land within a catchment area is a practical and integral part of a river. The land use within the catchment area dictates the flow and the quality of water within the system. Effective river management is not possible without the ability to influence, often to the point of prohibiting, any particular land use.

The member felt restrictions on land use could only be legitimised through democratic processes, and that whilst control and management had been "relentlessly wrested" from Atihaunui, the "authority and financial responsibility for this now resides with the wider community, and is exercised by the application of the Resource Management Act 1991."[68]

## *E The Recommendations of the Waitangi Tribunal in Wai 167*

The primary issue of significance for the Waitangi Tribunal was the recognition of Atihaunui's original ownership rights, and the rights of authority and control that this ownership entailed.[69] While public access needed to continue, "it should be clear that the public right is theirs not as of right but by permission."[70] As referred to earlier in the report:[71]

> [E]ach appearance [at consultations or hearings] reinforces [Atihaunui's] role as supplicants, not decision-makers, as one of several groups with interests often competing, and involves costs and a loss of status.

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[63] Linda Te Aho, above n 45, at 104.
[64] See Nicola Wheen "A Natural Flow: a History of Water Law in NZ" (1997) Otago Law Review 71.
[65] Wai 167, above n 10, at 346.
[66] Also recognised by Stone (1972), above n 9, at 481, 471, 457; and Christopher Stone "Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective" (1985) 59 S Cal L Rev 1., at 61.
[67] Wai 167, above n 10, at 346.
[68] Ibid.
[69] Ibid, at 343.
[70] Ibid, at 343.
[71] Ibid, at 313.

They repeated Atihaunui's central claim is that:[72]

> [N]othing should be done about the river except that ownership is settled first. That has been at the root of Atihaunui grievance for about 150 years and is the heart, the core, and the pith of this claim. [emphasis added]

*1 TAT as a political response to Wai 167*

The Tribunal made three alternative proposals for how the claim could be settled. Tribunal recommendations are not binding on the Crown, and the treaty settlement process remains a political one between the Executive and Iwi not governed by legislation.[73] The TAT proposal can be seen as a political response to these proposals, in the sense that the aim of the TAT proposal becomes clear in response to the recommendations it sought to avoid.

*2 The options for remedy*

The first two options proposed by the Tribunal were supported by the majority, and the third option was proposed by the dissenting member, who dissented on the grounds of freshwater ownership.

The first option was named "owner approval" (evidencing continued treatment of the river as property) and involved the vesting of "the river in its entirety" in an ancestor representative of Atihaunui, with WRMTB as its trustee. This would mean "any resource consent application in respect of the river would require the approval of the trust board."[74]

The second option was to add WRMTB as a consent authority in terms of the Resource Management Act 1991, meaning that the WRMTB and the current consenting authority (ie a local authority) would *both* need to assent to applications for resource consent.[75]

The third option, proposed by the dissenting member, followed from his conclusion that he was "unable to support any proposal that Atihaunui should own natural water or be designated as a consent authority under the Resource Management Act 1991"[76] despite his full support of the rest of the report.

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[72] Ibid, at 332.

[73] Wheen and Hayward, above n 12, chapter 1. See also Dean Cowie "The Treaty Settlement Process" in Nicola Wheen and Janine Hayward (ed) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012).

[74] Wai 167, above n 10, at 343.

[75] Ibid.

[76] Ibid, at 346.

*3 Te Awa Tupua*

The dissenting member recommended the creation of a joint body between the Crown and Atihaunui "to exercise all the rights and responsibilities of legal ownership of the bed, and that [this] body should be bound, as are other landowners, by the laws and regulations that apply."[77] He advocated that the body consist of "six appointees", equally appointed by Atihaunui and the Crown.

[77] Ibid, at 347.

## *Chapter II: The Awa Tupua Proposal*

The Great River flows
From the Mountains to the Sea
I am the River, and the River is me[78]

Now that the Waitangi Tribunal has confirmed the Crown's obligations to Atihaunui with respect to the Whanganui River, it remains for the Crown to settle those obligations. After a period of negotiation, it has been agreed that (1) the status of the Whanganui River and (2) Atihaunui's relationship with the River should be recognised in law. The goal is to deal with the Waitangi Tribunal's recommendations as they flow from Atihaunui's grievances over breaches of the Treaty of Waitangi.

This chapter aims to outline the Te Awa Tupua proposal based on the information currently available.[79] Its primary function is descriptive, with analysis of the proposal being postponed until an account of the RON has been given. The key point is the inclusion of relevant elements of the proposal, some of which have been omitted in discussion by commentators to this point.

### *A Preliminary matters*

Tutohu Whakatupua is an Agreement in Principle ("AIP") that records agreement as it stands, and will be further developed in the areas specified. When all these elements have been agreed, the AIP will be incorporated into a Deed of Settlement.[80] The Deed of Settlement is legally binding[81] and must be approved by Cabinet and ratified by a vote of tribal members.[82] The final stage of the settlement is converting this Deed of Settlement into Legislation. Certain areas yet to be agreed are some of the most fundamental to how TAT is conceptualised, such as the values by which it will direct itself and the Whole of River Strategy.[83]

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[78] Tutohu Whakatupua, above n 1, at p 1: "E rere kau mai te Awanui / Mai i te Kahui Maunga ki Tangaroa / Ko au te Awa, ko te Awa ko au."

[79] It is not impossible that conflicting political or legal imperatives will derail or significantly alter the negotiations. This is especially so in light of the Māori Party's recent withdrawal of support for the minority National Government's proposed reforms of the Resource Management Act 1991.

[80] Tutohu Whakatupua, above n 1, at 1.17.2(c).

[81] Cowie, above n 73, at p 52.

[82] Ibid, at 53-54; and Tutohu Whakatupua, above n 1, at 3.7.

[83] Tutohu Whakatupua, above n 1, at 2.14 – 217.

### *B Reference to the findings of the Waitangi Tribunal*

Tutohu Whakatupua references and reproduces the findings of the Waitangi Tribunal in Wai 167.[84]

### *C Political tensions are evident in the AIP*

Tutohu Whakatupua retains evidence of opposing political paradigms between Atihaunui and the Crown. An interesting trend in the document is consistent reference to the views of Atihaunui, without necessarily acknowledging that the Crown believes the same. This is particularly apparent in the statement of what RON advocates might regard as being the core element of the TAT proposal: "Atihaunui view the Whanganui River as a living being".[85] It is the Crown's decision to abide by the Treaty of Waitangi that forms the basis for this proposal, and the Treaty of Waitangi affords legal rights on the basis of the Crown's obligations to Atihaunui, not the river itself.

Competing political imperatives are also apparent in a list of what the Crown and Iwi hope to achieve from the settlement. These include[86] "recognis[ing] the full range of environmental, social, cultural and economic interests in the Whanganui River", "preserv[ing] public rights of use and access", "preserv[ing] the role and final decision making functions of local government", and that the settlement "does not derogate from existing private rights". As statements of political intent, these will not carry legal force *per se*, but they can be expected to be reflected in the settlement legislation.

### *D The Terms of the Proposal*

#### *1 The principles upon which the settlement is based*

The agreement states that Atihaunui view the settlement as being founded on two principles:[87]

> **Te Awa Tupua mai I te Kahui Maunga ki Tangaroa** – an integrated indivisible view of TAT in both biophysical and metaphysical terms from the mountains to the sea; and
>
> **Ko au te awa, ko te awa ko au** – the health and wellbeing of the Whanganui River is intrinsically interconnected with the health and wellbeing of the people.

[84] Ibid, at 1.5-1.6, and specifically 1.6.1 – 1.6.6.

[85] Ibid, at 1.2.

[86] Ibid, at 1.10.

[87] Ibid, at 1.8.

The goals of the settlement are consequently defined as:[88]

> **Te Mana o Te Awa** – recognising, promoting and protecting the health and wellbeing of the River and its status as TAT; and
>
> **Te Mana o Te Iwi** – recognising and providing for the mana and relationship of the Atihaunui in respect of the River.

The settlement is therefore founded both on (1) the mana of the Atihaunui people and their relationship with TAT, and (2) the mana and "health and wellbeing" of TAT as Māori see it. The remaining elements to be agreed in the settlement can now be seen as directed at the mana of Atihaunui. The point is that Tutohu Whakatupua outlines the key elements of how the River is to be operationalised as TAT, whilst acknowledging that the specific content of the values and whole of river strategy have not been decided.

*2 The key elements of the proposal*

The following are identified as the "key elements"[89] of the proposal:[90]

> 2.1.1 Statutory recognition of the status of the Whanganui River as TAT;
>
> 2.1.2 Statutory recognition of TAT as a legal entity with standing in its own right;
>
> 2.1.3 The vesting in the name of TAT of those parts of the bed of the Whanganui River that are currently owned by the Crown;
>
> 2.1.4 The development and legal recognition of a set of values for TAT;
>
> 2.1.5 The appointment of Te Pou Tupua (as Guardian of the River) to represent the interests of TAT; and
>
> 2.1.6 The collaborative development and legal recognition of a Whole of River Strategy.

Although "expressed as individual elements" these elements "form an interconnected set of arrangements" which are directed at "the appropriate recognition of the status of the Whanganui River as TAT."[91]

### *E The statutory recognition of TAT*

The "indicative wording" for TAT's statutory recognition is:[92]

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[88] Ibid, at 1.11.

[89] Ibid, at 2.1.

[90] Ibid, at 2.1.

[91] Ibid, at 2.2.

[92] Ibid, at 2.4.

> TAT comprises the Whanganui River as an indivisible and living whole, from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements.

It states that this will apply to "the interconnected waterways within the Whanganui catchment."[93]

### *F A legal entity with legal personality and legal standing*

TAT is variously referred to as being a "legal entity",[94] having "legal personality"[95] and having "legal standing in its own right".[96] Tutohu Whakatupua states that the creation of this legal personality is "intended to reflect the Atihaunui view" that the River is a "living entity in its own right and is incapable of being "owned" in an absolute sense".[97] This might be seen as a remarkable step. However generally speaking, New Zealand's largest rivers are under public management pursuant to the RMA and are not recognised as being privately owned anyway – hence Atihaunui's ownership claim. In addition, the proposal preserves whatever private interests exist. The document maintains Crown neutrality on whether Atihaunui's view is accepted in an objective sense, and the Minister for Treaty Negotiations has publically referred to TAT as operating like a "company".[98] Regardless, it is clear that private property rights in the bed of the Whanganui River will be maintained despite TAT's legal personality and Atihaunui's view that the River cannot be owned.

#### *1 Personhood as a neutral resolution to the question of ownership*

Significantly, Tutohu Whakatupua states that the "recognition of TAT as a legal entity does not in itself create legal ownership in the Whanganui River or its waters."[99] This is a clear rejection of the recommendations of the majority in the Waitangi Tribunal that Atihaunui should own both the River and the water in the River, pursuing a clear Crown policy[100] that nobody ought to have private interests in water under NZ law. It also rejects any idea that Te Pou Tupua will be owners of the Whanganui, enabling the Crown to reject any idea that they have transferred ownership of the River.

