GIVING A VOICE TO THE RIVER AND THE ROLE OF INDIGENOUS PEOPLE: THE WHANGANUI RIVER SETTLEMENT AND RIVER MANAGEMENT IN VICTORIA

KATIE O'BRYAN*

I INTRODUCTION

In September 2017, the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* was passed by the Victorian Parliament. Described by the government as 'Landmark Legislation' and 'an Australian first', an essential element of the Act is the creation of the Birrarung Council, a statutory body to be the 'independent voice for the river'.[1] Of significance for Indigenous involvement in river management is the mandatory requirement for Traditional Owner representation on the Council.[2]

This development in river management, although new to Victoria, has some parallel with recent developments in Aotearoa New Zealand, namely the Whanganui River Treaty Settlement. In this settlement, the Whanganui River has been granted legal personality, the embodiment of that legal personality being in the form of a statutory river guardian containing Māori representation, to be the 'independent voice' of the river.[3] But giving an independent voice to the environment (or an element thereof) may already have begun to enter the Victorian consciousness in the guise of the Victorian Environmental Water Holder ('VEWH'), with the main point of departure being a lack of mandated Indigenous representation on the VEWH.

This article considers the Whanganui River Treaty Settlement, and in particular the granting of legal personality to the River as embodied in a guardian, and with all of the associated legal rights and responsibilities of a legal entity. It critically analyses various merits and weaknesses identified in the settlement to ascertain whether it enhances Māori participation in river management, and can therefore provide a useful model for Victorian Traditional Owners. An important related question is whether this new model is indicative of wider changes to water governance, or merely the creation of just another voice in the already crowded

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* Dr Katie O'Bryan is a Lecturer in the Monash University Law Faculty.

1 Richard Wynne, 'Landmark Legislation to Protect the Yarra River' (Media Release, 22 June 2017) <http://www.premier.vic.gov.au/landmark-legislation-to-protect-the-yarra-river>.

2 *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 49(1)(a).

3 Christopher Finlayson, 'Whanganui River Deed of Settlement Signed' (Media Release, 5 August 2014) <https://www.beehive.govt.nz/release/whanganui-river-deed-settlement-signed>.

water management debate. Can the guardianship model embrace the concept of Indigenous representation in river management, given that they are conceptually quite different? In that respect, this article argues that this particular guardianship model does not fundamentally change the water governance system, but gives an additional, albeit indirect, voice to Māori, a voice which emphasises Māori river values. The article then considers, by way of comparison with the Whanganui River guardianship model, whether the VEWH is reflective of a move towards a more independent management model, akin to an environmental guardian. Finally, this article examines the potential application of this guardianship model to individual rivers in Victoria, identifying five key issues that would need to be considered.

A The River as a Legal Entity

On 30 August 2012 the Aotearoa New Zealand Government announced that it had reached a framework agreement with the negotiators for the Whanganui Iwi for the settlement of its long-running claim to the Whanganui River.[4] In what was seen as an innovative development in water management in not only Aotearoa New Zealand but internationally, this framework included an in-principle agreement to give legal personality to the Whanganui River, with the associated river guardian to be the voice of the River. That in-principle agreement has now been transformed into the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ), and was passed by the New Zealand Parliament in March 2017.[5]

The concept of giving legal personality to a natural object has existed in theory since Christopher D Stone's seminal article of 1972, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects'[6] In the context of improving environmental protection, the basic idea behind Stone's concept is that many inanimate entities such as corporations and trusts have legal personality which gives them legal rights,[7] and therefore, why not extend this to natural objects, such as trees and rivers? He suggests that those rights can be protected by the appointment of a guardian, who can then represent the natural object in court proceedings (standing).[8]

Stone's concept has started to gain traction in recent years; in 2008 the rights of nature, or 'Pacha Mama' [Mother Earth], were recognised in Ecuador's *Constitution*.[9] In 2010 the World People's Conference on Climate Change and the

4 Christopher Finlayson, 'Whanganui River Agreement Signed' (Media Release, 30 August 2012) <http://.beehive.govt.nz/release/whanganui-river-agreement-signed>.

5 The bill had its third reading speech on 14 March 2017 and received Royal Assent on 20 March 2017.

6 Christopher Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450 (''Should Trees Have Standing?' (1972)'). See also, Christopher Stone, 'Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective' (1985) 59 *Southern California Law Review* 450; Christopher Stone, *Should Trees Have Standing?: Law, Morality and the Environment* (Oxford University Press, 3rd ed, 2010); Anna Grear (ed) *Should Trees Have Standing?: 40 Years On* (Edward Elgar, 2012).

7 Stone, 'Should Trees Have Standing?' (1972), above n 6, 452.

8 Ibid 464 ff.

9 *Constitución de la República del Ecuador 2008* [Constitution of the Republic of Ecuador 2008] arts 10, 71–74 <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

Rights of Mother Earth adopted the *Universal Declaration of the Rights of Mother Earth*.[10] That same year Bolivia enacted the *Law of the Rights of Mother Earth* [Ley de Derechos de la Madre Tierra].[11] And in 2012 the International Union for the Conservation of Nature adopted a resolution which noted the Declaration from the World People's Conference and called on the United Nations to develop a Universal Declaration of its own.[12]

But Aotearoa New Zealand was the first country to give legal personality to a specific natural object.[13] This has ostensibly introduced a new type of governance structure for natural objects in Aotearoa New Zealand, one which is clearly focussed on the environment, but an environment which is shaped by and reflective of Māori concepts and values. In that respect, this particular version of Stone's original concept takes a much more holistic approach to environmental protection, one which acknowledges the intrinsic relationship which Indigenous people have with the environment. Therein lies the significance of the Whanganui River Treaty Settlement; it is an opportunity to observe whether this new legal entity for natural objects and its associated guardianship governance structure can deliver not only environmental outcomes, but also on Indigenous (Māori) aspirations for the management of water resources. If so, it has the potential to be adapted beyond the shores of Aotearoa New Zealand to other countries, such as Australia.

B The Limits of a Comparative Analysis

There are, of course, limits to comparing the legislative and policy framework of one country with another in order to see whether it can, in fact, be adapted. This type of comparison is generally referred to as policy transfer, or lesson-drawing, and it is beyond the scope of this article to canvass its limits here.[14] However there

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10 *Universal Declaration of the Rights of Mother Earth* (World People's Conference on Climate Change and the Rights of Mother Earth, Global Alliance for the Rights of Nature, 22 April 2010) <http://therightsofnature.org/universal-declaration>.

11 *Ley de Derechos de la Madre Tierra* [Law of the Rights of Mother Earth] (Bolivia) Plurinational Legislative Assembly, Law 71, 21 December 2010 <http://www.lse.ac.uk/GranthamInstitute/law/the-rights-of-mother-earth-law>.

12 International Union for the Conservation of Nature, *Incorporation of the Rights of Nature as the Organizational Focal Point in IUCN's Decision Making*, Res 100, World Conservation Congress, WCC-2012-Res-100-EN (6–15 September 2012) cl 4 <https://portals.iucn.org/library/node/44067>.

13 The potential application in Aotearoa New Zealand of the concept had been advocated in the 1990s by Alex Frame: Alex Frame, 'Property and the *Treaty of Waitangi*: A Tragedy of the Commodities?' in Janet McLean (ed), *Property and the Constitution* (Hart, 1999) 237. See also James DK Morris and Jacinta Ruru, 'Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?' (2010) 14 *Australian Indigenous Law Review* 49, 56. The concept has also appeared in relation to the Te Urewera National Park in the settlement of the historical *Treaty* claims of Tūhoe: *Te Urewera Act 2014* (NZ). And on 22 March 2017, the Uttarakhand High Court in India recognised the Ganga and Yamuna Rivers as living entities: Anupam Trivedi and Kamal Jagati, 'Uttarakhand HC Declares Ganga, Yamuna Living Entities, Gives Them Legal Rights', *Hindustani Times* (online), 22 March 2017 <http://www.hindustantimes.com/india-news/uttarakhand-hc-says-ganga-is-india-s-first-living-entity-grants-it-rights-equal-to-humans/story-VoI6DOG71fyMDihg5BuGCL.html>.

14 For more information on policy transfer and lesson-drawing, see generally, Richard Rose, 'What is Lesson-Drawing?' (1991) 11 *Journal of Public Policy* 3, David Dolowitz and David Marsh, 'Who Learns What from Whom: A Review of the Policy Transfer Literature' (1996) 44 *Political Studies* 343; David Dolowitz and David Marsh, 'Learning from Abroad: The Role of Policy Transfer in Contemporary

are various features of Aotearoa New Zealand's political system which are likely to have had a bearing on the ability of the Whanganui Iwi to negotiate such a settlement. These differences must be borne in mind when evaluating whether a similar management structure could be feasible in Victoria.

