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Does co-governance give effect to te Tiriti o Waitangi and the Treaty of Waitangi?

I Introduction

As the Crown pushes to settle all historical breaches of the Treaty of Waitangi models of "co-governance" are being included in an increasing number of Treaty settlements. Perhaps the most novel co-governance model which has been included in a Treaty settlement is the extension of the concept of "legal personality" to natural features. Legal persons are entities that are entitled to the same legal rights, duties and responsibilities as human beings.[1] Entities which are legal persons have the right to appear in court, hold property and enter into binding contracts.[2] To date, New Zealand legislation has recognised the legal personality of three natural features as part of a Treaty settlement: Te Urewera, Te Awa Tupua, and Te Kāhui Tupua.[3] While the legal personality model is certainly symbolically significant, there has been little academic analysis of whether the model gives effect to the Treaty of Waitangi.

Using Te Awa Tupua as a case study, this essay evaluates whether legal personality as a model of co-governance enacted as part of a negotiated Treaty settlement process gives effect to te Tiriti o Waitangi and the Treaty of Waitangi. Part II will examine what it means to give effect to the Treaty of Waitangi and Te Tiriti o Waitangi, concluding that they can be reconciled. Part III will evaluate whether Te Awa Tupua gives effect to the Treaty of Waitangi. This essay concludes that while features of the legal personality model are

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[1] SM Solaiman "Legal personality of robots, corporations, idols and chimpanzees: a quest for legitimacy" (2017) 25 Artif Intell Law 155 at 157.

[2] AH Angelo "Personality and Legal Culture" (1996) 26(2) VUWLR 395 at 404.

[3] See Te Urewera Act 2014, s 11; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 [Te Awa Tupua Act], s 14; and Te Pire Whakatupua mō Te Kāhui Tupua/Taranaki Maunga Collective Redress Bill 2023 (293—1) [Te Kāhui Tupua Bill], cls 17–21.

imperfect, on balance the model gives effect to the Treaty of Waitangi and is therefore a successful model of co-governance.

II What Does it Mean to Give Effect to Te Tiriti o Waitangi and the Treaty of Waitangi?

A Reconciling the Meanings of the Treaty and te Tiriti

The meaning of the Treaty of Waitangi and te Tiriti of Waitangi has long been the subject of debate. This essay adopts Ned Fletcher's view that the underlying meaning of the Treaty of Waitangi can be reconciled with the meaning of te Tiriti o Waitangi. Where doubt remains about the differences between the two texts, it is appropriate to defer to the wording and interpretation of te Tiriti o Waitangi as that is the version which rangatira signed. This section analyses how each article may be reconciled and what it means to give effect to the reconciled meaning.

The text of article one of the Treaty of Waitangi stipulates that Chiefs cede all the rights and powers of sovereignty to the Crown.[4] In contrast, article one of the English translation of te Tiriti o Waitangi stipulates that Chiefs grant the Crown the power of complete government of their land.[5] Upon a plain reading of both articles, it appears that the Crown is afforded more power as sovereign under the Treaty compared to governing power granted by te Tiriti. However, as Ned Fletcher argues, the meaning of the article may be reconciled if the Treaty is interpreted in light of the context in which it was written. Fletcher argues that the intention and the subsequent effect of the Treaty was to set up an arrangement similar to a federation, meaning sovereign power would not override tribal

[4] The Treaty of Waitangi 1840, art 1.