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[93] Ibid, at 2.5.

[94] Ibid, at 2.6.

[95] Ibid, at 2.7.

[96] Ibid, at 2.7.2.

[97] Ibid, at 2.7 – 2.7.1.

[98] Kate Shuttleworth "Agreement Entitles Whanganui River to Legal Identity" *The New Zealand Herald* (New Zealand, 30 August 2012).

[99] Tutohu Whakatupua, above n 1, at 2.9.

[100] Jacinta Ruru "Māori Rights in Water – The Waitangi Tribunal's interim report" (Māori Law Review, September 2012) available <from http://maorilawreview.co.nz/2012/09/maori-rights-in-water-the-waitangi-tribunals-interim-report/>.

At this point, it is worth referring to s 64 of the Waikato-Tainui Act, which acknowledges that the Crown and Waikato-Tainui

> have different concepts and views regarding the Waikato River (which the Crown would seek to describe as "ownership") [and that] the 2009 deed and this Act are not intended to resolve those differences".[101]

The TAT settlement process is therefore proceeding at the same time as NZ law has codified a difference in understanding regarding whether Awa Tupuna (river ancestors) can conceptually be owned.

### *G Te Pou Tupua – the Guardians*

Two[102] "Pou Tupua" will be appointed "as guardian[s] to represent the interests and act on behalf and in the name of" TAT.[103] These persons, in a "guardianship-type role",[104] will also be given specific statutory purposes, powers and functions and will be charged with administering any funds and property that are to be held in the name of TAT.[105] They will also exercise the "landowner" functions over the parts of the bed formerly held by the Crown.[106]

One guardian is to be appointed by the Crown, and the other appointed "collectively by all iwi [sic] with interests in the Whanganui River".[107] Te Pou Tupua are to "provide the human face of TAT" and owe responsibilities solely to TAT, and not those by whom they are appointed.[108]

The "primary functions"[109] of Te Pou Tupua are to:

> protect the health and wellbeing of TAT; uphold the status of TAT and the TAT Values; act and speak on behalf of TAT; carry out the landowner functions … ; and carry out any other relevant functions on behalf of TAT (for example participate in statutory or non-statutory processes and <u>hold property or funds in the name of TAT</u>)."

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[101] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 64(1)(a) and (b).
[102] Tutohu Whakatupua, above n 1, 2.18.
[103] Ibid, at 2.8.2.
[104] Ibid, at 2.18.
[105] Ibid, at 2.8.3 – 2.8.4.
[106] Ibid, at 2.21.4.
[107] Ibid, at 2.19.
[108] Ibid, at 2.20.2 – 2.20.3.
[109] Ibid, at 2.21.

*2 "Held in the name of"*

As part of the creation of this legal personality the Crown has sought to dispose of all the interests it holds in the bed of the Whanganui River, including interests held by subsidiaries such as the Department for Conservation.[110] These are "to be held in the name of TAT"[111] by Te Pou Tupua. It would appear that "held in the name of" could embrace TAT either as a person or as some kind of trust, and the wording of the legislation on this point will be crucial to how TAT is conceptualised.

***H A set of river values to guide decision making***

The settlement is to provide for "the legal recognition" of a "set of values for TAT" known as the "TAT Values".[112] These values will be the subject of consultation and discussion among Atihaunui with "other iwi [sic] with interests in the Whanganui catchment" of the River before being finalised in the Deed of Settlement.[113] I suggest that the values eventually codified in law will be central to the claim that the TAT proposal advances the RON in NZ. The extent to which the proposal focuses on the RON will be evident from the extent to which the values give priority either to Iwi or to intrinsic natural values, for example in ecosystems, or in amenity values.

At this stage, the content of the values is indicated by what the values are intended to do. This indicative description suggests that the values will incorporate the role of humans and development imperatives with regard to the River. Tutohu Whakatupua states the values will:[114]

> … comprise the innate values and characteristics of the Whanganui River as TAT. They will encompass the natural environment and features of the River and the interrelationship of people (all people not just Iwi) with the River.

Given the Crown's specific acknowledgement in the Waikato Act that concepts of ownership differ between Iwi and the Crown, it is possible that the blunt reference to "all people not just iwi [sic]" will mean that, in certain circumstances, the values could justify a course of action which overrides the Atihaunui conception of river-as-person by a conception of river-as-property. This could even be seen as likely given the references to protection for existing private property interests, and provision for

[110] Ibid, at 2.10 for a complete list.
[111] Ibid, at 2.8.1.
[112] Ibid, at 2.14.
[113] Ibid, at 3.6.
[114] Ibid, at 2.16.

economic interests in the Whanganui referred to in 1.10 of Tutohu Whakatupua above.[115]

The values will be given legal force through the settlement legislation.[116] The exact way this will be done is worded in a confusing manner:[117]

> The settlement will require persons exercising functions and powers relating to the Whanganui River, or activities in the Whanganui River catchment that affect the Whanganui River, to give appropriate consideration to the TAT Values and the legal status of the River as TAT when exercising such functions or powers. This obligation will affect central government agencies as well as local authorities.

I understand this paragraph to indicate that: when (1) persons[118] (including central government and local authorities) (a) are exercising functions and powers "relating to" the River and/or (b) conducting or governing activities within its catchment area "that affect the Whanganui River", those persons (2) must give "appropriate consideration to" (a) the TAT values and (b) the legal status of the river as TAT.

The exact meaning of "affect" has the potential to be a subject of legal dispute as it will determine the scope of the guardians' powers. I suspect that "affect" or its statutory equivalent will be subject to reading down for remoteness – feasibly, any legislation impacting the hydrological cycle could affect the Whanganui River. The words "appropriate consideration" also suggests an intention to preserve a politically flexible approach even if "appropriate consideration" will not be the eventual statutory language.

### *I The Whole of River Strategy – a complement to existing RMA documents*

In addition to the TAT values, the settlement will allow for the development of a Whole of River Strategy. The purpose of this strategy:[119]

> Will be to bring together all those persons and organizations with interests in the Whanganui River (including Iwi, local and central government, commercial and recreational users and other community groups) to collaboratively develop a strategy focused on the future environmental, social, cultural and economic health and wellbeing of the Whanganui River. [emphasis added]

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[115] Ibid, at 1.10; see also my discussion above at Chapter II, subheading C.

[116] Tutohu Whakatupua, above n 1, at 2.17.

[117] Ibid.

[118] Defined term, Resource Management Act 1991, s 2.

[119] Tutohu Whakatupua, above n 1, at 2.24.

This Whole of River Strategy will "complement RMA and other planning and policy documents, not duplicate them."[120] The Whole of River Strategy will be given effect by requiring:[121]

> persons exercising functions and powers relating to the Whanganui River, or activities in the Whanganui River catchment that affect the Whanganui River, to give appropriate consideration to the Whole of River Strategy when exercising those functions or powers.

The strategy will be the real test of TAT's RON status, due to the need to reconcile conflicting environmental, social, cultural and economic interests in TAT. Whilst the TAT values will influence decision-making, and the conduct of Te Pou Tupua, the Whole of River Strategy can be expected to be the source of real restrictions with regard to actions in the Whanganui catchment. The Waikato-Tainui Settlement Act also includes a whole of river strategy and it is that strategy that carries the most legal weight pursuant to ss 9-17 of that Act.[122] "Appropriate consideration" would appear to open the door to an overall judgment approach to the competing interests in TAT.

The location of TAT within the RMA framework may mean that any RON status conveyed by the personification of TAT *in itself* (independently from the RMA's RON status) may be subject to a de facto limiting where its status may conflict with other development imperatives in the RMA. It is unlikely that TAT's status will mean that it outweighs *any* human interest absolutely. The TAT proposal incorporates substantial room for political manoeuvring.

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[120] Ibid, at 2.26.

[121] Ibid, at 2.28.

[122] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

## *Chapter III: What do we mean by the Rights of Nature?*

The aim of the previous two chapters has been to outline the TAT proposal in its historical, political and legal context. Having ascertained what the TAT proposal entails, the next step is to compare that structure to what we mean by "the Rights of Nature".

### *A The Rights of Nature is environmental philosophy generally, and does not always entail "rights"*

The "rights of nature" is a phrase that is applied indiscriminately. Use of the term "right" is particularly ambiguous because of its various connotations as either moral rights, moral considerateness, legal rights, or legal considerateness.[123] Similarly, within environmental philosophy, the "nature" which merits moral concern can be defined in various ways, with lines commonly drawn excluding rivers,[124] rocks,[125] plants,[126] shellfish,[127] animals,[128] higher animals,[129] and humans.

Within environmental philosophy, philosophers advance different grounds for moral concern leading to different levels of moral consideration for different moral communities. The level of consideration required can be of varying strengths and based on varying principles: even a utilitarian ethic has regard to the preservation of resources so that they are available for human use.[130]

The RON can more accurately be seen as "a generic metaphor that covers human responsibilities for the whole of the biophysical world."[131] In this sense it is simply "environmental philosophy".

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[123] "Considerateness" is the term used by Stone (1985), above n 66.

[124] Paul W Taylor *Respect for Nature: A Theory of Environmental Ethics* (Princeton University Press, New Jersey, 2011).

[125] Most exclude rocks or at least give such a low level of considerateness so as to be almost irrelevant, except perhaps for Aldo Leopold *A Sand County Almanac* (Oxford University Press, 1977).

[126] Peter Singer *Animal Liberation* (Ecco, New York, 2002).

[127] Ibid.

[128] René Descartes excluded animals; see Roderick Frazier Nash *The Rights of Nature* (University of Wisconsin Press, Wisconsin, 1989) at 17.

[129] Timothy Bancroft-Hinchey "India: Dolphins declared non-human persons" *Pravda* (Russia, 5 August 2013) available from <http://english.pravda.ru/science/earth/05-08-2013/125310dolphins_india-0/>.

[130] Stone (1985), above n 166, at 39.

[131] James A Nash "The Case for Biotic Rights" (1993) 18 Yale Journal of International Law 235 at 235, 236.

Within environmental philosophy, this dissertation only deals with *ecocentric* philosophy. I am not discussing the animal liberation[132] movement. Commentators draw a dividing line[133] between ethical consideration of individual animals on the basis of pain and suffering,[134] and consideration of animals at the collective level as part of a holistic ecosystems-based approach. They can be further contrasted with biocentric (or "life-centred"[135]) approaches based on autopoiesis (the capacity for a self-fulfilling and defining destiny), such as those of Paul Taylor.[136] Biocentric approaches exclude non-living nature[137] such as rivers from their moral community except for their value as habitats.