In short, Māori have had a much stronger voice in the development of Aotearoa New Zealand's water management regime, at least in more recent times, compared with Indigenous people in Victoria's (and Australia's) water management regime. This can be attributed to a number of factors, the *Treaty of Waitangi* ('*Treaty*') and the Waitangi Tribunal being of particular influence in that regard. But there are other factors, such as the greater power of the Māori vote,[15] with people of Māori ethnicity constituting 14.9 per cent of Aotearoa New Zealand's population,[16] compared with Victoria, in which Aboriginal people comprise approximately 0.7 per cent of the population.[17] Aotearoa New Zealand's political structure has also contributed to a stronger voice for Māori, as it provides for designated Māori representation in parliament.[18]

C Māori and Water Management

The features noted above all played an important role in the development of the *Resource Management Act 1991* (NZ) ('*RMA*'), Aotearoa New Zealand's primary statute governing the management of water resources. The *RMA* was a major reform of Aotearoa New Zealand's resource management regime, affecting

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Policy-Making (2000) 13 *Governance: An International Journal of Policy and Administration* 5, David Benson and Andrew Jordan, 'What Have We Learned from Policy Transfer Research? Dolowitz and Marsh Revisited' (2011) 9 *Political Studies Review* 366. For policy transfer specifically in the context of water, see Rebecca Swainson and Rob C de Loe, 'The Importance of Context in Relation to Policy Transfer: A Case Study of Environmental Water Allocation in Australia' (2011) 21 *Environmental Policy and Governance* 58.

15 Voting is not compulsory in Aotearoa New Zealand, although it is a legal requirement to register to vote: Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government* (Oxford University Press, 4th ed, 2004) 23. New Zealanders were once world leaders in exercising their right to vote, however participation rates have decreased from a high of 89 per cent in 1981 to 69 per cent in 2011: Electoral Commission (NZ), 'Voter Participation Strategy' (15 July 2013) 1.

16 Statistics New Zealand, '2013 Census Quick Stats about Māori' (December 2013) 5 <http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-maori-english.aspx>. That figure rises to 17.5 per cent for people with Māori ancestry: at 6. About 60 per cent of the Māori population are of voting age: Statistics New Zealand, *Māori Population Estimates: Mean Year Ended 31 December 1991–2013 – Table 1: Total Māori Estimated Resident Population of New Zealand: By Single-Year of Age, Five-Year Age Group, Broad Age Group and Median Age, 1991–2013* (31 December 2013) <http://stats.govt.nz/~/media/Statistics/browse-categories/population/estimates-projections/maori-pop-estimates/maori-pop-ests-mye31Dec-1991-2013.xls>.

17 Australian Bureau of Statistics, *2076.0 – Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011 – Population Distribution and Structure* (28 November 2012) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0main+features1102011>.

18 Māori representation was a feature first introduced in 1867 on a temporary basis but made permanent in 1876: Electoral Commission (NZ), *Māori Representation* (8 February 2013) <http://www.elections.org.nz/māori-and-vote/māori-representation>. There were initially four Māori electorates, but following the introduction of the mixed-member proportional system in 1993, that number has risen to seven: Electoral Commission (NZ), *Māori Representation* (20 October 2014) <http://www.elections.org.nz/voting-system/maori-representation>.

over 50 statutes and repealing a number of major pieces of legislation,[19] including legislation relating to water. It was seen as ground-breaking at the time for combining the management of land, water and air into the one statute and was considered to be 'the largest law reform exercise in New Zealand's history'.[20] It was also seen as revolutionary due to the extensive participation of Māori in its development, and the subsequent recognition of Māori interests in its provisions. Despite making some inroads, the *RMA* has not lived up to its initial promise in terms of Māori participatory rights.

Due to the inadequacies of the *RMA*, Māori have turned to *Treaty* settlements to achieve their aspirations for water management.[21] One of the earliest of these was the Ngāi Tahu Settlement pursuant to which the title of the bed of Te Waihora/Lake Ellesmere was vested in Te Rūnanga o Ngāi Tahu.[22] Importantly, as far as the management of water resources is concerned, Te Rūnanga o Ngāi Tahu can enter into an agreement with the Minister to prepare a joint management plan ('JMP') for the integrated management of the bed of Te Waihora and the natural and historic resources of the area.[23] A JMP was approved for Te Waihora in late 2005,[24] being 'the first statutory joint management plan between the crown and Iwi'.[25]

More recently, in 2010 the New Zealand Government implemented the Waikato River Settlement.[26] The key aspects of this settlement are: a vision and strategy document having special and unique legislative status as the primary, direction-setting document for the river; a single co-governance entity, the Waikato River Authority ('WRA'); and joint management agreements.[27]

The Waikato River Settlement (and in particular the features noted above) was seen as a milestone in Aotearoa New Zealand in the way it dealt with Māori interests in water management. 'Heralded as revolutionary',[28] it was described as a 'bold vision' containing 'groundbreaking provisions', and an 'innovative

19 Derek Nolan (ed), *Environmental and Resource Management Law* (5th ed, LexisNexis, 2015) 113.
20 Ministry for the Environment, *Your Guide to the Resource Management Act* (August 2006) 5.
21 Linda Te Aho, 'Indigenous Aspirations and Ecological Integrity: Restoring and Protecting the Health and Wellbeing of an Ancestral River for Future Generations in Aotearoa New Zealand' in Laura Westra, Klaus Bosselmann and Colin Soskolne (eds), *Globalisation and Ecological Integrity in Science and International Law* (Cambridge Scholars, 2011) 346, 352; Samuel George Wevers, 'Recognising Rangatiratanga through Co-management: The Waikato River Settlement' [2013] *New Zealand Law Review* 689, 710–11.
22 *Ngāi Tahu Claims Settlement Act 1998* (NZ) s 168.
23 *Ngāi Tahu Claims Settlement Act 1998* (NZ) s 177.
24 Te Rūnanga o Ngāi Tahu and Department of Conservation, 'Te Waihora Joint Management Plan – Mahere Tukutahi o Te Waihora' (10 December 2005).
25 Department of Conservation (NZ), *Te Waihora Joint Management Plan* (December 2005) <http://www.doc.govt.nz/about-us/our-policies-and-plans/statutory-plans/statutory-plan-publications/conservation-management-plans/te-waihora-joint-management-plan>.
26 *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* (NZ).
27 Christopher Finlayson, 'Waikato River Deed of Settlement Signed with Waikato-Tainui' (Media Release, 17 December 2009) <http://www.beehive.govt.nz/release/waikato-river-deed-settlement-signed-waikato-tainui>.
28 Jacinta Ruru, 'Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand' (2013) 22 *Pacific Rim Law & Policy Journal* 311, 334 ('Indigenous Restitution').

approach towards managing the country's longest and most economically significant river'.[29]

The Waikato River Settlement built considerably on previous settlements involving water bodies, such as the Ngāi Tahu Settlement regarding Te Waihora noted earlier. However it is arguably the Whanganui River Settlement which has truly revolutionised the face of water management for Māori in Aotearoa New Zealand. It is therefore the focus of this article.

II THE WHANGANUI RIVER SETTLEMENT

A Background to the Whanganui River Settlement

The Whanganui River is Aotearoa New Zealand's longest navigable river and is of significant national importance.[30] Its importance in particular to the Whanganui Iwi is reflected in their ongoing struggle for well over a century to have their rights and interests in the Whanganui River recognised,[31] including one of the longest running legal battles in Aotearoa New Zealand's history.[32] Despite losing this legal battle, the Whanganui Iwi continued to pursue various legal proceedings, eventually lodging a claim before the Waitangi Tribunal in 1990.[33] The Tribunal heard the section of the claim which related specifically to the river in 1994, and produced its final report on the river in 1999.[34] The Tribunal recommended various options in its report for consideration in future negotiations, none of which were explicitly adopted in the settlement. But there can be little doubt that the content of the report and the findings of the Tribunal were influential.[35]

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29 Jeremy Baker, 'The Waikato-Tainui Settlement Act: A New High-Water Mark for Natural Resources Co-management' (2013) 24 *Colorado Journal of International Environmental Law and Policy* 163, 165.

30 'Whanganui River Settlement: Ratification Booklet for Whanganui Iwi' (2014) 13 ('*Ratification Booklet*') <http://www.wrmtb.co.nz/new_updates/Whanganui_River_Settlement_Ratification_2014_v2.pdf>; Whanganui Iwi and the Crown, 'Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui' (5 August 2014) 6 ('*Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui*') <http://www.wrmtb.co.nz/new_updates/RurukuWhakatupua-TeManaoTeIwioWhanganui.pdf>.

31 Although evidence of Māori assuming control of the river dates back to before 1860, formal objections and protests began in 1873 with a parliamentary petition against the Timber Floating Bill: Waitangi Tribunal, 'Whanganui River Report' (1999) 4 ('*Whanganui River Report*').

32 Elaine C Hsiao, 'Whanganui River Agreement – Indigenous Rights and Rights of Nature' (2012) 42 *Environmental Policy and Law* 371, 372; *Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui*, above n 30, 35. An extensive discussion of the legal battle is contained in the *Whanganui River Report*, above n 31, 195–232.

33 *Whanganui River Report*, above n 31, 5–6.

34 Ibid 9.

35 The in-principle framework agreement between the Whanganui Iwi and the Crown refers to various findings of the Tribunal: Whanganui Iwi and the Crown, 'Tūtohu Whakatupua' (30 August 2012) <http://www.wrmtb.co.nz/new_updates/TuutohuWhakatupuaFinalSigned.pdf> ('*2012 Framework Agreement*').

Negotiations between the Whanganui Iwi[36] and the Crown to settle the Whanganui Iwi's historical *Treaty* claim to the river commenced in 2002.[37] Following the signing of an in-principle framework agreement in August 2012, negotiations continued and on 26 March 2014 the New Zealand Government announced that a Deed of Settlement had been initialled by the negotiators.[38] This signified the end of substantive negotiations. After ratification by Whanganui Iwi members,[39] the Deed of Settlement was signed on 5 August 2014.[40] The Deed of Settlement comprised two documents. The first, *Ruruku Whakatupua – Te Mana o Te Awa Tupua*,[41] related to the recognition of the Whanganui River as a legal entity. The second, *Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui*,[42] contained all of the other elements of the settlement.