[5] H Kawharu "The full text of Te Tiriti o Waitangi | The Treaty of Waitangi" (1988) Museum of New Zealand Te Papa Tongarewa <tepapa.govt.nz>.

government.[6] The sovereignty which Chiefs would cede in signing the treaty was that of the British subjects who lived in Aotearoa at the time.[7]

Article two of the Treaty of Waitangi guarantees Māori the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties, but grants the Crown the exclusive right of preemption over land when Māori wish to sell it.[8] In comparison, the English translation of te Tiriti o Waitangi stipulates that the Crown agrees to protect all the people of New Zealand in their unqualified rangatiratanga (chieftainship) over their lands, villages, and all their treasures, and that Chiefs will exclusively sell land to the Crown.[9] Fletcher argues that the Treaty's promise of full, exclusive and undisturbed possession recognises that Māori society was to remain independent.[10] Fletcher argues that the way article two was described to rangatira as a guarantee of their "full rights as Chiefs" affirms that Māori government was to be left undisturbed.[11]

Under article three of the Treaty of Waitangi, the Crown extended royal protection and all the rights and privileges of British subjects to Māori.[12] In comparison, under the English translation of article three of te Tiriti o Waitangi the Crown agrees to protect all the ordinary people of New Zealand and grants them the same rights and duties of citizenship as the people of England.[13] Article three can be read as meaning that Māori became British subjects, but the text's extension of rights and privileges does not explicitly grant Māori the status of British subjects.[14] Fletcher argues that based on the intentions of those who

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[6] Ned Fletcher *The English Test of the Treaty of Waitangi* (Bridget Williams Books, 2022) at 529.

[7] At 529.

[8] The Treaty of Waitangi, above n 5, art 2.

[9] Kawharu, above n 6.

[10] Fletcher, above n 7, at 527.

[11] At 527.

[12] Treaty of Waitangi, above n 5, art 3.

[13] Kawharu, above n 6.

[14] Fletcher, above n 7, at 527–529.

wrote the documents it is likely that article three was understood to make Māori British subjects, but that this was not seen as inconsistent with the retention of autonomy.[15]

In summary, the reconciled meaning of the Treaty of Waitangi guarantees three things. First, that the Crown has the right to *govern* all people in New Zealand, but that Māori and the Crown only have sovereignty over their respective peoples. Second, that the Crown is obligated to protect Māori's exclusive possession of and unqualified chieftainship over their lands, properties, forests, fisheries and treasures. Third, that Māori have the same rights, duties and responsibilities of British subjects, but retain legal autonomy. Therefore, giving effect to the Treaty requires that Māori are able to act autonomously and exercise their sovereignty, and also requires that the Crown protect the right of Māori to do so. From this point forward, the reconciled meaning is referred to as "the Treaty".

B Giving Effect to the Reconciled Meaning of the Treaty with Te Awa Tupua

This section identifies how the Crown has breached their obligations under the Treaty, in turn identifying the wrongs which the Te Awa Tupua model must remedy in order to give effect to the Treaty.

In 1999, the Waitangi Tribunal released the Whanganui River Report.[16] The Report found that prior to Crown intervention, Atihaunui-a-Paparangi had exclusive possession and control of the Whanganui River.[17] The Tribunal identified that the Crown had breached the Treaty in two ways. First, by removing the possession and control of the Whanganui River from Atihaunui. The Tribunal concluded that Atihaunui had never ceded authority over the river in a manner that was contemplated by the Treaty.[18] Second, as rivers come within the meaning of 'other properties' which Māori were guaranteed full exclusive and undisturbed possession over under article two of the Treaty, the Crown had failed to fulfil their obligation to protect Atihaunui's rangatiratanga over the Whanganui River.[19]

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[15] At 528.

[16] Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 1.

[17] At 1.

[18] At 340.

[19] At 337.

The Tribunal proposed two options for consideration in negotiations. First, the Tribunal proposed that ownership of the river be entirely vested in the ancestors representative of Atihaunui, meaning any resource consent application under the Resource Management Act would require the approval of Atihaunui.[20] The Tribunal explained that this would give effect to Atihaunui's rangatiratanga.[21] Second, the Tribunal proposed that the Whanganui River Māori Trust Board be added as a 'consent authority' in terms of the Resource Management Act 1991 on cases concerning the Whanganui River, such that the Board would act jointly with the current consenting authority to exercise approval power over applications for resource consent.[22] The Tribunal recommended that the Crown should negotiate with Atihaunui through the Whanganui River Māori Trust Board having regard to their proposals.[23] The Tribunal further recommended that Atihaunui receive compensation for the taking of water for the Tongariro power scheme, and the extraction of gravel by the Government.[24]

III Does the Legal Personality Model Give Effect to the Treaty of Waitangi?