The RON I am discussing for the purposes of this dissertation are the holistic approaches that embrace Earth as a total interdependent system. These approaches acknowledge the *intrinsic* value of *biologically*[138] non-living objects – such as Rivers – because of their place in the global ecosystem and are known as "ecocentric" approaches. My dissertation is limited to ecocentric approaches because any RON claim about a river would have to embrace rivers as intrinsically valuable.[139]

### *B The role of environmental ontology*

Ecocentric environmental philosophy is predicated on a belief that humans must be understood as ontologically part of the natural environment, rather than standing outside of it.[140]

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[132] Singer, above n 126.

[133] Mark Sagoff "Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce" (1984) 22 Osgoode Hall Law Journal 297.

[134] Singer, above n 126.

[135] Taylor, above n 124, at 11.

[136] Ibid, at 44.

[137] Ibid, at 18.

[138] Acknowledging Te Awa Tupua's status as a living entity to Atihaunui. Epistemological questions must be left for another day; see generally Lorraine Code "Ecological Responsibilities: which trees? Where? Why?" in Anna Grear (ed) *Should Trees Have Standing? 40 Years On* (Edward Elgar, Cheltenham, 2012).

[139] While the river is a habitat, it is being treated as an entity, and that entity is what receives personhood and protection. The river is being protected as a river, intrinsically through the RMA. It is not being protected as a habitat, for example through the Conservation Act 1987 or Wildlife Act 1953. It may be that the river can be considered biocentrically as a human habitat, and this would be appropriate for the RMA's anthropocentric elements, however I think Atihaunui would agree that Te Awa Tupua has intrinsic value beyond its human use. Kaitiakitanga is an intergenerational obligation and the river is "beyond possession".

[140] Anna Grear "Towards a New Horizon: In Search of a New Social and Juridical Imaginary" (April 10, 2013) available at SSRN: http://ssrn.com/abstract=2247857.

### *1 Anthropocentric environmental philosophy*

Dualist ontology is reflected in anthropocentric philosophy that deals with nature as simply a system of expendable resources, and allocates them on a utilitarian basis to presently living humans. Nature-as-property is seen as a core element of the anthropocentric paradigm where nature is conceived of as "rightless", and of mere instrumental value. Commentators consistently draw parallels between nature-as-property and human slavery – where something is property it is rightless and relies on its owner for its legal protection.[141] The property paradigm enables an owner of property to "interfere with the functioning of ecosystems and natural communities that exist and depend upon [their] property for their existence and flourishing."[142]

### *2 Ecocentric environmental philosophy*

The origins of modern ecocentric environmental philosophy can be seen in the desire to challenge this anthropocentric (or human-centred) paradigm. The dualist ontology of man versus nature is contrasted with an environmental ontology that sees humanity as constituted by, and embedded in nature. The contrast is between anthropocentric consideration of nature's instrumental value, and the ecocentric consideration of nature's intrinsic worth.[143] On the basis of an increased ecological and scientific understanding of the global environment, ecocentric environmental philosophy holds that all within nature must be taken to be interdependent and (however distantly) linked.

### *3 Ecocentric environmental philosophy embraces human concern for humans, as well as non-human nature*

This ontological belief in humanity as part of nature leads to the conclusion that the human *relationship* with nature extends to the natural world as a whole. To separate the interests of humanity and the interests of nature is to leave the position open to criticism, because it would perpetuate the subject/object distinction at the heart of the criticisms of dualist ontology.[144] As acknowledged by deep ecologists, ecocentric environmental philosophy includes humanity's interests as an equally entitled part of that whole.

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[141] Both Aldo Leopold and Christopher Stone (two of the most formative writers in this area) begin their landmark writings with this example: Stone, above n 9, at 456; Leopold, above n 125, at 1.

[142] CELDF "Rights of Nature Background" (Community Environmental Legal Defense Fund website, accessed 2013) available from: <http://celdf.org/rights-of-nature-background>.

[143] Stone (1985), above n 66, at 47-52; Arne Naess "The Shallow and the Deep, Long-range Ecology Movement. A Summary" (1973) 16 Inquiry 95.

[144] Celia Deane-Drummond "Gaia as Science Made Myth: Implications for Environmental Ethics" (1996) 9 Studies in Christian Ethics 1 at 14.

### 4 *"How ought we live?"*

When environmental philosophy extends to human interests, as part of nature, the question for environmental philosophy is not just "how ought we live in relation to nature?" but, instead, becomes the ultimate question of ethical philosophy: "how ought we to live?" Ecocentric philosophy must therefore be seen as a comprehensive question of a search for "the good life".

## *C The Good Life*

The difficult question for environmental philosophy is the question of how to reconcile and arbitrate between the various interests of all within nature, in situations where they are seen to conflict. Environmental philosophy becomes an overall question of distributive justice among the global ecological community. In the context of Te Awa Tupua, environmental philosophy must answer some complex questions: To what extent can different humans claim varying economic interests in Te Awa Tupua, and how ought these to be reconciled? To what extent can economic interests in Te Awa Tupua take precedence over environmental interests? Could there ever be a situation where (a) the intrinsic survival interest of all living entities on earth (including humans) in avoiding catastrophic climate change *overrides* (b) the ecological disruption caused to Te Awa Tupua by hydro-electric infrastructure development?

These are difficult questions, and when I ask them, I do not mean to imply that I think we should dam Te Awa Tupua. My point is that the dilemmas of environmental philosophy – and the RON – extend to considerations of human ethical relations with other humans, as well as toward non-human nature, and may have significant political and economic effect. Of particular interest, if Te Awa Tupua is to be conceived as a person, with intrinsic rights, and legal standing to act on its own behalf, are te Pou Tupua obliged (legally or morally or both) to exert political, legal, or economic influence in broader environmental issues? Te Awa Tupua is linked by the hydrologic cycle and climate systems to all of nature to some extent – would it therefore be appropriate for Te Pou Tupua – independently[145] of Atihaunui's views and interests – to make submissions in public forums on matters of biodiversity and climate change?[146]

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[145] Tutohu Whakatupua, above n 1, at 2.20.2 – 2.20.3.

[146] Atihaunui have indicated already that the holistic Māori world view as described in Wai 167 must be taken into account in matters of climate change in terms of kaitiakitanga and Rangatiratanga and urging more consultation with Māori. See Linda Te Aho "Contemporary Issues in Māori Law and Society: *Crown Forests, Climate Change, and Consultation – Towards More Meaningful Relationships*" (2007) 15 Waikato Law Review 138 at 147.

Once nature is given moral consideration on a holistic basis, and man is included in that holism, environmental philosophy becomes a comprehensive question of the good life – justice – embracing every thing to *some* degree. The RON is much greater than simple personhood for natural entities.

### *D The Rights of Nature does not necessarily entail moral or legal rights*

RON therefore encompasses many different philosophical "camps"[147] that advance non-human nature's moral considerateness on different grounds. These grounds do not necessarily entail the idea of moral or legal rights.[148]

> … [I]t is an all too common mistake to suppose that all questions of legal *considerateness* boil down to questions of legal *rights*. … there is an analogous and compounding error to confront: to suppose that the only basis for arguing that A has a legal right … is to demonstrate that A has a moral right …[149]

Later environmental movements such as Wild Law have reflected the difficulties of rights terminology in explicitly adopting a "systems governance" approach.[150] Despite this, there are certain "camps" that insist on advocating the use of moral or legal rights, and on naming the concept as "the Rights of Nature".[151]

### *E An insistence on "rights" is problematic in this holistic perspective and should be rejected*

At the international level, a call in support of the RON often (although not always) means a call for legal rights in the form of "the right to life and to exist".[152] In 2012 the International Union for the Conservation of Nature ("IUCN") adopted a resolution supporting the "incorporation of the RON as the organisational focal point in IUCN's decision making". The resolution explicitly supports the Universal Declaration of the Rights of Mother Earth,[153] and Ecuador's constitutional protection of the "rights" of

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[147] Stone's word (1985), above n 66, at 39.

[148] Ibid, at 46: "not all moral considerateness can be expressed in terms of moral rights".

[149] Ibid, at 39 with original emphasis.

[150] Cormac Cullinan *Wild Law: A Manifesto for Earth Justice* (Green Books, Devon, 2003).

[151] Facebook Group "The Rights of Nature" available from <https://www.facebook.com/groups/159766094040266/>; Cullinan at Wild10, above n 3.

[152] Universal Declaration of the Rights of Mother Earth 2010 (World People's Conference on Climate Change and the Rights of Mother Earth, Bolivia, 22 April 2010).

[153] International Union for the Conservation of Nature "Incorporation of the Rights of Nature as the organisational focal point in IUCN's Decision Making" Res 100 (World Conservation Congress, Republic of Korea, Jeju, September 2012).

"Mother Earth".[154] When we consider whether TAT is an example of the RON, often a declaration of rights appears to be what is being discussed.

### *1 Objection based on liberalism and environmentalism*

Legal rights can be seen as the wrong concept to use in determining humanity's relationship with nature. As Taylor puts it, "Using the language of rights … presupposes a system of norms."[155] As argued by Leane,[156] these presupposed norms are those of "development law", and reflect political liberalism in its classical, modern, and neoliberal forms. The message of environmental philosophy is that the question of humanity's relationship to nature is not *necessarily*, or even likely to be, one of hierarchical ordering of interests and protected minimum rights.[157] Leane goes so far as to say "that environmental values are in fundamental contradiction to liberal political values".[158] At a fundamental level, there is a tension between the independent individualism of rights, and the interdependent collectivism of environmental philosophy. Tribe criticised the "liberal individualism"[159] of those such as John Rawls, whose philosophy of ethics he says presupposes:[160]

> an individualistic conception according to which the best that can be wished for someone is the unimpeded pursuit of his own path, provided it does not interfere with the rights of others.

The liberal paradigm is premised on "rational utility-maximising" self-interested individualism,[161] justified on the basis of wealth maximisation and economic growth, and is inconsistent with the communitarian "world reform"[162] supported by RON advocates. Legal rights are not necessary to reflect the RON, and because of their heritage, are undesirable. Liberalism and the liberal values that underlie the use of rights language are not necessarily bad in themselves, but "at this time of daunting

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[154] Vernon Tava "Resisting enclosure: The emergence of ethno-ecological governance in a comparative analysis of the constitutions of Venezuela, Ecuador and Bolivia" (LLM Thesis, University of Auckland, 2011).

[155] Taylor, above n 124, at 229.

[156] Geoffrey W G Leane "Environmental Law's Liberal Roots: (Not) a Green Paradigm" in N Rogers (ed) *Green Paradigms and the Law* (Lismore, Southern Cross University Press, 1998).

[157] Klaus Bosselmann "A Vulnerable Environment: Contextualising Law with Sustainability" (2011) 2 Journal of Human Rights and the Environment 45 at 61 contrasts liberal approaches from ecological ones.

[158] Leane, above n 156, at 16.