Although it was initially hoped that settlement legislation would be enacted in 2015,[43] it was not until 2 May 2016 that the Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016 (NZ) was introduced into the New Zealand Parliament, finally becoming law in March 2017.

B Summary of the Settlement

The *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ('*Te Awa Tupua Act*') provides for the recognition of the Whanganui River as a legal person, Te Awa Tupua, pursuant to what has been described here and by other commentators as a guardianship model,[44] being the model espoused by Stone. But where this approach differs from Stone's model is that it incorporates a distinctively Māori worldview, a view in which Māori see rivers as the embodiment of their ancestors, 'tupuna'.[45] Māori terminology is therefore used

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36 The Whanganui Iwi were represented in negotiations by the Whanganui River Māori Trust Board.

37 Whanganui Iwi and the Crown, 'Record of Understanding' (13 October 2011) [1.16] <http://www.wrmtb.co.nz/new_updates/Record%20of%20Understanding%202012.pdf>. Although those negotiations ended unsuccessfully, by 2011 the parties had signed a Record of Understanding, in which they 'agreed to enter into formal negotiations to settle the historical *Treaty* claims of Whanganui Iwi in relation to the Whanganui River': at [1.25].

38 Christopher Finlayson, 'Whanganui River Deed of Settlement Initialled' (Media Release, 26 March 2014) <http://www.beehive.govt.nz/release/whanganui-river-deed-settlement-initialled>.

39 Following the initialling of the Deed of Settlement, eight ratification hui were held in June 2014 at various locations throughout New Zealand to provide information about the proposed settlement, including post governance arrangements: *Ratification Booklet*, above n 30, 68. Voting took place between 13 June and 11 July 2014: at 69. Over 95 per cent of those who voted, voted in support of the settlement: Whanganui River Māori Trust Board, 'Whanganui River Settlement – Ratification Results' <http://www.wrmtb.co.nz/Ratification%20Results%20Panui.pdf>.

40 Christopher Finlayson, 'Whanganui River Deed of Settlement Signed' (Media Release, 5 August 2014) <http://www.beehive.govt.nz/release/whanganui-river-deed-settlement-signed>.

41 Whanganui Iwi and the Crown, 'Ruruku Whakatupua – Te Mana o Te Awa Tupua' (5 August 2014) <http://www.wrmtb.co.nz/new_updates/Ruruku_Whakatupua_Te_Mana_o_Te_Awa_Tupua_Signed5August%202014.pdf> ('*Ruru Whakatupua – Te Mana o Te Awa Tupa*').

42 *Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui*, above n 30.

43 *Ratification Booklet*, above n 30, 69.

44 Ruru, 'Indigenous Restitution', above n 28, 341; Meg Good, 'The River as a Legal Person: Evaluating Nature Rights-Based Approaches to Environmental Law' (2013) 1 *National Environmental Law Review* 34, 35; Tom Barraclough, *How Far Can the Te Awa Tupua (Whanganui River) Proposal Be Said to Reflect the Rights of Nature in New Zealand?* (LLB(Hons) Thesis, University of Otago, 2013) 23.

45 For more on the Māori world view of rivers, see generally, *Whanganui River Report*, above n 31, 36 ff.

throughout the settlement documents and in the *Te Awa Tupua Act*, and is the terminology used primarily in this article. This is deliberate, inviting the non-Māori reader to engage with what may be unfamiliar terminology so that it becomes familiar.

Under the Whanganui River model, the guardian of Te Awa Tupua is Te Pou Tupua; 'the human face of Te Awa Tupua'.[46] Te Pou Tupua is comprised of two people, one nominated by the Crown and one nominated by the Whanganui Iwi.[47] Once appointed to Te Pou Tupua, they will act collectively on behalf of Te Awa Tupua, not on behalf of their nominators.[48]

In undertaking its functions,[49] Te Pou Tupua must uphold the four intrinsic values of Te Awa Tupua,[50] which are known as Tupua te Kawa.[51] It is in Tupua te Kawa where one finds the embodiment of the Māori world view.

Any person exercising functions under 25 named statutes[52] 'must recognise and provide for' the Te Awa Tupua status as a legal person, and for Tupua te Kawa.[53] Three statutes are singled out for differential treatment: the *Heritage New Zealand Pouhere Taonga Act 2014* (NZ), the *Public Works Act 1981* (NZ) and the *RMA*.[54] Any person exercising powers under these three Acts must 'have particular regard to' the Te Awa Tupua status and Tupua te Kawa.[55] '[R]ecognise and provide for' has been interpreted by the courts as being stronger than the phrase 'have particular regard to'.[56] Therefore this means that there is a lesser standard required of decision-makers under these three Acts.

One of the functions of Te Pou Tupua is to enter into relationship documents with Crown agencies and local authorities concerning various matters of mutual interest, including (in relation to local authorities) the exercise of functions and powers in relation to the granting of consents relating to the Whanganui River.[57] It is also assisted by an advisory group of three, known as Te Karewao, of which two are Māori.[58]

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46 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 18(2) ('*Te Awa Tupua Act*'). The term 'guardian' does not appear in the *Te Awa Tupua Act*. However, it was used in the 2012 Framework Agreement to describe Te Pou Tupua: *2012 Framework Agreement*, above n 35, cls 2.1.5, 2.8.2, 2.18.

47 *Te Awa Tupua Act* ss 20(1)–(2).

48 *Te Awa Tupua Act* s 19(2)(a).

49 *Te Awa Tupua Act* s 19(1).

50 *Te Awa Tupua Act* ss 19(1)(b)(ii), (2)(a).

51 *Te Awa Tupua Act* s 13.

52 *Te Awa Tupua Act* sch 2 cl 1.

53 *Te Awa Tupua Act* s 15(2).

54 Insofar as it does not apply to preparing or changing a regional policy statement, regional plan or district plan made under the *RMA*, which are covered in s 15(2) and therefore must be recognised and provided for.

55 *Te Awa Tupua Act* s 15(3).

56 *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496, [89]. See also Part II C(i)d.

57 *Te Awa Tupua Act* s 19(1)(h). The details are set out in *Ruruku Whakatupua – Te Mana o Te Awa Tupua*, above n 41, cls 3.36–3.42.

58 *Te Awa Tupua Act* s 28(1). One member is appointed by the trustees (defined in s 7 as the trustees of Ngā Tāngata Tiaki o Whanganui), one by other iwi with interests in the Whanganui River, and one by relevant local authorities. '[I]wi with interests in the Whanganui River' is defined in s 7. An additional member can be appointed to represent specific iwi interests where Te Pou Tupua is exercising a function relating to a discrete part of the River: s 28(2).

An important element of the legal framework for Te Awa Tupua is the preparation of the Te Awa Tupua Strategy – Te Heke Ngahuru ki Te Awa Tupua ('Te Heke Ngahuru') to identify issues relating to the Whanganui River, provide a strategy to address those issues, and recommend actions to be taken.[59] Te Heke Ngahuru will be prepared by a strategy group, known as Te Kōpuka nā Te Awa Tupua ('Te Kōpuka').[60] Because the purpose of Te Kōpuka is intended to be collaborative,[61] the group will be relatively large, comprising up to 17 members, one appointed by the trustees (of Ngā Tāngata Tiaki o Whanganui) and up to five members appointed by the iwi with interests in the Whanganui River.[62] Further, in performing its functions, Te Kōpuka must 'have particular regard to' the Te Awa Tupua status and Tupua te Kawa.[63]

The legal effect of Te Heke Ngahuru is that any person exercising functions, duties or powers under any of the 26 named statutes must 'have particular regard to' it.[64] As mentioned above, this is a lesser requirement on decision-makers than 'recognise and provide for', thus the implementation of its recommended actions is not inevitable. However, if one considers the role of regional and district plans in relation to applications for resource consents under the *RMA*, Te Heke Ngahuru is in a better position than these documents, to which decision-makers are only required to 'have regard'. The *Te Awa Tupua Act* also provides that decision-makers may adopt (in whole or in part) Te Heke Ngahuru as part of an *RMA* planning document, namely a regional policy statement, regional plan or district plan.[65] Accordingly, decision-makers must have particular regard to Te Heke Ngahuru as a stand-alone document, but may also be required to have regard to it, if it is adopted as part of an *RMA* planning document. It is not, however, as important in the *RMA* hierarchy as, for example, the Waikato River Vision and Strategy, because it does not prevail over any inconsistent provisions in a planning or policy document issued under the *RMA*,[66] nor does the Act mandate that *RMA* planning documents be amended to conform with Te Heke Ngahuru.[67] It is merely discretionary.