A The Design of Te Awa Tupua's Legal Personality

1 Background

Despite the Waitangi Tribunal's conclusion in the Whanganui River Report that concerns of all parties about the rights to the Whanganui River and its water could be reconciled,[25] the settlement process was still largely shaped by the broader political concern over Māori

[20] At 343.
[21] At 343.
[22] At 343.
[23] At 344.
[24] At 344–345.
[25] At 342.

proprietary rights to water.[26] The Crown acknowledged in the Act that legal personality is a compromise to prevent iwi from gaining ownership rights to water.[27]

2 Te Pā Auroa nā Te Awa Tupua: Te Awa Tupua Framework

In 2017, Parliament passed the Te Awa Tupua (Whanganui River Claims Settlement) Act. The Act granted Te Awa Tupua the rights, duties and liabilities of a legal person.[28] All Crown owned parts of the Whanganui River bed were vested in Te Awa Tupua.[29] As part of the Act, the Crown acknowledges the intrinsic connection between the iwi and hapū of Whanganui and the Whanganui River, and that they had failed to recognise, respect and protect this special relationship.[30] This section analyses the complex structure of co-governance bodies responsible for managing and acting on behalf of Te Awa Tupua.

a) Te Pou Tupua

Te Pou Tupua was established to be the human face of Te Awa Tupua.[31] Te Pou has the power to exercise Te Awa Tupua's rights on its behalf, and is responsible for promoting the health and promoting the health and well-being of Te Awa Tupua.[32] Te Pou Tupua is comprised of two members, one nominated by the Crown, and the other nominated by the iwi with interests in Te Awa Tupua.[33] The nominators must then jointly appoint members to the office of Te Pou Tupua if they are satisfied they will fulfil the purpose and perform the functions of Te Pou Tupua.[34] Te Pou Tupua may also invite other persons to assist it or Te Karewao.[35]

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[26] Katherine Sanders "'Beyond Human Ownership'? Property, Power and Legal Personality for Nature in Aotearoa New Zealand" (2018) 30 J Environ Law 207 at 226.
[27] Te Awa Tupua Act, above n 3, s 69(19).
[28] Section 14.
[29] Section 41.
[30] Section 69.
[31] Section 18(2).
[32] Section 19.
[33] Sections 20(1)–(6).
[34] Section 20(7).
[35] Section 28(3).

b) Te Karewao

The Act also established Te Karewao, an advisory group comprised of representatives appointed by local interest groups whose role ss to provide Te Pou Tupua with advice and support.[36] Te Karewao is comprised of three members, one appointed by the trustees, one appointed by the iwi with interests in the Whanganui River, and one appointed by relevant local authorities.[37]

c) Te Kōpuka

Te Kōpuka, a strategy group responsible for furthering the health and well-being of Te Awa Tupua.[38] Te Kōpuka consists of 17 representatives of iwi, central and local government, and local interest groups.[39] Te Kōpuka's prupose is to develop and approve Te Heke Ngahuru,[40] and act as a permanent joint committee for the administrative purposes of the local Regional and District Councils.[41] Te Heke Ngahuru is a strategy document developed to direct the environmental, social, cultural and economic health and well-being of Te Awa Tupua.[42] Te Heke Ngahuru will be developed through a collaborative, public process by Te Kōpuka, and reviewed every 10 years.

d) Interaction with other official bodies

The Te Awa Tupua Act also applies to officials who performing functions under a select number of acts.[43] Most notably, this includes the local councils considering resource consent applications under the Resource Management Act 1991. This means that when council considers that a resource consent is related to the Whanganui River, the council must have "particular regard" to the Te Awa Tupua Act.[44] If the exercise of a function

[36] Sections 27–28.
[37] Section 28.
[38] Sections 29–30.
[39] Section 32.
[40] Section 30.
[41] Section 33.
[42] Section 36.
[43] Section 37.
[44] Section 37.

requires a decision, document or report, said result must include a statement which describes how particular regard was given to the status and intrinsic values of Te Awa Tupua.[45]

B Does the Model Give Effect to the Treaty?