[159] Laurence H Tribe "Ways Not to Think About Plastic Trees: New Foundations for Environmental Law" (1974) 83 Yale Law Journal 1315 at 1335.

[160] Ibid.

[161] Carol Rose "Property as Storytelling" (1990) 2 Yale Journal of Law and the Humanities 37.

[162] Grear, above n 140; Cynthia Giagnocavo and Howard Goldstein "Law Reform or World Re-form: the Problem of Environmental Rights" (1990) 35 McGill L J 345.

environmental challenge [they are] profoundly inappropriate" to the extent of being "suicidal".[163]

*2 Objection based on the content of rights*

Even if rights were to be an appropriate vehicle for reform, there is still the problem of the content of those rights. Those who do insist on using legal rights, and rights terminology tend to acknowledge that where rights do come into conflict, a balancing process ensues.[164] Many writers have made suggestions for such content in the moral sphere[165] but ultimately:[166]

> To say that nature has its own rights does not give us a viable guideline in deciding when and to what extent nature's rights should prevail over countervailing rights of individual humans.

Typical balancing analyses tend to fall back on traditional moral values to suggest a hierarchy of rights according to the different "logical foundations of the rights of plants, non-sentient animals, sentient animals, and humans".[167] As Stone puts it,[168]

> wherever the existence of rights or duties are entered into a controversy, we are pressed to look behind and around them, to whatever set of moral principles they are alleged to derive from, as well as to companion principles. … What we are after … [is] a whole moral framework.

"Rights" are not needed. The RON, when holistically understood, requires a complete reconsideration of humanity's ethical relationship to nature. As I will discuss shortly, this reconsideration requires legal mechanisms that explicitly facilitate, rather than ignore this.

*3 An objection based on the role of rights in the NZ legal system*

Courts in NZ are constrained in their application of "rights" due to their deference to Parliamentary Sovereignty. They are reluctant to interpret rights in a manner that

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[163] Leane, above n 156, at 27.

[164] CELDF "Rights of Nature FAQ" (CELDF, accessed 2013) available from <http://celdf.org/rights-of-nature-frequently-asked-questions>; Susan Emmenegger and Exel Tschentscher "Taking Nature's Rights Seriously: the Long Way to Biocentrism in Environmental Law" (1994) 6 Geo Int'l Envtl L Rev 545; Nash, above n 131.

[165] Nash, above n 131; Cullinan, above n 150; Universal Declaration on the Rights of Mother Earth, above n 152.

[166] Emmengegger, above n 164, at 581.

[167] Ibid.

[168] Stone (1985), above n 66, at 66.

overrides a statutorily implied revocation of those rights,[169] and NZ's strongest constitutional protection of even fundamentally accepted political-liberal rights are only protected by a common statute,[170] that entails "justified limitations"[171] and defers to other enactments.[172] If the RON requires holistic ontological reorientation of "systems governance", a statute phrased in terms of "rights" is likely to conflict with NZ's wider legal environment, and these rights would be read down in the event of conflict. This problem is likely to be exacerbated outside of the High Court or appellate courts – such as in the Environment Court – due to their specialist limited jurisdiction.

*4 Conclusion on the use of moral or legal rights*

In sum, the "RON" must be understood as "environmental philosophy generally", without necessarily entailing moral or legal "rights", and it is a comprehensive question of ethics, and the good life. The RON as environmental philosophy is therefore an incredibly broad area that embraces overlapping thinking in epistemology,[173] ontology,[174] rights theory,[175] ecology, political and economic liberalism,[176] property theory,[177] legal theory of personhood,[178] and, most importantly, ethics.

There is no logically determinate or objective way to reconcile conflicting rights to be found in environmental ethics, or ecology, due to the problem of ethical pluralism (I return to this point shortly). Instead, it is more transparent to talk about environmental philosophy as a question of "rightness"[179] and how humans can live in a harmonious manner with nature. This accurately reflects the value judgements that must be continuously made between the various interests of the holistic environment.

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[169] In *R v Hansen* [2007] NZSC 7, for example, the presumption of innocence was read down in relation to a statutory provision that presumed possession of cannabis of a specified weight was for the purpose of supply.

[170] New Zealand Bill of Rights Act 1990.

[171] Ibid, s 5.

[172] Ibid, s 4.

[173] Code, above n 138.

[174] Grear, above n 140.

[175] John Livingston (1984) "Rightness or Rights?" 22 Osgoode Hall LJ 309; Giagnocovo, above n 162.

[176] Leane, above n 156.

[177] Katharine K Baker "Consorting with Forests: Rethinking our Relationship to Natural Resources and How We Should Value Their Loss" (1995) 22 Ecology LQ 677 at 691.

[178] Stone (1972), above n 9; Ngaire Naffine "Legal personality and the natural world: on the persistence of the human measure of value" in Anna Grear (ed) *Should Trees Have Standing? 40 Years On* (Edward Elgar, Cheltenham, 2012).

[179] Livingston, above n 175.

### *F The use of ecological science in ethics*

Neither environmental ethics, nor ecology, can provide a single determinative account of how to act in relationship with nature. Put bluntly, environmental philosophy will not tell us exactly what to do in any particular situation. To seek to apply the RON in law – in the sense of a certain standard of conduct – becomes impossible in any prescriptive sense.[180] We therefore need to moderate what we can expect from environmental law. Environmental philosophy cannot provide a single determinative account of how one ought to live.

#### *1 The naturalistic (or "is-ought") fallacy*

The "is-ought fallacy" was identified by David Hume[181] and developed by John Stuart Mill. It is also known as "the naturalistic fallacy" because it tends to be found in accounts of ethics that determine ethical issues by appeals to nature.

The fallacy consists of drawing a logically *determinate* bridge between a fact and a value, acting as if the fact determined the value. As John Stuart Mill described it:[182]

> Those who set up nature as a standard of action do not intend a merely verbal proposition; that the standard … should be *called* nature; they think they are giving some information as to what the standard of action really is. … They think that the word nature affords some external criterion of what we should do.

The effect of the fallacy as described by Stone is that:[183]

> From the fact that a person has some quality (sentience, autonomy), we cannot demonstrate, without introducing some often unexpressed or ultimately unprovable body of principles, that therefore we *ought* to be just to him.

Whilst science is "taking a view of human beings which cannot but have implications for how we should order our lives, … what these implications are is going to be difficult to work out, and subject to all kinds of interactive considerations. It will not be a simple matter of reading off 'ought' from is."[184]

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[180] The exception is the use of utilitarian Cost-Benefit Analyses in environmental and other legislation, and evidently any statement of simple moral principle can be stated in legislation. The point is that a *comprehensive* ethical code cannot be stated in statute form.

[181] Christopher Stone "Response to commentators" in Anna Grear (ed) *Should Trees Have Standing? 40 Years On* (Edward Elgar, Cheltenham, 2012) at 120.

[182] J S Mill *Three Essays on Religion* (Henry Holt and Company, New York, 1874) at 13.

[183] Stone (1985), above n 66, at 53: original emphasis.

[184] Brian H Baxter "Naturalism and Environmentalism: A Reply to Hinchman" 15 Environmental Values 64 at 15.

*2 Our understanding of nature is socially constituted*

In addition, attempting to determine values or purposes in nature is problematic. This is because (1) science does not give a single account of nature, and (2) our understanding of nature is socially constructed anyway.

Celia Deane-Drummond notes that the Gaia hypothesis does "appear to present us with a model of life which supports one particular ethical stance or a form of ethical monism", but "the range of possible interpretations of Gaia from a scientific perspective mean that there is an equally wide range of ethical outcomes".[185]

Similarly, appeals to values in nature such as autopoiesis have been criticised because autopoiesis is "not a universal and objective idea, firmly grounded in ecological science. Rather, it is a social construction of nature that suits a particular political aim."[186] In particular, human impact on ecosystems according to ecological science can be neither condemned nor praised in any absolute sense. Brulle cites research showing "the extraordinary impact of humans on the shape of the ecology of the entire North American continent [which] significantly altered the type and distribution of both flora and fauna" beginning "more than 13,000 years ago".[187] "Not only are our ideas about nature socially constructed, but also nature itself is partially the product of human social interaction."[188]

The issue of reading values into nature can most prominently be seen in the adoption of competition as a moral value, reading competition into Darwin's account of nature. Emond refers to the research of Darwin and a contemporary, Kropotkin, who both argued that competition gave way to cooperation[189] – an interpretation of nature ignored by those such as the Social Darwinists.[190]

At the most extreme, if we insisted on nature as a determinative guide to ethics, we might conclude "that nature does not contain harmony and balance; [and] that death and suffering are integral to it, not optional extras."[191] Who is to say that the end point of all eco-systems is not their destruction by the waste of a dominant species? There is no necessary bridge between fact and value, there is only choosing to act according to

[185] Deane-Drummond, above n 144, at 15.
[186] Robert J Brulle "Habermas and Green Political Thought: Two Roads Converging" 11 Environmental Politics 1 at 10.
[187] Ibid, at 10-11.
[188] Ibid, at 11.
[189] D Paul Emond "Co-operation in Nature: A New Foundation for Environmental Law" (1994) 22 Osgoode Hall L J 323, at 344.
[190] James R Flynn *How to Defend Humane Ideals* (University of Nebraska Press, 2000) at 50; Emond, ibid, at 344.
[191] Baxter, above n 184, at 65.

our understanding of nature – because of a commitment to an ethical value such as justice.

*3 The use of science can be defended in the search for environmental ethics.*

As Baxter has put it[192]

> Insofar as philosophy and political theory are critically emancipatory it is because they fuse together factual claims, norms/values and prescriptions. On the factual side, it is not clear why biology should not have enlightening things to say – and to enable us to reject conclusively some factual claims, thereby making some norms and prescriptions impossible to accept … It is not that sociobiology or evolutionary psychology aim to replace philosophy or political theory, but rather that they aim to make a significant contribution to these disciplines by linking the normative and prescriptive elements to other levels of knowledge.

Scientific observation is integral to accounts of ethical pluralism.

## *G The problem of ethical pluralism*

Even if ecology could provide a *determinative* account of ethics – one that (for example) uses nature in anticipating and reconciling all possible moral dilemmas – it cannot provide an *objective* system of ethics – one that all moral decision-makers are compelled to accept because of its objective truth.

Modern ethicists provide multiple accounts criticising ethical monism and proposing alternative ethical agendas.[193] I argue that these agendas share some common features in the way that they seek to respond to the failings of ethical monism. In particular, the pluralist accounts I have researched use the same philosophical building blocks: logic/reason/analysis, values/norms/commitments, and empirical observation (scientific data). They emphasise that monist ethics cannot provide determinative answers, or a means of metaphysical validation. They also recognise that ethical inquiry – the search for the good life – is therefore an on-going developmental process. I argue that the theoretical RMA decision-making process mimics these pluralist processes.