The *Te Awa Tupua Act* also provides for the vesting in Te Awa Tupua of that part of the bed of the Whanganui River currently owned by the Crown,[68] and the establishment of a fund to support the health and well-being of Te Awa Tupua.[69]

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59 *Te Awa Tupua Act* s 36.
60 *Te Awa Tupua Act* s 30(1).
61 The purpose of Te Kōpuka is 'to act collaboratively to advance the health and well-being of Te Awa Tupua': *Te Awa Tupua Act* s 29(3).
62 *Te Awa Tupua Act* s 32(1). The remaining appointees are a combination of local authorities, various interest groups and an appointee from the Director General of Conservation.
63 *Te Awa Tupua Act* s 30(3).
64 *Te Awa Tupua Act* s 37(1)–(2). Note that the 26 statutes include the *RMA* (without qualification) and the *Heritage New Zealand Pouhere Taonga Act 2014* (NZ). It would appear that the remaining statute listed in sch 2, the *Public Works Act 1981* (NZ), is exempt.
65 *Te Awa Tupua Act* s 37(5)–(6).
66 *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* (NZ) s 12(1).
67 *Te Awa Tupua Act* s 38.
68 *Te Awa Tupua Act* s 41.
69 *Te Awa Tupua Act* s 57.

Te Pou Tupua also maintains a registry of hearing commissioners for the purposes of resource consent applications relating to the Whanganui River.[70]

Other arrangements include the protection of the name of Te Awa Tupua,[71] the deeming of Te Awa Tupua as a public authority under the *RMA*,[72] and as a body corporate so that it can make an application to be a heritage protection authority ('HPA') under the *RMA*.[73]

The *Te Awa Tupua Act*, however, does not create, limit, transfer, extinguish, or otherwise affect any rights to, or interests in, water.[74] Nor does the vesting of the Crown-owned parts of the bed of the Whanganui River in Te Awa Tupua create or transfer a proprietary interest in water.[75] Further, the consent of Te Pou Tupua is not required to use water, although a consent authority may determine that Te Pou Tupua is an affected person for the purpose of applications for resource consents relating to water, which gives it certain procedural rights under the *RMA*.[76]

This is a reflection of clause 9.3 of the Deed of Settlement in which the Crown emphasised its position that no one owns water, and in which the Whanganui Iwi emphasised its view that its rights and responsibilities in relation to water include interests of a proprietary nature.[77] Because of these opposing positions, the parties then agreed that the 'settlement is not intended to derogate from the freshwater policy review process nor is it intended to resolve the issue of rights and interests in water'.[78]

Finally, existing private property rights will not be affected by the vesting of the Crown-owned parts of the bed of the Whanganui River in Te Awa Tupua,[79] nor will customary rights or title.[80]

Focussing on what has been described above, this article now considers what had been said about the Whanganui River Settlement at the time of the in-principle agreement in 2012, as this was the point in time when it attracted the most commentary.

C Critique of the Settlement and the River as a Legal Entity

The commentary on the Whanganui River Settlement was mostly positive regarding the granting of legal personality to the Whanganui River, particularly insofar as Māori are concerned. No one, it would appear, considered it to be a retrograde step in that respect. Various deficiencies were identified but generally

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70 *Te Awa Tupua Act* ss 19(1)(f), 61.
71 *Te Awa Tupua Act* s 60.
72 *Te Awa Tupua Act* s 17(e).
73 *Te Awa Tupua Act* s 17(f).
74 *Te Awa Tupua Act* s 16(b).
75 *Te Awa Tupua Act* s 46(1)(a).
76 An affected person is determined pursuant to s 95E of the *RMA*. This entitles them to be notified about and put in submissions about resource consent applications for which only limited notification has been given: *Resource Management Act 1991* (NZ) ss 95B(2), 96(3) ('*RMA*').
77 *Ruruku Whakatupua – Te Mana o Te Awa Tupua*, above n 41, cl 9.3.
78 Ibid cl 9.4.
79 *Te Awa Tupua Act* ss 16(a), 46(2)(b).
80 *Te Awa Tupua Act* s 46(2)(b).

on the basis that the settlement did not go far enough. The following section engages first with the merits of the settlement for the Whanganui Iwi (and by extension, for Māori more generally), as subsequently reflected in the *Te Awa Tupua Act*, and then analyses some of its deficiencies in that respect.

1 Merits of the Settlement

(a) Recognition as a Single Entity

The *Te Awa Tupua Act* recognises the River, Te Awa Tupua, as 'an indivisible and living whole … from the mountains to the sea'.[81] This not only reflects the Māori view of the river, but recognises the value in having a unified approach to protecting the health and well-being of Te Awa Tupua. This unified approach is further evidenced by the requirement for Te Kōpuka, the strategy group, to develop Te Heke Ngahuru, the river strategy.

(b) Legal Personality and Standing

Stone emphasised standing, the ability to bring a court action, as a vital element of natural objects being granted legal personality. In the context of the Whanganui River Settlement, the status of Te Awa Tupua as a legal entity means that people may be held accountable for damage to the Whanganui River without an individual having to show that their particular interests have been affected. If the river is damaged in some way (damage in this respect refers to damage that has not been authorised by a licence or permit) and if any of the Tupua te Kawa are affected, then Te Pou Tupua would be able to bring an action on behalf of Te Awa Tupua.[82] Standing is effectively guaranteed, even if the outcome of proceedings is not. This an important procedural benefit of the settlement as it provides access to the courts, and in doing so it emphasises Māori values as a basis for bringing a court action.

(c) The RMA and Water Management

Te Awa Tupua, via Te Pou Tupua (with its Māori appointee), has the potential to have decision-making powers over itself. Pursuant to the *Te Awa Tupua Act*, it is deemed to be a public authority for the purposes of the *RMA*.[83] This means that a local authority is able to transfer one or more of its powers or functions to Te Awa Tupua.[84] The most important function of a local authority in this regard is its role as a consent authority. Accordingly, despite the settlement not including a provision deeming Te Awa Tupua to be a consent authority for the purposes of the *RMA*, the deeming of Te Awa Tupua as a public authority means that theoretically it is a possibility. As a consent authority Te Awa Tupua's permission would be required to carry out any activity for which a resource consent is required under

81 *Te Awa Tupua Act* ss 12, 13(b).
82 *Te Awa Tupua Act* s 14(2).
83 *Te Awa Tupua Act* s 17(e).
84 *RMA* s 33.

the *RMA*.[85] In addition, being deemed a public authority also means that Te Awa Tupua can enter into joint management agreements ('JMAs') with local authorities pursuant to section 36B of the *RMA*. Although these sections of the *RMA* have been little utilised to date,[86] this may change over time. The *Te Awa Tupua Act* provides for the making of relationship agreements with local authorities concerning (among other things) the exercise of functions and powers in relation to the granting of consents relating to the Whanganui River and the relationship between the exercise of the local authority's functions and the functions of Te Pou Tupua.[87] This would appear to be the forum for Te Pou Tupua to raise the issue of the transfer of functions under section 33 of the *RMA* from the local authority to Te Awa Tupua, represented by Te Pou Tupua. Te Pou Tupua, with one appointee nominated by the Crown, may be perceived as more neutral than an iwi authority, and technical expertise and resources may also be less of an issue. Thus, there might be less reluctance from local authorities to transfer functions to, or enter into a JMA with Te Awa Tupa.

While the heritage protection provisions of the *RMA* are understood as having been of little utility in facilitating Māori participation in water resource management, this was largely because of the difficulties in being approved as a heritage protection authority ('HPA').[88] However, Te Awa Tupua is deemed to be a body corporate specifically for the purpose of enabling it to apply to be an HPA.[89] This suggests that Te Awa Tupua would have little difficulty in being approved as an HPA for the Whanganui River. It is clearly appropriate for the role, and with the settlement providing financial support to Te Pou Tupua,[90] it should be able to carry out any financial responsibilities associated with being an HPA.[91] The benefits of being an HPA are, in summary, that it would potentially enable Te Awa Tupua to have a specific management function of a protective nature, in relation to at least that part of itself which is the subject of a heritage order.

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85 Section 2 of the *RMA* defines a consent authority as 'a regional council, a territorial authority, or a local authority that is both a regional council and a territorial authority, whose permission is required to carry out an activity for which a resource consent is required under this Act'.

86 David V Williams, 'Ko Aotearoa Tēnei: Law and Policy Affecting Māori Culture and Identity' (2013) 20 *International Journal of Cultural Property* 311, 320; Waitangi Tribunal, 'Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua' (Report of Wai 262 Tribunal, 2011) vol 1, 113–14 <https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356416/KoAotearoaTeneiTT2Vol1W.pdf>; Morris and Ruru, above n 13, 51. Although the amendment to the *RMA* inserting s 36B was enacted in 2005, it was not until 2008 that a JMA was made, namely the JMA signed between Taupō District Council and Ngāti Tūwharetoa: Linda Te Aho 'Indigenous Challenges to Enhance Freshwater Governance and Management in Aotearoa New Zealand: The Waikato River Settlement' (2010) 20 *Journal of Water Law* 285, 289.

87 *Te Awa Tupua Act* s 19(h).

88 Katie O'Bryan, *From Aqua Nullius to Aqua Minimus? The Legal Recognition in Victoria of Indigenous Rights to Participate in the Management of Inland Water Resources* (PhD Thesis, Monash University, 2015) 309–11 ('*From Aqua Nullius to Aqua Minimus?*').

89 *Te Awa Tupua Act* s 17(f).

90 *Ruruku Whakatupua – Te Mana o Te Awa Tupua*, above n 41, cls 3.31–3.35. Funding arrangements have not been included in the *Te Awa Tupua Act*.

91 These are the two matters which the Minister must consider when approving an application to become an HPA: *RMA* s 188(5).