As previously established, Atihaunui were guaranteed full, exclusive and undisturbed possession under article two of the Treaty. The Crown breached their obligations under the Treaty by removing the Whanganui River from Atihaunui's possession without their full and free consent, and subsequently failing to protect Atihaunui's rangatiratanga over the Whanganui River.[46] Giving effect to the Treaty would therefore require that Atihaunui regain possession of the Whanganui River, and that their right to exercise rangatiratanga over the Whanganui River is protected by the Crown.

At first glance, Te Awa Tupua appears to be designed to give effect to the Treaty. The Act explicitly recognises the relationships that Whanganui iwi have with Te Awa Tupua in a way that is distinctively Māori and includes acknowledgements by the Crown that there has been a breach of the Treaty.[47] Yet, Te Awa Tupua as a co-governance model does not return possession of the Whanganui River to Atihaunui. The Te Awa Tupua Act vests ownership of the Whanganui River in Te Awa Tupua itself. It is however arguable that Atihaunui could have rights akin to possession of the Whanganui River if they have a high degree of control over the management of Te Awa Tupua. Giving effect to rangatiratanga would also require a high degree of control, including the power to make decisions regarding the Whanganui River. The remainder of this section argues that degree of power granted to Atihuanui does not meet the standard of possession or rangatiratanga.

Te Kōpuka, the board responsible for developing and approving Te Heke Ngahuru, is comprised of 17 representatives, including representatives of commercial entities such as

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[45] Section 15.

[46] See Waitangi Tribunal, above n 16.

[47] Linda Te aho "Ruruku Whakatupua Te Mana o te Awa Tupua — Upholding the Mana of the Whanganui River" (2014) Māori L Rev 12(20).

Genesis Energy Ltd.[48] Whanganui iwi with interests in the River may only appoint up to 5 representatives, and they therefore do not comprise a majority.[49] While Te Heke Ngahuru is supposed to be approved by consensus, this does not guarantee that the interests of Whanganui iwi will have primacy over the interests of other representatives.

Even if Whanganui iwi did have the power to develop and approve Te Heke Ngahuru alone, the strategy has limited legal effect. Officials administrating a limited number of acts, such as the Resource Management Act,[50] must only have "particular regard to" Te Heke Ngahuru when they believe a decision will affect the Whanganui River.[51] This reduces the potential impact of the strategy in two ways. First, because officials who reasonably believe their function does not relate to the Whanganui River even when it does in fact, is not required to consider Te Heke Ngahuru. Second, because even when an official does believe their function relates to the Whanganui River, particular regard does not require compliance. This means if an official gives greater weight to other considerations, Te Heke Ngahuru may not have any effect at all.

Moreover, Te Pou Tupua has restricted agency over the resource consent process. The consent of Te Pou Tupua is not required for a successful resource consent application; however, the consent authority *may* determine that Te Pou Tupua is an affected person for the purposes of the Resource Management Act, and Te Pou Tupua consent *may* be required in relation to the bed of the Whanganui River.[52] Te Pou Tupua therefore faces the same vulnerabilities as Te Heke Ngahuru. Where some other commercial or political interest is deemed more significant than the views of Te Pou Tupua, local councils may grant resource consent for activities which are contrary to the interests of Whanganui iwi.[53]

While the required standard is subjective, the Act does ensure a degree of accountability. Section 15(6) of the Te Awa Tupua Act requires that when officials perform

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[48] Te Awa Tupua Act, above n 3, s 32(1).

[49] Section 32(1)(b).

[50] Schedule 2 Paragraph 1.

[51] Section 37.

[52] Section 46(3).