This dissertation cannot give a comprehensive account of pluralist approaches to environmental ethics,[194] and instead, will outline an example of the methods I

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[192] Ibid, at 64.

[193] These will be outlined shortly.

[194] An interesting recent text on this is Donato Bergandi (ed) *The Structural Links between Ecology, Evolution and Ethics: the Virtuous Epistemic Circle* (Springer Netherlands, 2013).

describe. The purpose of these examples is to illustrate their similarities with the provisions of the RMA, which Bosselmann has described as a pluralist statute.[195]

*1 Ethical monism*

Stone stated that traditional ethics and its camps of environmental philosophers are "monistic and determinate"[196] in the sense that "the enterprise is conceived as aiming to produce, and defend against all rivals, a single coherent and complete set of principles, capable of governing all moral quandaries."[197] He notes the tendency of ethics to dissolve into battles, where "if an ethical system cannot satisfactorily dispose of every conceivable dilemma, it *will not do*, and must withdraw entirely across all fronts."[198]

*2 The demise of metaphysical ethics*

Habermas phrased the problem in terms of a response to postmodernism,[199] and the social demise[200] of ideas of an external metaphysics to lend authenticity to our ethical beliefs. Flynn note we can no longer appeal to a concept of metaphysics such as God's plan or Plato's world of forms, or "nature". Stone "call[s] moral monism into question … [as] anachronistic wherever it crops up, and particularly out of place in an area as complex as morals".[201] The point is that ethics cannot provide objective truth.

*3 The monist race to the bottom*

The post-Enlightenment "lust for objectivity"[202] is argued to have been causative of the prevailing anthropocentric paradigm and environmental crisis.[203] Stone and Tribe referred to how environmentalists who "want to say something less egotistic and more emphatic [are prevented from doing so, because] the prevailing and sanctioned modes of explanation in our society are not quite ready for it."[204] Flynn, Stone and Minteer note the monist requirement for ever-lower ethical standards in order to cover all

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[195] Bosselmann, above n 157.
[196] Stone (1985), above n 66, at 68.
[197] Ibid.
[198] Ibid, at 69 (original emphasis).
[199] Brulle, above n 186, at 3, 11.
[200] Brulle, above n 186.
[201] Stone (1985), above n 66, at 73.
[202] Flynn, above n 190.
[203] Bosselmann, above n 157, at 47. See for more on this Ben A Minteer "No Experience Necessary? Foundationalism and the Retreat from Culture in Environmental Ethics" (1998) 7 Environmental Values 333.
[204] At 1336 of Tribe, citing Stone (1972) at 490, "I myself feel disingenuous rationalising the environmental protectionist's position in terms of a utilitarian calculus, even one that takes future generations into account, and plays fast and loose with its definition of "good"."

situations, meaning ethics must "be brought under the governance of … the most blandly general, single parent principle"[205] and force us "to estrange our moral thought from our considered moral intuitions."[206] Utilitarianism is offered as an example.[207] Environmental philosophy is defined in opposition to such ethical monism, because these monist standard do not account for nature's intrinsic value. In the search for absolutism, the standard is either drawn too broadly to withstand scrutiny,[208] or so narrowly that it produces arguments based on inauthentic values.[209]

### *4 The use of reason and evidence*

Pluralism instead deals in the "meta-ethical burden" we require of an ethical theory.[210] Habermas defines his meta-ethical requirements according to the function of language as a social ordering mechanism.[211] The idea is that if the presuppositions of language provide for social ordering, then those same presuppositions could form meta-ethical criteria,[212] and enable a discursive process of public norm-creation. Flynn phrases his solution to the problem of ethical objectivity in terms of a seven point agenda.[213] Each point on the agenda entails two kinds of "price": (1) "the price we forfeit if we refuse to argue over that item" and (2) "the prices we may incur if we do argue over that item."[214] The agenda "structures debate"[215] because incurring either price means you fail the meta-ethical standard: "no one who is serious about their ideals … can refuse to defend [them] against the challenges the items [on the agenda] pose. When they do so, they … find that they are at the mercy of logic and social science." For example, item 7 is that advocates are:[216]

> willing to show that their ideals do not require them to falsify or evade any of the truths revealed by science, usually social science, but biological and even natural science can be relevant.

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[205] Stone (1985), above n 66, at 71.
[206] Ibid, at 75.
[207] Flynn, above n 190, chapter 3.
[208] Such as the right of all nature to existence because it exists, requiring so many trade-offs that it is no longer useful.
[209] Flynn, above n 1990, chapter 4.
[210] Stone (1985), above n 66, at 61; Brulle, above n 186.
[211] Brulle, above n 186.
[212] Ibid, at 3; Brulle describes it as "[the] norms form the pragmatic presuppositions of speech, and define rational universal moral principles" on an understanding of "how communication creates and maintains social order".
[213] Flynn, above n 190, at 95.
[214] Ibid, at 96.
[215] Ibid.
[216] Ibid.

If you refuse to conform to item 7, “you give all rational human beings a good reason not to accept [your ideals]” because you reject the scientific method, with its self-acknowledged limitations. The second price is that “when you submit to scientific truth, it is most likely to inflict wounds when either social consequences or social dynamics are debated.”[217] Ethical or normative claims can therefore be assessed in relation to other levels of knowledge.

### *5 Ethical pluralism as on-going development*

> Our agenda [Flynn’s meta-ethical requirements] cannot offer humane [or ecocentric] ideals one big victory. Rather, it commits us to an endless and open-ended debate. We must sweat to load down each and every opponent with price after price until collectively these are enough to sink them, and we must sweat to defend our own ideals so as to exempt them from similar prices.[218]

Minteer concludes that the human relationship to the environment is “an ongoing dialectical process of vigilance and criticism”.[219] Stone’s approach is based on the use of empirical data[220] and varying moral analyses (or “planes” including most camps of environmental philosophy[221]), and emphasises pluralist ethics is subject to ongoing development.[222] Critical theory recognises that “decisions regarding protection of the natural environment will always be partial, temporary, and contingent”.[223]

### *6 The role of ethical pluralism in Rights of Nature law*

A holistic understanding of the RON requires an ethical pluralist approach. The RON is an umbrella term covering multiple monist approaches, but the core project of each is the ethics of humanity’s relationship with the environment. All these approaches (to the extent that they purport to be monist) can be quickly undermined by critics. If RON advocates were to accept something less than objective status, then this might make room for others to join the debate on less exclusionary grounds, and progress the movement forwards.[224]

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[217] Ibid, at 97-98.

[218] Ibid, at 99.

[219] Minteer, above n 203, at 344.

[220] Stone (1985), above n 66, at 117-118.

[221] Ibid.

[222] Ibid, at 154.

[223] Brulle, above n 186, at 15. For the role of epistemology in this contextual process, see Code, above n 138.

[224] Minteer, above n 203.

### *H An alternative to nature as ethical standard: the "let's just say" approach*

Another possibility is that monist ethics, even if not objectively valid, could be supported in terms of their consequences.[225] Stone's ethical point in the original *Trees* was that a society that recognises nature's rights would be better off than one that did not.[226] He does not shy from saying that "the strongest case can be made from the perspective of human advantage for conferring rights on the environment."[227] Stone returned to this point in 1985, saying:[228]

> To justify positioning corporations as holders of legal rights … one need go no further than showing that a regime in which corporations are so positioned is preferable to one in which they are not … in terms of the beneficial consequences to contemporary humans.

There has been judicial acceptance of this idea[229] in the United States, where one judge concluded:[230]

> The value of this genetic heritage is, quite literally, incalculable … who knows, or can say what potential cures for cancer or other scourges, present or future, may lie locked up in the structure of plants which may yet be undiscovered … ? … Sheer self interest impels us to be cautious.

This argument has not been taken up more widely because such an approach seems disingenuous according to the purpose of ethical monism.[231] At this stage, I simply note that the "let's just say" approach might be a viable alternative to ethical objectivity at the core of TAT in the conflicting views between Atihaunui and the Crown.

### *I Conclusion*

The relationship between ecology and environmental ethics is complicated. Even the notion of interdependence in nature is an empirical observation – the foundation of ecocentric environmentalism is not objectively valid in an absolute sense. We cannot

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[225] The Crown's repeated description of the "views of Atihaunui" might be seen as an example of this, in the sense that they are not objectively shared, but are respected, in view of a desirable outcome.

[226] Stone (2012), above n 181.

[227] Stone (1972), above n 9, at 492. Thomas Berry too has made similar claims from an anthropocentric angle in Cullinan, above n 150*,* at 15.

[228] Stone (1985), above n 66, at 39.

[229] Admittedly this case is discussing animals, and not natural resources in the sense of the RMA, but it can still be seen as ecocentric in the sense of discussion of a species over individuals – even if the concern is anthropocentric.

[230] *National Association of Home Builders v Babbit* (1997) 130 F.3d 1041 at 1051.

[231] For support see Minteer, above n 203, at 334.

lambast RON opponents as if it is.[232] Instead, we have to accept an ethical position of lesser strength.[233] We cannot achieve the commanding "thou shalt not" commandments that the "rights" of nature might have desired. "Nature's right to exist" is not the necessary format for the RON. The RON must be understood as being a fundamental ethical question of the good life in relation to human and non-human nature as a whole. In environmental philosophy, it is neither legal or moral personhood, nor legal standing, nor "rights" that are required to conclude that nature has intrinsic value and recognise that value in law.[234]

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[232] Dunedin's Yellow-Eyed Penguin, for example, lives a very solitary life: <http://www.doc.govt.nz/conservation/native-animals/birds/birds-a-z/penguins/yellow-eyed-penguin-hoiho/facts/>.

[233] Or, it may have greater strength, depending on one's perspective.

[234] Mary Warnock "Should trees have standing?" in Anna Grear (ed) *Should Trees Have Standing? 40 Years On* (Edward Elgar, Cheltenham, 2012); Stone (2012), above n 181; Stone (1985), above n 66.

## *Chapter IV: Is Te Awa Tupua an example of the Rights of Nature in law?*

On the 6th October 2013,[235] Cormac Cullinan joined a number of other international commentators[236] in listing the personhood of the Whanganui River as an example of the RON.[237] Along with Te Awa Tupua, he listed the Universal Declaration of the Rights of Mother Earth and Ecuador's constitutional protection of *Pachamama*.

In the course of his address, Cullinan described "the volition of wild places" and discussed wildness as a metaphysical concept in saying, "We cannot see it but we can see its marks/shape". He identified an "unbreakable kinship … which we are part of, and never cannot be part of" between nature and humans. He described the need to pursue our "re-wilding" with nature in line with this wildness, and to respect nature's "desire to live, to love, and to flourish, [in] what the American Declaration of Independence calls the pursuit of happiness."

Cullinan stated that "our legal systems have been designed not to enable us to participate and work with the law of nature but to dominate and oppress" in the sense that "our laws define everything not a corporation or a person as property". He used the example of slavery, and said "when [slaves] were property, there could never be anything other than an exploitative relationship."