(d) Relevance and Legal Effect of Te Awa Tupua and Tupua te Kawa

The entire legal framework, 'Te Pā Auroa nā Te Awa Tupua', with its focus on Māori values, is a relevant consideration for all statutory functions, powers and duties relating to the Whanganui River or to activities occurring in its catchment.[92] This is an important procedural benefit because it ensures that decision-makers always consider the Te Awa Tupua legal framework; it does not rely on a public official having to make a judgment call about whether or not the framework is relevant.

In addition, any person in the exercise of functions, duties or powers under 25 named statutes (including certain parts of the *RMA*), must 'recognise and provide for' the Te Awa Tupua status and Tupua te Kawa.[93] Therefore in these 25 statutes, Te Awa Tupua and its values are more than just relevant considerations. They must be recognised and provided for, thus ensuring that they are reflected in the outcome, rather than simply considered in the process leading to the outcome. This arguably amounts to a substantive benefit, rather than a procedural one. The strongest support for this view can be found in *Bleakley v Environmental Risk Management Authority*[94] in which McGechan J considered the difference between 'recognise and provide for' and 'take into account' in the *Hazardous Substances and New Organisms Act 1996* (NZ). Although acknowledging that it was statute- and context-specific, he noted:

> There is a deliberate legislative contrast between s5 'recognise and provide for' and s 6 'take into account'. When Parliament intended that actual *provision* be made for a factor, Parliament said so. One does not 'provide for' a factor by considering and then discarding it. In that light, the obligation to 'take into account' in s 6 was not intended to be higher than an obligation to consider the factor concerned in the course of making a decision – to weigh it up along with other factors – with the ability to give it, considerable, moderate, little, or no weight at all as in the end in all the circumstances seemed appropriate.[95]

This view was subsequently accepted in relation to the *RMA* by the Environment Court in *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*.[96]

However, in the High Court decision of *Takamore Trustees v Kapiti Coast District Council* ('*Takamore Trustees*'), Ronald Young J did not go quite so far as to suggest that 'recognise and provide for' amounted to a substantive right in considering the difference in terminology between sections 6, 7 and 8 of the *RMA*.[97] The reasoning of Ronald Young J is somewhat confusing,[98] but what is clear from these cases is that 'recognise and provide for' is, at the least, considered to be a very strong directive, and one which must be complied with.

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92 *Te Awa Tupua Act* s 11(1).

93 *Te Awa Tupua Act* s 15(2). In relation to the *RMA*, this applies to the preparation or changing of regional policy statements, regional plans and district plans: *Te Awa Tupua Act* sch 2 cl 1(s). In relation to the exercise of all other functions, duties and powers under the *RMA*, decision-makers must 'have particular regard' to the Te Awa Tupua status and Tupua te Kawa: *Te Awa Tupua Act* s 15(3).

94 [2001] 3 NZLR 213.

95 Ibid [72].

96 [2002] 9 ELRNZ 111, [36].

97 [2003] 3 NZLR 496, [89].

98 He uses 'take into account' in relation to all three sections: ibid.

In relation to the *Heritage New Zealand Pouhere Taonga Act 2014* (NZ), the *Public Works Act 1981* (NZ) and parts of the *RMA*, decision-makers must 'have particular regard to' the Te Awa Tupua status and Tupua te Kawa. This too is a procedural benefit and according to Ronald Young J, is less firm than 'recognise and provide for'.[99] Nonetheless, it is still a relatively strong directive and would certainly elevate Te Awa Tupua and Tupua te Kawa above other matters to which a person must only 'have regard to' when exercising functions, duties or powers under those three Acts.[100]

(e) Composition of Te Kōpuka

Te Kōpuka contains a substantial proportion of iwi members, with a maximum of 6 out of 17 able to represent iwi interests.[101] Iwi therefore form the largest representative grouping in Te Kōpuka.[102] Thus, assuming they work together as a bloc, iwi will have the strongest voice in Te Kōpuka. Although the Māori voice is still a minority one, in comparison with the level of mandated Indigenous representation on water-related committees in Australia, Māori representation is significantly higher. For example, the entity which most closely resembles Te Kōpuka in Victoria, the proposed Birrarung Council (which will assist in the preparation of a strategic plan for the Yarra River), mandates a minimum of two Indigenous representatives out of 12.[103] Other examples include the Basin Community Committee (established under the *Water Act 2007* (Cth) to provide advice to the Murray-Darling Basin Authority) which makes provision for up to two Indigenous representatives on the committee out of a total of up to 17 members.[104] In Victoria's *Water Act 1989* and *Catchment and Land Protection Act 1994* there is currently no requirement for any Indigenous representation on any committee or governance entity established under either of those Acts.

(f) Promotes Relationships and Preserves Rights

Te Aho suggests that another positive element of the settlement (subsequently reflected in the settlement legislation) is that it 'compels local government relationship agreements'.[105] It is arguable that the *Te Awa Tupua Act* does not compel such agreements; the Act merely provides that one of the functions of Te

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99 Ibid.

100 In relation to the *RMA*, it would even seem to elevate them above the Principles of the *Treaty of Waitangi*, which decision makers 'shall take into account': *RMA* s 8. But it would not elevate them above any of those matters in s 7, as these are all matters to which decision makers must also 'have particular regard.'

101 *Te Awa Tupua Act* s 32(1)(a)–(b). Note, however, that only one is appointed by the trustees. This could be important from the Whanganui Iwi point of view.

102 Government representatives make up the next largest bloc, being up to four local authority representatives, and one representative appointed by the Director-General of Conservation.

103 *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 49(1)(a).

104 *Water Act 2007* (Cth) s 202(4)–(5). This requirement occurred as a result of amendments to the *Water Act* in 2016. Prior to the amendments, there was provision for only one person, and that person technically did not have to be Indigenous, they merely had to have expertise in Indigenous matters relevant to the Basin's water resources. In practice, however, the person appointed was always Indigenous.

105 Linda Te Aho, '*Ruruku Whakatupua Te Mana o te Awa Tupua* – Upholding the Mana of the Whanganui River' (May 2014) *Māori Law Review* ('Upholding the Mana of the Whanganui River').

Pou Tupua is to enter into such agreements, as set out in the Deed of Settlement.[106] If one goes to the relevant clause in the Deed of Settlement, it only mandates engagement, rather than an outcome in the form of an agreement, stating 'Te Pou Tupua will engage with relevant local authorities for the purpose of entering into a relationship'[107] which they 'may agree to record … in a relationship document'.[108]

This view is supported by the fact that, first, the wording of the relevant clause in the Deed of Settlement in relation to the making of similar agreements with Crown Agencies is much stronger; the various Crown Agencies 'will enter into a relationship document with Te Pou Tupua'.[109] Second, there is no time frame set out in the settlement legislation or the Deed of Settlement for the making of agreements with local authorities.[110]

Nonetheless, it is a positive statement of intent which at least compels the parties to discuss relevant issues, and in the context of the rest of the settlement, could well lead to an agreement between Te Pou Tupua and the relevant local authorities.

The *Te Awa Tupua Act* also preserves any existing customary rights and title,[111] as well as rights to apply for and be granted a customary rights order in relation to the Whanganui River,[112] the trade-off being that all other existing rights are also preserved.[113] This is important because following *Attorney-General v Ngati Apa*,[114] the continuing existence of Māori customary title over water remains an open question yet to be resolved.[115]

The settlement also settles only that part of the Whanganui Iwi's historical *Treaty* claim that relates to the Whanganui River.[116] This means that the Whanganui Iwi can continue to pursue its historical *Treaty* claim in respect of the remainder of the claim that does not involve the Whanganui River. It also means that contemporary actions for any breaches of the *Treaty of Waitangi* can still be brought against the Crown.[117]

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106 *Ruruku Whakatupua – Te Mana o te Awa Tupua*, above n 41, cls 3.36–3.42.
107 Ibid cl 3.41.
108 Ibid cl 3.42.
109 See, eg, ibid cl 3.36.
110 There is no time frame for the making of relationship documents with Crown Agencies, however there is a time frame of 12 months for commencing negotiations with Crown Agencies: see, eg, ibid cl 3.37.
111 *Te Awa Tupua Act* s 46(2)(b).
112 *Te Awa Tupua Act* ss 80, 81(2).
113 *Te Awa Tupua Act* ss 16(a), 46(2).
114 [2003] 3 NZLR 643.
115 Jacinta Ruru, 'The Legal Voice of Māori in Freshwater Governance: A Literature Review' (Report, Landcare Research NZ, October 2009) 80 ff; see also Jacinta Ruru, 'Māori Legal Rights to Water: Ownership, Management or Just Consultation?' (2011) 7 *Resource Management Theory & Practice* 119, 131–2.
116 *Te Awa Tupua Act* s 9 contains the definition of historical claims, and specifically excludes claims by the Whanganui Iwi that do not relate to the Whanganui River: s 9(4). Section 87 of the Act then settles all historical claims as defined.
117 The *Treaty of Waitangi Act 1975* (NZ) defines historical treaty claim in s 2 as 'a claim made under section 6(1) that arises from or relates to an enactment referred to in section 6(1)(a) or (b) enacted, or to a policy or practice adopted or an act done or omitted by or on behalf of the Crown, before 21 September 1992'.

(g) Prominence of Māori Language and Values

Finally, Te Aho notes the prominence of te reo[118] and matauranga Māori[119] in the settlement documents, making them distinctively Māori in orientation.[120] In that regard, much of what is contained in the settlement documents is now reflected in the *Te Awa Tupua Act*.