[53] Resource Management Act 1991, s 104.

a function where they may have 'particular regard' for Te Awa Tupua, and that function results in a decision, document, or report, that they must include a statement which explains how they have given particular regard to Te Awa Tupua. This means that there is some pressure on public officials to weigh the interests of Te Awa Tupua highly, as Te Pou Tupua may apply for a judicial review of any decisions which fail to have particular regard for Te Awa Tupua.[54] However even with the potential accountability of judicial review, the model does not give effect to the Treaty. A model which protects rangatiratanga would give iwi the power to make decisions which impact their taonga, such as to approve a resource consent application which concerns the Whanganui River or Riverbed. Indeed, this is what the Waitangi Tribunal recommended in their report.[55]

C Evaluation

While the legal personality model gives Whanganui iwi better access to their taonga than they had prior to settlement, it is clear that the Crown's concern about the political reaction to Māori gaining rights to water majorly limited the authority they were willing to give Whanganui iwi, thereby preventing the model from giving effect to the Treaty. This is an example of how the settlement process can place pressure on Māori to accept settlements which do not provide adequate redress for financial and political losses they have experienced as a result of Treaty breaches. As Margaret Mutu explains, the Crown retains full control over the process, which often forces Māori to take offers which are unfavourable as the Crown is unwilling to make significant concessions.[56]

However, evidence suggests that although the model does not give effect to the Treaty, it has still produced positive outcomes.[57] A study which investigated the extent to which the Te Awa Tupua Act has changed decision-making for activities that affect the Whanganui River found that the Act had made four substantive changes to decision-making

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[54] Te Awa Tupua Act, above n 3, s 18(3).

[55] Waitangi Tribunal, above n 16, at 343.

[56] Margaret Mutu "The Treaty Claims Settlement Process in New Zealand and Its Impact on Māori" (2019) Land 8(10) 152 at 162.

[57] Emily Ireland "Legal personhood of the Whanganui Awa: To what extent has the Te Awa Tupua Act 2017 influenced decision-making for activities that affect the Whanganui River?" (MPlan Thesis, Lincoln University, 2021) at 65.

processes. First, participants recognised the need to partner with Whanganui iwi before beginning any activity that relates to the Whanganui River.[58] Second, participants reported the Act had informed their cultural knowledge base, enhanced cultural growth, and the understanding of the Whanganui iwi's relationship with the River.[59] Third, participants reported that the change enhanced the scope and purpose of activities, pushing actors to clarify what they were trying to achieve.[60] Finally, participants reported that they believed that slowing down the process had led to better decision-making.[61] Exercising rangatiratanga requires that Māori have the sovereignty to make decisions for themselves. This includes being able to make strategic decisions to achieve the most desirable outcomes for taonga. At present Te Awa Tupua does not give effect to the Treaty, but by increasing respect for the Te Awa Tupua as an entity amongst the community, the model promotes the health and well-being of the Whanganui River as a taonga, which as was discussed in the Waitaingi Tribunal Report, was the ultimate goal of Whanganui iwi.[62]

IV Conclusion

Te Awa Tupua as a co-governance model demonstrates that the Crown is unwilling to reconcile its political interest with its obligations under the Treaty. Neither possession nor rangatiratanga were restored under the settlement as the Crown's primary consideration was the political reaction to granting Māori proprietary rights to water bodies. While Te Awa Tupua does not give effect to the Treaty, this does not mean that the legal personality model is incapable of giving effect to the Treaty in other settlements. Other examples of natural features that have been granted legal personality, such as Te Urewera, better give effect to the Treaty as the bodies who act on behalf of the legal person give iwi significantly more power.[63] Te Awa Tupua's failure to give effect to the Treaty is certainly concerning, but it does not mean the model is incapable of producing

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[58] At 65.

[59] At 65.

[60] At 65.

[61] At 65.

[62] Waitangi Tribunal, above n 16, at 1.

[63] See Te Urewera Act, above n 3.

positive outcomes for the Whanganui River as a taonga, which is the ultimate goal of Whanganui iwi.