Cullinan argued that "if human behaviour is the problem, then the systems we use to govern human behaviour are central to the solution". He asked:

> isn't it crazy that rivers don't have the right to exist and to flow? – when even the most fundamental human right, the right to life, is wholly dependent on ... the availability of water, and we can't have water unless we protect the right of the whole hydrological cycle to exist.

Cullinan concluded his talk by calling for appreciation of the RON as another historic civil rights movements, and for this reason, stated "we need to use the language of rights and freedom."

### *A Does the Te Awa Tupua proposal recognise the Rights of Nature in law?*

This dissertation has outlined the Te Awa Tupua proposal in its legal and political context. It has also explained what is meant by the RON – when fully articulated as

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[235] Taking place in the same week that this dissertation was submitted on 11 October 2013.

[236] Hsiao, Maloney, Cullinan, above n 3.

[237] Cormac Cullinan address to the Tenth World Wilderness Conference (Salamanca, Spain) dated 6th October 2013, available from <http://www.ustream.tv/recorded/39576317> (accessed 6.48pm 7 October 2013).

the pluralist ethical consideration of relationships within nature, it is a comprehensive question of the good life, and a question of how humans can live sustainably.[238] Because of these conclusions, we need to have considerably different expectations of what TAT would look like as the RON in law, and what it can realistically achieve. We cannot articulate a single determinate conception of environmental ethics. Even if we could it would not be objectively valid to all people in all circumstances. Negotiation of ethical extremes may be required, and it will be an ongoing process.

In this chapter I argue that the Te Awa Tupua proposal is an example of the RON in law. I will illustrate how Te Awa Tupua's structure *per se*, and its structure within its legal context, mean that it *can* be seen to reflect legal protection of the RON, in the developed sense that I have described it. However in my view, the substantive RON flow from the RMA, and not TAT.

### *B We do not need a declaration of rights*

As discussed,[239] a declaration of legal rights is neither necessary nor desirable. The absence of a specific statement of "rights" does not preclude the TAT's RON status.

### *C The personhood of Te Awa Tupua*

Te Awa Tupua is a clear example of Christopher Stone's 1972 proposal in *Should Trees Have Standing*. I contend that this model was intentionally replicated in order to solve the questions raised by the Waitangi Tribunal's recommendations.

#### *1 Resolution of the ownership question*

A 2009 master's thesis[240] by James Morris and ensuing publication[241] with Jacinta Ruru suggested the possibility of using Christopher Stone's model in co-management of resources in the context of the Treaty of Waitangi.[242] Stone's model was considered for co-management as it "neutralise[s] arguments over property rights".[243]

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238 Bosselmann (2011), above n 157, at 63 identifies it as "the sustainability discourse, understood as the collective cultural and political project of global citizens."

239 At Chapter III, sub-heading E.

240 James D K Morris "Affording NZ rivers legal personality: a new vehicle for achieving Māori aspirations in co-management?" (Unpublished LLM Thesis, University of Otago, 27 June 2009).

241 James D K Morris and Jacinta Ruru "Giving voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?" (2010) 14 AILR 49.

242 In her Carl Smith Medal lecture, Ruru identified Stone's model as a midway point in the question of public/Iwi ownership of natural resources: Jacinta Ruru "Undefined and Unresolved: Māori Legal Rights to Water" (Carl Smith Medal Lecture, Otago University, 2012) available from <http://www.otago.ac.nz/prodcons/groups/public/@otagopodcast/documents/audio_video/otago034411.mp3>

243 Morris, above n 240, at 130.

If TAT is a person that cannot be owned, then the resolution of ownership is not required,[244] even though this seems incongruous with the fact that private interests in TAT are maintained.[245] Similarly, Stone's model allows the question of authority and control to be retained within the RMA framework, allowing for a pluralist[246] ethical consideration of conflicting land uses – including kaitiakitanga, the intrinsic value of ecosystems, and the ability of communities to provide for their economic wellbeing. At the same time, it provides a unique recognition of the status of Te Awa Tupua, the status of Atihaunui, and the interdependent relationship between the two.

*2 What was Stone's proposal?*

Stone wrote his 1972 article in a hurried attempt to influence the Justices of the United States Supreme Court in the *Sierra Club v Morton* litigation.[247] Walt Disney Enterprises Inc proposed development of a large theme park style attraction with accompanying roads, infrastructure, and accommodation in an area of largely untouched wilderness.

*3 The position of nature at common law*

Stone's article needs to be seen as a response to common law treatment[248] of natural entities. Stone offers the example of discharges into a river.[249] The legal issue in such a case was treated as a civil dispute of competing riparian property interests.[250] A downstream riparian interest-holder could bring a claim against the upstream riparian interest holder for damage to their riparian interests. But in adjudicating claims between these interests, the question of the river's intrinsic interests never arose.[251] In particular, no matter how devastating the environmental damage from discharge, a riparian down-river from a point-source discharge could disregard the damage to the river as an ecosystem by merely accepting a monetary settlement.[252] In the context of the *Sierra Club* litigation, Walt Disney Enterprises Inc could propose cutting roads through an area of substantial ecological and wilderness value, and the Sierra Club could only claim damage to its *own* interests, whilst never being able to simply state that development of the area was wrong *per se*.

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[244] Morris, above n 240, at 109.
[245] Tutohu Whakatupua, above n 1, at 1.10.
[246] Bosselmann 2011, above n 157.
[247] Roderick Nash, above n 128; *Sierra Club v Morton* 405 US 727 (1972).
[248] Stone (1972), above n 9, at 459.
[249] Ibid.
[250] See Wheen, above n 64, at 78-80.
[251] Stone (1972), above n 9.
[252] Ibid.

### *4 Stone's proposal*

Stone therefore proposed the admission of natural entities as a party to civil litigation to allow the court to consider their interests, through either the liberalisation of standing requirements, or the establishment of guardians for nature in a similar way to guardians for medically incapacitated persons are appointed. He embarked on a lengthy demonstration that nature could have interests that could be protected. In terms of the Te Awa Tupua proposal, he identified three criteria that "appeared to be necessary and sufficient for legal personhood":[253]

> First, the system would have to permit a legal (or administrative) action in the thing's name when the thing was threatened. Second, damages to the thing, independent of damages to natural persons (through impacts on the thing), would have to be a factor in establishing liability or relief. Third, where relief was ordered, whether in the form of damages or an injunction, the thing itself would have to be the beneficiary.

It is fair to conclude that the conferral of legal standing and legal personality on Te Awa Tupua fulfils these criteria. Tutohu Whakatupua appears to anticipate TAT bringing a law suit through its conferral of standing, for damage to its own interests regardless of its instrumental value for human use, and that any remedy from the Court would be for TAT's benefit and can be held in its name by Te Pou Tupua. However environmental law in New Zealand is no longer governed by competing riparian claims – substantive law is held in the RMA.

### *5 The question of the merits*

In terms of Te Awa Tupua's RON status, personality and standing may confer particular "rights" or legal advantages to Te Awa Tupua.[254] However Stone acknowledged, "To usher a lake through the courthouse doors is not to say that it will – only that it may – win on the merits."[255]. Standing and personhood *per se* may confer nothing. In NZ's positivist legal system, the fact that one is a person entails nothing except that either legislation or the Common Law confers rights according to that personhood. In NZ's environment of strong Parliamentary Sovereignty, it is especially simple to call anything we want a person. Regardless, personhood is just a "cluster concept".[256] There are no necessary personhood characteristics, especially

[253] Stone (2012), above n 181, at 100.

[254] For example, TAT's personhood may mean it can enter into contractual arrangements or hold property. This may depend on whether the Courts choose to see it as a person with guardians, a company with directors, or a beneficiary with trustees.

[255] Stone (2012), above n 181, at 102.

[256] Naffine, above n 178, at 71.

when practical concerns can be remedied by the use of a guardian. The point is that personhood and standing *in themselves* confer nothing except procedural access and capability in terms of Stone's three criteria. I suggest that this is why it can be used so readily in the Treaty settlement context – "like a company" or a trust, it is a relatively empty form that does not declare allegiances between either party.[257]

The way to decide the merits for the Te Awa Tupua proposal is found in the Resource Management Act, which I will argue is a RON statute.

### *D Evolutionary legal processes and systems governance*

In 1974, Tribe advocated a gradual, nuanced, substantive search for how humanity ought to relate to nature,[258] and even warns against the incorporation of environmental values into statute because this will prevent organic evolution as they develop in our understanding. In an astute statement he notes that our ontological redefinition has far-reaching effects:[259]

> To recognise that humanity is a part of nature and the natural order a constituent part of humanity is to acknowledge that something deeper and more complex than the customary polarities must be articulated and experienced if the immanent [inherent] and transcendent [instrumental] are somehow to be united.

Tribe anticipated the problem of ethical pluralism. It is remarkable that the entire RON debate was effectively framed in the space of two articles, by two authors, within two years of each other in the early 1970s. Some forty years later, advocates of "wild law" admit that they are still in the early stages of this.[260]

#### *1 The lessons of ethical pluralism for environmental law*

Ethical pluralists can be seen to agree with Tribe's conclusions. Pluralist approaches emphasise "an ongoing dialectical process of vigilance and criticism"[261] in response to a progressive, logical application of values to factual situations as they arise in response to scientific data. It is not a simple dichotomy of preservation and development, or person and property.

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[257] The ideological and political implications of private property, the corporate form, or trusts is outside the scope of this dissertation, although these approaches are acknowledged: see as general example A Berle and G Means *The Modern Corporation and Private Property* (2nd ed, Harcourt, Brace and World, New York, 1968).

[258] Tribe, above n 159, at 1338-1339.

[259] Ibid, at 1340.

[260] Glen Peter-Ahlers Sr "Earth Jurisprudence: A Pathfinder" (2008) 11 Barry L Rev 121.

[261] Minteer, above n 203, at 344.

### *E The Resource Management Act 1991 is a Rights of Nature statute*

The RMA consolidated multiple government bureaucracies and statutes.[262] It was developed as part of a reform package that included the Environment Act 1986 and the Conservation Act 1987,[263] both of which have been identified as taking an ecological approach.[264] I argue that the structure of the RMA mimics pluralist approaches to environmental ethics.

#### *1 Part II of the RMA*

The RMA is structured around Part II of the Act,[265] which includes ss 5-8. Section 5(1) states that the "the purpose of [the] Act is to promote the sustainable management of natural and physical resources." Natural and physical resources are defined to include water in section 2 of the Act, and included (and may still include, depending on the TAT legislation) the Whanganui River.