For example, the *Te Awa Tupua Act* sets out the four intrinsic values of Te Awa Tupua to be protected, Tupua te Kawa, which are clearly centred around Māori values. They recognise that the Whanganui Iwi and the River are interdependent, which is reflected particularly in the third of the four values: Ko au te Awa, ko te Awa ko au [I am the River and the River is me].[121] Headings to each part in the Act have a Māori component, written first, followed by an English component.

With such prominence given to Māori language and values, this could have a further practical effect, namely that Māori perspectives on water management will be given greater priority than may otherwise be the case. This is something which is clearly contemplated by the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic), the Government's media release for the Bill stating:

> For the first time in the Victorian Parliament's history, the Bill is co-titled and part of its preamble is written in Woi-wurrung, assuring Traditional Owners a permanent voice in the governance and protection of the Yarra River.[122]

2 Deficiencies of the Settlement

The granting of legal personality to the Whanganui River does, however, raise some important issues for the Whanganui Iwi.

(a) Management Issues

Recognition of Te Awa Tupua as a legal entity means that the Whanganui Iwi is a step removed from direct involvement in Te Awa Tupua. Iwi with interests in the Whanganui River nominate one of the two members who comprise Te Pou Tupua, but once appointed, that nominee does not represent those Iwi.[123] In other words, Te Pou Tupua does not represent the interests of Māori; it represents the interests of the river, Te Awa Tupua. This is alleviated somewhat by a requirement that Te Pou Tupua 'develop appropriate mechanisms for engaging with, and reporting to, the iwi and hapū with interests in the Whanganui River on matters relating to Te Awa Tupua, as a means of recognising the inalienable connection of those iwi and hapū with Te Awa Tupua'.[124] It must also be remembered that the values of Te Awa Tupua to be protected, Tupua te Kawa, were negotiated with the

118 Māori language.
119 Māori knowledge.
120 Te Aho, 'Upholding the Mana of the Whanganui River', above n 105. Previous settlement documents also contained Māori language and values, but the implication from Te Aho is that they were less prominent.
121 *Te Awa Tupua Act* s 13(c).
122 Wynne, above n 1.
123 *Te Awa Tupua Act* s 19(2)(a).
124 *Te Awa Tupua Act* s 19(2)(b).

Whanganui Iwi. These values recognise the relationship and role of the Whanganui Iwi with regard to Te Awa Tupua.

Te Awa Tupua through its guardian, Te Pou Tupua, still has a relatively limited role in the management of the River. Te Pou Tupua is not a consent authority. It does not prepare, or assist in the preparation of Te Heke Ngahuru (the strategy) nor is it represented on Te Kōpuka (the strategy group). Te Pou Tupua has the status of a landowner in relation to the beds of those parts of the river which have been vested in Te Awa Tupua, which does not give it a management role. It does, however, administer and make decisions regarding applications to the fund that has been set up to support the health and well-being of Te Awa Tupa.[125] Te Awa Tupua also has the *potential* to take on some management responsibilities via the *RMA* under a section 33 transfer or a section 36B JMA. It can also apply to become an HPA. If any of this were to occur, Te Pou Tupua as guardian would exercise those management responsibilities on its behalf. But these management roles are not as of right.

In addition, although Te Awa Tupua is required to maintain a register of hearing commissioners for resource consent applications relating to the Whanganui River,[126] it does not make appointments; that role is being undertaken by the relevant authority (albeit in consultation with Te Awa Tupua).[127] Furthermore, appointments from the register by the relevant authority is not a mandatory requirement.[128]

Thus there is effectively little change to the current governance of the Whanganui River. Any management role is contingent on an agreement to transfer powers, entry into a JMA, or a successful application to become an HPA, all of which occur under the *RMA*.

(b) No Recognition of Ownership of Water

The settlement has been criticised for the lack of recognition that it gives to ownership of water by Te Awa Tupua.[129] Thus from a practical perspective, the recognition of Te Awa Tupua as 'an indivisible and living whole comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements'[130] is largely illusory, of only symbolic effect. Not only is water an essential physical element of Te Awa Tupua, but water's metaphysical elements are what bind it to the rest of Te Awa Tupua.

(c) Fragmentation of Ownership of the River Bed

The illusory nature of Te Awa Tupua as 'an indivisible and living whole' is further exacerbated by the fact that it is only the section of river bed which is owned

125 *Te Awa Tupua Act* ss 19(1)(e), 58.
126 *Te Awa Tupua Act* s 19(1)(f).
127 *Te Awa Tupua Act* sch 6 cl 5(3)(b).
128 *Te Awa Tupua Act* sch 6 cl 5(1)(b).
129 Te Aho, 'Upholding the Mana of the Whanganui River', above n 105; Laura Hardcastle, 'Turbulent Times: Speculations about How the Whanganui River's Position as a Legal Entity Will Be Implemented and How It May Erode the New Zealand Legal Landscape' (February 2014) *Māori Law Review* 4.
130 *Te Awa Tupua Act* s 12.

by the Crown that is being transferred in title to Te Pou Tupua. The rest of the Whanganui River bed will remain in private hands. It also excludes any part of the bed of the Whanganui River which is located in the marine or coastal area.[131] Thus, despite the intentions expressed in the settlement, Te Awa Tupua is still physically (and therefore metaphysically) fragmented. This, however, is less likely to be an issue in the Victorian context, as the Crown in Victoria owns the beds and banks of all major rivers.[132]

(d) Issues with the Guardianship Entity

The proposed guardianship entity, Te Pou Tupa, is comprised of only two appointees, one of which is nominated by iwi with interests in the Whanganui River.[133] One issue here lies in the potential difficulty of finding a nominee that will be approved by the many iwi that have interests in the Whanganui River.[134] This could lead to a politicisation of the position, despite the fact that the nominee will not be acting on behalf of iwi but on behalf of Te Awa Tupua. That is, various iwi may want to see one of their own appointed to Te Awa Tupua, in a misguided belief that the appointee will prioritise their particular interests. Thus, efforts must be made to ensure that all iwi with interests in the Whanganui River clearly understand the nature of the role and functions of Te Pou Tupua.

On the other hand, having only two appointees might be advantageous, as there is less possibility for differences of opinion within Te Pou Tupua about the meaning of Tupua te Kawa and its application to Te Pou Tupua's functions. There are also other mechanisms, namely Te Karewao (the advisory group), which allows for two additional iwi to have input into the functioning of Te Pou Tupua.[135] This may alleviate some of the concerns relating to the limited number of people appointed to Te Pou Tupua. As this model is yet untested, it remains to be seen how well it will work in practice.

(e) Purpose of Te Heke Ngahuru

The ambit of the strategy's purpose is relatively wide, being 'to address and advance the health and well-being of Te Awa Tupua'.[136] There are likely to be competing values within this wide purpose.[137] Balancing these competing values in preparing the strategy could be difficult, given the multiplicity of views on Te Kōpuka (the strategy group). This may be tempered by the fact that in exercising its functions, including preparing the strategy, Te Kōpuka must 'have particular regard to' the Te Awa Tupua status and Tupua te Kawa.[138] The composition of Te

131 *Te Awa Tupua Act* s 41(2)(d)(ii).
132 This occurred by virtue of s 5 of the *Water Act 1915* (Vic).
133 *Te Awa Tupua Act* s 20(1)–(2).
134 '[I]wi with interests in the Whanganui River' is defined in s 7 of the *Te Awa Tupua Act*. There are eight iwi listed, including the Whanganui Iwi.
135 *Te Awa Tupua Act* s 28(1)(a)–(b). There is also the potential for a third iwi to have input: s 28(2).
136 *Te Awa Tupua Act* s 35.
137 Initially the settlement referred to 'the environmental, social, cultural and economic health and wellbeing of Te Awa Tupua', *Ruruku Whakatupua – Te Mana o Te Awa Tupua*, above n 41, cl 4.1.
138 *Te Awa Tupua Act* s 30(3). See Part II C(i)d for the effect of the phrase 'have particular regard to'.

Kōpuka also contains a significant proportion of members representing iwi interests, thus ensuring that the Māori voice is not overshadowed by the voices of non-Māori interests in developing Te Heke Ngahuru, and that the balancing exercise gives appropriate weight to the Te Awa Tupua status and Tupua te Kawa in the final strategy.

(f) No Guarantee of Protection

Another criticism raised is that '[legal] personhood and standing *in themselves* confer nothing except procedural access and capability'.[139] In other words, Te Pou Tupua on behalf of Te Awa Tupua will have standing to bring an action for damage to Te Awa Tupua, but of course this does not guarantee that the action will succeed.[140]

As acknowledged earlier, procedural access does not necessarily lead to a substantive outcome, however it is the first step towards a substantive outcome. In that regard it is important because the initial hurdle has now been removed.

Te Aho suggests that in combination with other elements of the settlement, such as the post-settlement governance entity being recognised as 'having an interest … greater than the public generally when applying the *RMA*', the legal status of the River 'provides the strongest opportunity for more effective participation by Iwi in planning processes of all freshwater settlements to date'.[141]

However legal personhood in isolation does little to improve iwi participation; it is only in combination with the rest of the settlement that iwi participation is improved, thus providing support for the criticism noted above.