Section 5(2) defines sustainable management as:

> Means managing the <u>use, development, and protection</u> of natural and physical resources in a way, or at a rate, which enables <u>people and communities</u> to provide for their <u>social, economic, and cultural well-being</u> …

S 5(2) then states a proviso to this goal – "while" – and continues:

> (a) sustaining the potential of natural and physical resources … to meet the reasonable foreseeable needs of future generations; and
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The concept of sustainable management is developed in ss 6-7, which outline a set of values for decision-making "in achieving the purpose [s 5] of this Act". Section 6 provides "matters of national importance" which include (among others): "the preservation of the natural character of … rivers and their margins, and the protection of them from inappropriate subdivision, use, and development" and "the protection of

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[262] Geoffrey Palmer "The Making of the Resource Management Act" in *Environment – The International Challenge* (Victoria University Press, 1995) at 150-172.

[263] Klaus Bosselmann and Prue Taylor "The NZ law and conservation" (1995) 2 Pacific Conservation Biology 113 at 116.

[264] Jennifer Caldwell *An Ecological Approach to Environmental Law* (LLB (Hons) Dissertation, Legal Research Foundation Inc, Auckland, 1988).

[265] Wheen, above n 64, at 109; notes that *Lee v Auckland City Council* [1995] NZRMA 241 at 248 describes it as "the lodestar of" s 104.

areas of significant indigenous vegetation and significant habitats of indigenous fauna". In section 7, persons exercising functions and powers under the Act "shall have particular regard to":

> (a) kaitiakitanga:
> (aa) the ethic of stewardship:
> …
> (d) intrinsic values of ecosystems:
> …
> (f) maintenance and enhancement of the quality of the environment:
> …

These ecocentric values are balanced against more anthropocentric concerns such as amenity values and the protection of the habitat of trout and salmon that treat the environment more instrumentally. Importantly, Part II can be seen as a pluralist statement of RON values.

*2 Cascading instruments*

The RMA provides a system of hierarchical planning and policy statements that can be promulgated at the national, regional, or district-wide level.[266] This enables central government to take collective, holistic action where appropriate. It could allow for ecocentric holistic agenda-setting by central government in determining the NZ public's relationship to nature.

*3 Sections 13-15 of the RMA*

Sections 13-15 of the RMA provides a series of default positions regarding the taking, use, damming, or diverting of water (s 14), actions in relation to the beds and lakes of rivers (s 13) and the discharge of contaminants into water or onto land that may enter water (s 15). The effect is that there is a default prohibition on many actions with regard to Te Awa Tupua as an indivisible whole that affect its environmental integrity. A breach of these sections can lead to prosecution for an offence under s 338(1)(a) of the RMA.[267]

While setting up a default position, ss 13-15 allow for actions relating to Te Awa Tupua's water, bed, and contaminant discharge if they are variously allowed by a National Environmental Standard, a rule in a Regional or District Plan, or a Resource

[266] Resource Management Act 1991, Part 5.

[267] Ibid, section 339 provides for penalties of imprisonment up to two years or a fine of $300,000 for a natural person, or a fine of $600,000 for a "person other than a natural person". These are backed up by criminal and civil enforcement provisions.

Consent. These mechanisms require the Part II values to be taken into account,[268] and allow for public consultation,[269] and/or public notification hearings.[270] These instruments are promulgated by local authorities subject in principle to democratic constraints.[271] Regional Council jurisdictions are delineated on the basis of water catchments, and can therefore be seen as adopting an ecosystem-based approach. In applying for any resource consent, an applicant must provide an assessment of environmental effects,[272] with "effect" being widely defined as including "any cumulative effect which arises over time or in combination with any other effects"[273] and including "any potential effect of low probability which has a high potential impact".[274]

*4 Definitions under the RMA*

The section 2 interpretation section of the RMA is also relevant to its RON status because of the way it orientates the Act toward nature. "Contaminant" (used in s 15) is incredibly broadly defined as any substance or energy that by itself or in combination with other substances, is likely to change the biological condition of the water. "Benefits and costs" include benefits and costs "of any kind, whether monetary or non-monetary". "Biological diversity" means "the variability among living organisms, and the ecological complexes of which they are a part, including diversity within species, between species, and of ecosystems". "Discharge" in the context of s 15 includes to "allow to escape". The key determinant of ecocentrism – the intrinsic values of ecosystems – is also defined:

> *intrinsic values*, in relation to ecosystems, means those aspects of ecosystems and their constituent parts which have value in their own right, including—
> (a) their biological and genetic diversity; and
> (b) the essential characteristics that determine an ecosystem's integrity, form, functioning, and resilience

Finally, in its full ontologically redefined glory, environment includes humanity:

> *environment* includes—
> (a) ecosystems and their constituent parts, including people and communities; and
> (b) all natural and physical resources; and

[268] See for example ibid, s 66(1), s 104(1).
[269] Ibid, Part 5.
[270] Ibid, ss 95A – 95F.
[271] Local Government Act 2002.
[272] Resource Management Act 1991, s 88(2)(b).
[273] Ibid, s 3(d).
[274] Ibid, s 3(f).

(c) amenity values; and
(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

### *5 The RMA as RON statute*

Needless to say, the ambit of the RMA is breathtaking, and it has been called "the most advanced legislation so far"[275] in terms of environmental sustainability. Nature, in NZ, is certainly not "rightless" in the sense of lacking *any* legal protection except as property.

The RMA can be called a pluralist[276] RON statute.[277] If interpreted to its fullest potential, it provides decision-makers, applicants, and the public the means to determine their relationship to the environment in a distinctly ecocentric way. It is founded upon multiple environmental values, including the intrinsic values of ecosystems, the life-supporting capacity of the environment, and the ability to provide for human economic wellbeing. Decisions are made according to the effect of those decisions as measured by science. The RMA takes a key set of values, that embrace an ontologically redefined environment, and provides the mechanisms for local and central authorities to make decisions regarding the Rights of Nature (including humans) according to scientific evidence. The overall judgment approach was developed when ethical push came to ethical shove, where the judiciary must determine a result. The RMA enables progressive development of our environmental values according to situations as they arise. According to my understanding of the RON, that is the most we can hope for from the law. In assessing the RMA, we need to bear this in mind.

### *6 The RMA's institutionalisation of Guardians*

Section 311 allows "any person … at any time [to] apply to the Environment Court" for a declaration. The declaration may declare an inconsistency between a higher level

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[275] Bosselmann (2011), above n 157, at 57 citing S Westerlund "Theory for Sustainable Development: For or Against?" in Bugge and Voigt (eds) *Sustainable Development in International and National Law* (Europa Law Publishing, Groningen 2008) at 49.

[276] Bosselmann (2011), above n 157, at 50.

[277] An analysis of NZ Law according to a Wild Law approach has already indicated that the RMA and other conservation law in NZ strongly reflects a wild law approach. To the extent that wild law and the RON can both be seen as ecocentric holistic philosophies of humanity's relationship to nature, this research strongly supports my conclusions. See Begonia Filgueira and Ian Mason "Wild Law: Is there any evidence of Earth Jurisprudence in Existing Law and Practice?" (2009) UK Environmental Law Association and the Gaia Foundation at 32-34.

policy instrument and a plan,[278] "the existence of any function, power, right, or duty under [the] Act",[279] or "whether … an act or omission, *or a proposed act or omission*, contravenes or *is likely to contravene* this Act, regulations made under this Act, or a rule in a plan or proposed plan, … or a resource consent".[280]

The situation therefore exists, *prior* to the implementation of the TAT proposal, whereby any person[281] may apply to a specialist environment court (composed of one Judge and two lay-members[282]) for a declaration that a proposed action regarding the environment is likely to contravene a rule in a planning instrument that protects the intrinsic value of natural entities.

While, up to the present, "nature" has not been admitted as a party to litigation as far as I am aware, it is clear that self-appointed guardians of nature are already capable of defending nature's interests under the RMA, but only to the extent they are protected by law. This may be an area where TAT could have a significant impact.

### *F The overall judgment approach*

Despite the above, an obvious objection to my conclusions is that the environmental situation in NZ remains dire[283] – particularly in relation to fresh water in view of NZ's agriculture industry.[284]

NZ's environmental state, in contrast with our ambitious legislation, might be traced to the advent of the "overall judgment approach".[285] When the RMA was enacted, commentators (cautiously[286]) heralded the enactment as a significant improvement on existing law. The High Court noted that "the RMA is informed by a wholly different environmental philosophy which places far greater emphasis on environmental protection."[287] Under previous legislation:[288]

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[278] Resource Management Act 1991, s 310 paras (b)-(bb).
[279] Ibid, para (a).
[280] Ibid, para (c).
[281] Defined in Resource Management Act 1991, s 2 to include an unincorporated body of persons.
[282] Ibid, s 248.
[283] Bosselmann (2011), above n 157, at 49.
[284] Geoff Cumming "New Zealand; 100 per cent pure hype" *New Zealand Herald* (New Zealand, 6 January 2010).
[285] Bosselmann (2011), above n 157.
[286] Wheen described the Act in 1997 as "represent[ing] progress, but only in a measured and predictable way" in light of NZ's water law history. Wheen, above n 64, at 110.
[287] *Machinery Movers Ltd v Auckland Regional Authority* [1994] 1 NZLR 492 at 499 cited in Wheen, above n , at 181-182. Greener law for water
[288] Nicola R Wheen "The Resource Management Act 1991: A "Greener" Law for Water?" (1997) 1 NZ Journal of Environmental Law 165 at 172.

> in general the tolerance for environmental damage was determined exclusively by comparison with anticipated human benefits. There were no environmental standards or bottom lines which had, at all costs, to be maintained; the sole issue was balance.

Bosselmann and Taylor specifically attribute the RMA to an ecocentric ethic because of its recognition for the intrinsic values of nature,[289] and noted that some saw it as legislation entailing "bio-physical bottom lines" in the form of s 5(2)(a)-(c).[290]

*1 The meaning of "while" in section 5*

The question became the meaning of the word "while" in section 5.[291] "While" can be read as either "a coordinating or subordinating conjunction".[292] The definition of sustainable management in s 5(2) can be seen to have an anthropocentric first part, separated by "while", before a series of ecocentric concerns in the second part. If "while" were taken to be coordinating, it would be read "and", and lead to a balancing test between goals of equal priority.[293] Conversely, if "while" were read as a subordinating conjunction, then "while" would be read "if", and the first part of s 5(2) could not be achieved without prioritising the ecocentric second part.

The judiciary's approach to section 5 was ultimately determined in what has been called the "overall judgment approach",[294] and attributed to generality of drafting in section 5.[295] The overall judgment approach means that:[296]

> [T]he individual contents of Part II are not absolutes to be achieved at all costs … and that in some cases some of them conflict with others of them, and

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[289] Klaus Bosselman and Prue Taylor "The New Zealand Law and Conservation" (1995) 2 Pacific Conservation Biology 113 at 116.

[290] Ibid, at 116; citing J Milligan "The Resource Management Act – 9 months on" (1992) NZLJ 331.