Te Awa Tupua not only has the rights and powers of a legal person, but also the liabilities, with Te Pou Tupua being responsible for the liabilities of Te Awa Tupua as a landowner.[142] In that respect Te Pou Tupua can ask for assistance from the Crown to meet its liabilities.[143] Stone noted that '[r]ivers drown people, and flood over and destroy crops',[144] so the possibility of an action being brought against Te Awa Tupua should not be discounted. How the courts would deal with these naturally occurring events is open to speculation, as arguably these are not in the nature of landowner liabilities.

(g) Issues with the Legal Personality Model as a Western Legal Construct

Finally, one could argue that the legal personality model is an inherently Western one. That is, it might be said that the model is based on Western legal concepts reflected in recognised legal structures, even if Stone's version of the model applies those structures to entities not previously the subject of the model – natural objects. However, the model in the Whanganui River Settlement could be

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139 Barraclough, above n 44, 47.

140 Hardcastle suggests that causation could be a problem: Hardcastle, above n 129, 7–8.

141 Te Aho, 'Upholding the Mana of the Whanganui River', above n 105.

142 *Te Awa Tupua Act* s 21(2). There are however some exclusions for which the Crown retains liability, for example Te Pou Tupua is not liable for remediation of contamination and structures existing prior to the settlement: s 56, sch 5 cls 1–2.

143 *Te Awa Tupua Act* sch 5 cl 3.

144 Stone, 'Should Trees Have Standing?' (1972), above n 6, 481.

viewed as an attempt to syncretise two different systems, albeit the dominant one still being the non-Māori system. The Whanganui Iwi's struggle for nearly 150 years for recognition of their rights over the Whanganui River has taken place within the non-Māori legal system, the current settlement being the culmination of this lengthy battle. It was a battle that took place within a Western legal construct. However, the Whanganui River Settlement is significant in that it takes what is essentially a Western legal model and endows it with distinctly Māori characteristics. In that respect, it goes further than Stone's initial vision in 1972 of a river as a legal entity that was limited to one which aimed to protect purely environmental characteristics.[145]

3 Other Aspects of the Settlement of Relevance to River Management

The preceding discussion has focussed largely on the legal framework which grants legal personality to the Whanganui River. However, there are other parts of the settlement, which may promote the participation of Whanganui Iwi more directly in the management of the Whanganui River.

(a) Post-Settlement Governance Entity

The settlement contemplated the establishment of a post-settlement governance entity ('PSGE'), Ngā Tāngata Tiaki o Whanganui, to implement the settlement and to receive, hold and manage any settlement assets and money on trust for the Whanganui Iwi.[146] That entity was established on 4 August 2014.[147] The *Te Awa Tupua Act* recognises that the PSGE as trustee has an interest in Te Awa Tupa that is 'greater than, and separate from, any interest in common with the public generally'.[148] This will give the PSGE legal standing in any litigation and in all relevant statutory processes relating to Te Awa Tupua, an important procedural right.

In relation to the *RMA*, the PSGE will be entitled to lodge submissions in relation to any matter involving the Whanganui River and will be entitled to be heard in relation to any matter involving the Whanganui River.[149] Similar entitlements will apply to other statutory processes.[150] It will also be an iwi authority for the purposes of the *RMA*.[151] As an iwi authority, a local authority can transfer any of its functions, powers or duties to the PSGE.[152] It also means that it can enter into JMAs with local authorities.[153] However, in practice these provisions

145 Stone specifically uses rivers and streams as examples of objects which could be given legal personality: Stone, ibid 459 ff.

146 *Ruruku Whakatupua – Te Mana o Te Iwi o Whanganui*, above n 30, ch 10.

147 'Deed of Trust – Ngā Tāngata Tiaki o Whanganui' (4 August 2014) <http://www.ngatangatatiaki.co.nz/wp-content/uploads/2015/04/Ng%C4%81-T%C4%81ngata-Tiaki-o-Whanganui-Trust-Deed-Final-Executed-Deed-4-August-2014-1.pdf> ('*Deed of Trust*').

148 *Te Awa Tupua Act* ss 72(d), 73(1)(d).

149 Where the *RMA* provides for the lodging of submissions, and where the *RMA* provides for a hearing: *Te Awa Tupua Act* s 72(b)–(c).

150 *Te Awa Tupua Act* s 73(1)(b)–(c).

151 *Te Awa Tupua Act* s 72(a)(i).

152 *RMA* s 33.

153 *RMA* s 36B.

of the *RMA* have been little utilised, as local authorities have, to date, been reluctant to make use of them.[154]

Accordingly, whereas Te Pou Tupa will be able to represent the interests of Te Awa Tupua in any proceedings, and indirectly the interests of Whanganui Iwi where they coincide with the interests of Te Awa Tupua, the PSGE will be able to represent the specific interests of the Whanganui Iwi. It is this aspect of the settlement which is of most benefit for the Whanganui Iwi in terms of their direct participation in decisions affecting the management of the Whanganui River.[155]

(b) Potential for Conflict?

A question arises in relation to the recognition of Te Pou Tupua as a public authority and the PSGE as an iwi authority. This enables both Te Pou Tupua and the PSGE to seek to have a local authority transfer functions pursuant to section 33 or to enter a JMA pursuant to section 36B of the *RMA*. This creates a potential for conflict if both entities did in fact seek to have a local authority transfer the same functions, or enter a JMA over the same area. This does not appear to have been addressed in the settlement, and it may be an unduly apprehensive view of the practical realities of relationships on the ground. It is a concern which is also tempered by the reluctance of local authorities to transfer powers under section 33 or enter into JMAs under section 36B. Nonetheless, it appears to be theoretically possible, though only time will tell whether it becomes a reality. A similar potential for conflict may also arise with the deeming of Te Awa Tupua as a body corporate for the purposes of applying to be an HPA.[156]

4 Concluding Remarks on the Whanganui River Settlement

The recognition of the Whanganui River as a legal entity, in combination with various elements of the rest of the settlement, is an innovative development in river management by Māori, even with the complexities raised in the discussion above. It is undeniably Māori in its terms; it guarantees standing to access the courts to protect the River's values, those values being unquestionably Māori in orientation. It ensures that the River's values are considered in any decisions which will affect the River or its catchment; it provides for significant Māori representation on the strategy group; it promotes relationships with local authorities; it enhances the ability for heritage protection; it opens the door for the River itself to become a consent authority. The major deficiencies of the legal guardianship model are that

154 See above n 86 and accompanying text.

155 Given that the values of Te Awa Tupua and the objectives of the PSGE are likely to be overlapping, their interests will for the most part be complementary, creating an even stronger voice. In that regard, cl 3.5(b) of the Trust Deed for the PSGE states that one of the purposes of the Trust is 'the promotion and protection of the health and wellbeing of Te Awa Tupua': *Deed of Trust*, above n 147. This is also one of the purposes of Te Awa Tupua: *Te Awa Tupua Act* s 13(d).

156 Although it does not appear that the PSGE itself is required to be a body corporate, it would appear that as part of the establishment of the PSGE, the initial trustees are able to incorporate appropriate trust entities to serve the needs of the Whanganui Iwi: *Deed of Trust*, above n 147, cl 4.3(e). This suggests that a body corporate could be set up by the PSGE, which would then be able to apply to become an HPA under the *RMA*. Given the objects of the PSGE as contained in the *Deed of Trust*, above n 147, cl 3.5, and in particular cl 3.5(e), it would be surprising if the PSGE did not set up a body corporate for this purpose.

it does not fundamentally change the governance of the Whanganui River, and that it only provides for indirect participation by the Whanganui Iwi in the management of the River as the river guardian does not represent Māori, but instead, represents the River. However, this latter deficiency is one which is largely remedied by the role of the PSGE.

Given the above, the question is whether there is any scope for adapting the Whanganui River guardianship model to the Australian context. In that regard the focus now turns to Victoria.

III THE RIVER GUARDIANSHIP MODEL IN VICTORIA

Victoria has been credited as being at the forefront of the development of modern water management in Australia,[157] whose 'development has been typical, though perhaps more dramatic'[158] than most of the states. As the first (and currently the only) Australian state to have an environmental water holder, and with the enactment of the *Yarra River Protection Act* ostensibly giving an 'independent voice' to the Yarra River in the form of the Birrarung Council, it is timely to consider whether the river guardianship model is one to which Victoria's Traditional Owners should look to enhance their participation in river management.[159]

A Comparisons with the Victorian Environmental Water Holder

It is arguable that Victoria has already edged towards giving legal personality to natural objects, with the establishment in 2010 of the Victorian Environmental Water Holder ('VEWH'), a body corporate with legal capacity to sue and be sued.[160] The role of the VEWH is to manage Victoria's environmental water holdings for the purposes of:

(a) maintaining the environmental water reserve in accordance with the environmental water reserve objective; and

(b) improving the environmental values and health of water ecosystems, including their biodiversity, ecological functioning and water quality, and other uses that depend on environmental condition.[161]

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157 J M Powell, *Watering the Garden State: Water, Land and Community in Victoria 1834–1988 (Allen & Unwin, 1989)* 7; Sandford D Clark and Ian A Renard, *The Law of Allocation of Water for Private Use: The Framework of Australian Water Legislation and Private Rights* (Research Project 69/16, Australian Water Resources Council, 1972) vol 1, 141; D E Fisher, *Water Law* (LBC Information Services, 2000) 5.