[291] Douglas Fisher "Clarity in a Little 'While'" (1991) 11 Terra Nova; Nicola R Wheen "The Resource Management Act 1991: A "Greener" Law for Water?" (1997) 1 NZ Journal of Environmental Law 165 at 172. Wheen identifies the question as first being posed by Douglas Fisher in "The Resource Management Legislation of 1991: A Juridical Analysis of its Objectives" in *Resource Management* (1991) 13, and being continued by others noted in her footnote 64 at 183; Bosselmann and Taylor, above n 289, at 117.

[292] Wheen, above n 291, at 183

[293] Fisher, above n 291.

[294] See generally *NZ Rail Ltd v Marlborough District Council* [1994] NZRMA 70; *Trio Holdings Ltd v Marlborough District Council* [1997] NZRMA 97; and *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59.

[295] Wheen, above n 291, at 188; citing *NZ Rail Ltd v Marlborough District Council*, above n 294, at 86.

[296] *Te Runanga o Taumarere v Northland Regional Council* [1996] NZRMA 77*;* As noted by Wheen, above n 291, at 191.

> difficult judgments can be required about which is to yield to another and to what extent …

What the judiciary was really grappling with[297] was the key question of pluralist ecocentric environmental ethics:[298] "how ought we to live?"[299]

### *G Ontological redefinition and ecological consciousness*

The RMA has not delivered on the RON because NZ society has not delivered. The shortfall is commitment to ecocentric values, the Rights of Nature, or sustainability.[300]

The impact of agriculture on waterways is an archetypal example of the difficult ethics under the RMA. Evidently, there is ample legal justification and capability for regional plans to absolutely protect freshwater bodies by reference to the Part II values. But in doing so, we cannot avoid NZ's reliance on its agriculture: as a whole via its national economy, and for individuals (farmers and consumers). The environmental impact of dairying is a volatile political issue precisely because it is ethically complicated. Environmental ethics cannot deliver a determinate answer, and even if it could, it would not be binding on those who do not share our ethical commitments.

I acknowledge the analyses of Preston[301] and Bosselmann[302] in identifying problems such as the environmental burden of proof. But I disagree with Preston's conclusions regarding the preservation of nature – theoretically, there is no bar to a resource consent for "use" of land in terms of preservation, and planning instruments commonly impose land use restrictions that might amount to preservation.

My claim is simply that the RMA recognises, in different terms, the intrinsic value of nature, and provides mechanisms to protect that intrinsic value. It acknowledges ethical pluralism, and requires decisions about trade-offs between particular environmental interests to be made according to ecocentric values that embrace the right of humans to provide for their wellbeing too. Environmental imperatives are

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[297] Bosselmann (2011), above n 157, at 57 notes Geoffrey Palmer's regret that "the need to change the judicial culture was overlooked" in G Palmer *Environment: The international Challenge* (Victoria University Press, Wellington, 1995) at 170.
[298] Bosselmann (2011), above n 157, at 50.
[299] The judiciary has been confronted with human interests versus human interests in cases such as *Cook Islands Community Centre v Hastings DC* [1994] NZRMA 375.
[300] Bosselmann (2011), above n 157, at 57.
[301] Brian J Preston "The effectiveness of the law in providing access to environmental justice: an introduction" (11th IUCN Academy of Environmental Law Colloquium, Hamilton, New Zealand, 28 June 2013).
[302] Bosselmann (2011), above n 157; Preston, ibid.

made on a localised basis according to democratic methods through plan preparation, public notification, and public enforcement. The overall judgment approach recognises that, in the RON, there are no ethical bottom lines.

### *H Will TAT shift our relationship to Nature?*

What remains is the will (and capability) to use the RMA and make the difficult ethical arguments. There are signs that this is taking place in the manner predicted by Stone – talking about nature in ecocentric terms may be having an effect. In the sentencing of Phillip Wooley[303] on charges of "disturbing a riverbed, depositing soil and vegetation in a riverbed and two [charges] of using land in a manner that broke a district rule", Judge Stephen Harrop stated:[304]

> You wantonly destroyed a good deal of vegetation. You did it for selfish reasons so you would get increased productivity on your farm. … In my view, what you did was arrogant and selfish … You put your own interests ahead of the environment … Clearly you are of the view still that you haven't done anything wrong.

The charges related to digging a drainage channel into a wetland owned by the Department of Conservation, but damage to property or trespass were not the offences. Nature's interests were being protected apart from their property value.

Perhaps, in a future case – *Te Awa Tupua v Attorney-General* for example – TAT's personhood will provide the impetus to capitalise on the protection of intrinsic value. Its personhood may yet shift the manner in which we see nature's value. But that protection and value does not come from TAT alone.

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[303] Anna Williams "'Selfish' farmer destroyed wetland" (Stuff, NZ, 22 August 2013). <http://www.stuff.co.nz/business/farming/agribusiness/9073735/Selfish-farmer-destroyed-wetland>.
[304] Ibid.

## *Chapter V: Conclusion*

Te Awa Tupua reflects the RON in NZ – but those rights do not come from its personhood alone, and the bulk of its legal protection as a natural entity preceded its personhood status. Te Awa Tupua does not go from zero-rights-property to full-rights-person just because it has legal standing and personality.

In many respects, TAT can still be seen as property. I recall my earlier discussion of the property foundations of TAT in the Treaty of Waitangi. The TAT proposal is being conducted in order to settle a question of ownership. In one sense, it can be seen as trust property, being passed into a kind of statutory trust to be administered as one might administer an object of property, it is just not called as such by the legal system. Tutohu Whakatupua protects existing private interests in the River, and the River is still subject to resource consents to abstract water for power generation. Similarly, TAT is still "property" as understood in Te Ao Māori, and "just because Māori have a personified worldview, it is incorrect to assume that they will always favour non-development."[305]

The dichotomy between "person" and "property" in RON discourse is open to challenge. It might be the case that property has never achieved Blackstone's paradigmatic statement of "sole and despotic dominion"[306] and that property has always entailed a commitment to protection of nature[307] in the sense of a prohibition of harmful use.[308] In addition, the possibility remains that a critical analysis of the RMA might reveal it to deal in property interests.[309] At the very least, the line between property and entity is open to dispute. I only note it here for completeness, and leave it for another day.

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[305] Morris and Ruru, above n 241, at 58.

[306] Blackstone, above n 22. Bosselmann discusses a Lockean conception of property rights in contrast with sustainability in K Bosselmann "Property Rights and Sustainability: Can they Be Reconciled?" in D Grinlinton and P Taylor (eds) *Property Rights and Sustainability: the Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff, The Hague 2011).

[307] Bosselmann (2011), above n 157, at 52 notes the concept of Allmende as a medieval land us system.

[308] Honore, above n 309, at 123, and also Carol Rose "'Takings' and the Practices of Property: Property as Wealth, Property as 'Propriety'" (1991) 33 NOMOS 223.

[309] See generally Te Aho, above n 45; Wai 167, above n 10. Te Aho suggests the reason the RMA does not deal in property is *because* of the issue of Iwi ownership. Alternatively, if resource consents deal in enough of the incidences of ownership identified by those such as Joseph Honore "Ownership" in A G Guest, ed *Oxford Essays in Jurisprudence* (1961), then we might be able to call them property. See Laura Fraser "Property Rights in Environmental Management: the Nature of Resource Consents in the Resource Management Act 1991" (2008) 12 NZ J Envtl L 145 for further discussion of this resource consents as property.

Te Awa Tupua clearly models itself, and meets, Stone's 1972 model, which is evident from its structural similarities. How this will be interpreted by the judiciary is another matter. Tutohu Whakatupua's use of the phrase "held in the name of" leaves open the possibility that the statutory wording will reflect a trust concept. If this were the case, there are some interesting questions regarding Te Awa Tupua's status variously as person, beneficiary, settlor and trust property.

On a cynical note, there are significant similarities between TAT's structure and the Waikato-Tainui Settlement Act. The arrangements under that Act include a whole of river strategy,[310] integration with existing RMA processes and authorities,[311] and the appointment of trustees or "guardians"[312] (the Waikato River Authority)[313] who are tasked with managing the river according to an agreed vision and strategy.[314] In this sense, Te Awa Tupua's personhood may be of no material effect. I suggest this will depend on how TAT's personhood status is pushed by Te Pou Tupua. The impact of Te Ao Māori here ought to be significant. In this respect, the foundation of TAT in Atihaunui's property rights may ironically be its greatest chance for RON liberation. But the fact that one guardian is appointed by the Crown means that any attempt to do so would require the assent of both guardians, and be limited by TAT's best interests and the TAT values. Pursuing lengthy legal battles for the sake of the RON may not be in TAT's interests.

TAT is certainly a person in name, but as we have seen, this does not necessarily mean anything. Much will depend on the TAT values, the Whole of River Strategy, and the decisions of Te Pou Tupua. Personhood and standing only open the door to arguments on the merits.

Based upon my understanding of the Rights of Nature and environmental philosophy, I argue that the RMA is the real source of the Rights of Nature in New Zealand. In this respect, TAT ought to be seen as merely a novel institutional form for exercising existing legal protections. The Rights of Nature were pre-existing in the NZ legal system.

The language of rights is not desirable in light of my objections above, and the project of world re-form. However I am prepared to accept the structuring effect of language. TAT's personhood, its repeated categorisation within RON discourse, and particularly

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[310] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, schedule 2.

[311] Ibid, ss 9-17.

[312] Linda Te Aho, above n 146, at 156-157.

[313] Waikato-Tainui Act, above n 330, s 22 and schedule 6.

[314] Ibid, s 22 and s 23.

its influence under Te Ao Māori and Te Pou Tupua – ko au te awa, ko te awa ko au – might lead to surprising possibilities. As Laurence Tribe put it:[315]

> What the environmentalist may not perceive is that, by couching his claim in terms of human self-interest … he may be helping to legitimate a system of discourse which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the initial impetus for his own protective efforts.

The prevalence of Christopher Stone's 1972 statement throughout the literature suggests that it has not gone unnoticed, and perhaps Tribe's statement works in reverse too. Beyond the legal aspects of the RON, as Stone said in 1972, there is a socio-psychic[316] aspect to Nature's Rights too. As Stone concluded in 1972:[317]

> The time may be on hand when these sentiments, and the early stirrings of the law, can be coalesced into a radical new theory or myth – felt as well as intellectualized – of man's relationships to the rest of nature. … What is needed is a myth that can fit our growing body of knowledge of geophysics, biology and the cosmos. … As radical as such a consciousness may sound today, all the dominant changes we see about us point in its direction.

What is clear is that the intrinsic values of ecosystems for New Zealand law became mainstream as early as 1991, only 20 years later. In this respect, perhaps the socio-psychic aspects of the Te Awa Tupua proposal will yield surprising developments in the years to come.

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[315] Tribe, above n 159, at 1330-1331.
[316] Stone (1972), above n 9, at 489.
[317] Ibid, at 500.

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