158 Clark and Renard, above n 157, 141.

159 There is in existence an entity called the Yarra Riverkeeper Association ('YRA') which claims on its web page to be 'the primary "voice of the river"'. The YRA, however, as a not-for-profit non-government entity, is different to a statutory guardian, although their goals and objectives would overlap. The YRA's 'voice' is essentially a community-based and educative advocacy. For further information on the YRA, see <http://yarrariver.org.au>. It is possible that the YRA could have a representative appointed to the Birrarung Council, as the *Yarra River Protection Act* provides for at least one member of the Council to be from an environmental organisation or a Yarra River land local community group: Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 (Vic) ss 49(1)(b), (e).

160 *Water Act 1989* (Vic) ss 33DB(1), (2)(c).

161 *Water Act 1989* (Vic) s 33DC.

Although the environmental water reserve has statutory status,[162] unlike the Whanganui River, it has not been given legal personhood or corporate legal status, that status being reserved for the VEWH. The VEWH does, however, manage and maintain the environmental water reserve. Erin O'Donnell suggests that the VEWH could be 'responsible for, and representative of the 'environment' (or at least ecosystem health) for those aquatic ecosystems for which it has the capacity to deliver water'.[163] Although there are environmental water managers in other states,[164] and an environmental water holder at the Commonwealth level,[165] O'Donnell points out that there are some unique features of the VEWH that make it different from these other models,[166] the inference being that it is therefore more likely to be able to represent the environment. The most important of these features are the VEWH's independence from government, and its corporate form, enabling it to sue and be sued. Unlike the other Australian environmental water management models, the Victorian environment Minister has only limited power to give directions to the VEWH.[167] The VEWH also performs its functions in its own right, not on behalf of the Victorian government.[168] And commissioners appointed to the VEWH can only be removed in limited circumstances, essentially for illegal or improper conduct.[169]

The main features that the VEWH has in common with Te Awa Tupua and its guardian Te Pou Tupua are also: its independence from government, and the capacity to sue and be sued, arising from its corporate form. Where they differ, however, is in the involvement of Indigenous people, and the inclusion of Indigenous water values. There is no legislative requirement for Indigenous Victorians to be involved in, or become members of, the VEWH.[170] Nor does the objective of the VEWH acknowledge Indigenous values. Although extending beyond purely environmental values, it does this merely by reference to 'other uses that depend on environmental condition' of water ecosystems,[171] which is an undefined phrase.

One reason for this difference is that the recognition of the Whanganui River as a legal entity occurred as a result of the negotiations for the settlement of the

162 *Water Act 1989* (Vic) s 4A.

163 Erin O'Donnell, 'Institutional Reform in Environmental Water Management: The New Victorian Environmental Water Holder' (2011) 22 *Journal of Water Law* 73, 84.

164 Ibid 78. She notes NSW and SA as having environmental water managers.

165 *Water Act 2007* (Cth) pt 6.

166 O'Donnell, above n 163, 79.

167 *Water Act 1989* (Vic) s 33DS.

168 *Water Act 1989* (Vic) s 33DC.

169 *Water Act 1989* (Vic) s 33DH. This can be contrasted with members of water corporations under s 101 of the *Water Act 1989* (Vic), and of members of the Victorian Catchment Management Authority and Catchment Management Boards under s 9C and 18D of the *Catchment and Land Protection Act 1994* (Vic) respectively.

170 There is nothing to preclude an Indigenous person from being appointed to the VEWH, but there is nothing to suggest that Indigenous water management is relevant to the functions of the VEWH. Currently, to be appointed as a commissioner to the VEWH, a person must have knowledge of or experience in one or more of the following fields – environmental management, sustainable water management, economics and public administration: *Water Act 1989* (Vic) s 33DF(2).

171 *Water Act 1989* (Vic) s 33DC(b).

Whanganui Iwi's claim to the river. By contrast, the establishment of the VEWH occurred as a result of environmental concerns.[172]

Indigenous interests in environmental water management were not mentioned anywhere during the debates on the Bill to establish the VEWH.[173] The Victorian Water Law Review of 2012–14 by the subsequent government also evidenced a desire for the VEWH to continue to have a purely environmental focus. In that regard, despite submissions to the review recommending that membership of the VEWH include a Traditional Owner[174] or at least a person with expertise in Indigenous water management (which in reality will be a Traditional Owner),[175] the review panel did not take up this recommendation. Accordingly, no such amendment was reflected in the resultant Water Bill 2014 (Vic). Although that bill lapsed following a change in government, there have been no further moves to amend the membership requirements of the VEWH, despite a further comprehensive review and subsequent Water Plan[176] by the incoming government. The current government has, however, committed to appointing an Aboriginal Victorian as a commissioner on the VEWH.[177] It has also committed to recognising Aboriginal values and objectives of water,[178] and to including Aboriginal values and traditional ecological knowledge in water planning, by making sure that 'the legislated objectives of the Victorian Environmental Water Holder consider identified Aboriginal water-related environmental outcomes'.[179] In other words, Aboriginal outcomes will be considered but only insofar as they relate to environmental outcomes. The government's commitments, however, do not extend to legislative recognition of Aboriginal values and objectives.

Another important difference between the Te Awa Tupua guardianship model and the VEWH is that the VEWH is directly involved in water management, albeit only in relation to environmental water.[180] It relies on partnerships with other water management authorities (such as Catchment Management Authorities) to

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172 This is evident from the Minister's second reading speech for the Water Amendment (Victorian Environmental Water Holder) Bill 2010 (Vic):

> There have now been 13 consecutive years of drought, with the prospect of ongoing water scarcity resulting from climate change. In response, environmental management has had to become more sophisticated, flexible, adaptive and responsive. This bill is an important step in recognising and meeting these new challenges and opportunities.

Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 2010, 1921 (Tim Holding, Minister for Water).

173 Water Amendment (Victorian Environmental Water Holder) Bill 2010 (Vic).

174 Federation of Victorian Traditional Owner Corporations, Submission No 72 to Office of Living Victoria, *Water Law Review – Water Bill Exposure Draft*, 14 February 2014, recommendation 3.3.1; Patrick Simons, Submission No 27 to Office of Living Victoria, *Water Law Review – Water Bill Exposure Draft*, nd, 2.

175 Katie O'Bryan, Submission No 39 to Office of Living Victoria, *Water Law Review – Water Bill Exposure Draft*, 12 February 2014, 4, 7.

176 Department of Environment, Land, Water and Planning (Vic), 'Water for Victoria – Water Plan' (2016) ('*Victorian Water Plan* (2016)').

177 Ibid 172 (Action 10.8).

178 Ibid 102 (Action 6.1).

179 Ibid 105 (Action 6.2).

180 *Water Act 1989* (Vic) s 33DD.

implement its decisions,[181] but the fundamental responsibility for managing the environmental water holdings remains with the VEWH.[182] This gives the VEWH an advantage over the Te Awa Tupua guardian, which does not have a direct role to play in the management of the Whanganui River.

A final difference to note is that the VEWH performs its functions across the entire State; it is not limited to a particular river or water feature. This means that in making decisions about the management and use of environmental water, it necessarily has to prioritise between river systems.

Accordingly, Victorian Traditional Owners may instead wish to consider the river guardian model in relation to specific rivers, akin to the Whanganui River Settlement. If the Victorian government was prepared to grant legal personality to a specific river, it could incorporate Aboriginal cultural values into the values of the river to be protected. But if Victoria was to go down this path, there are a number of issues which would need to be addressed.

B Application to Individual Rivers

1 Relationship with Traditional Owner Governance Structures

Questions might arise about how the river as a legal entity could be accommodated, given the existence of various Indigenous title holding and land management entities. The Aotearoa New Zealand model does not appear to deal with this issue, despite the Aotearoa New Zealand *Treaty* settlement landscape having some similar features. For example, PSGEs would appear to be the equivalent of registered native title bodies corporate ('RNTBCs') under the *Native Title Act 1993* (Cth) ('*NTA*') and additionally, in relation to Victoria under the *Traditional Owner Settlement Act 2010* (Vic) ('*TOS Act*'), Traditional Owner governance entities ('TOGEs').[183]

As noted earlier, in Aotearoa New Zealand there appears to be a potential for conflict if both Te Pou Tupua and the PSGE sought to have a local authority transfer some of its functions pursuant to section 33 of the *RMA* in relation to the Whanganui River to either of them, or to reach a JMA with either of them. Although this conflict is unlikely to occur given that section 33 and section 36B have been so little utilised, it remains a technical possibility. In the Victorian context, there is no equivalent of section 33 of the *RMA*, but the conflict could arise in situations where both the TOGE and the river guardian were seeking a management role.

There might also be a conflict between the VEWH and a river guardian, depending on the values of the river that have been identified as requiring protection by the guardian; environmental values do not always equate to Indigenous values.

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181 *Water Act 1989* (Vic) s 33DD(d).

182 O'Donnell, above n 163, 81.

183 A registered native title body corporate in Victoria can also be a TOGE – the Gunaikurnai Land & Waters Aboriginal Corporation being one such entity. However, this is unlikely to occur in future settlements, given that the Victorian focus is on *TOS Act* recognition rather than native title recognition.

These conflicts, however, could be avoided provided there is sufficient consultation prior to any recognition of the river as a legal entity.[184]

2 Nature of Settlement Agreements

The implementation of native title and Traditional Owner settlements is not by way of legislation, but by way of agreements made pursuant to legislation.[185] It is therefore a contractual relationship between the parties which is the basis upon which implementation proceeds. While there is nothing inherently wrong with this kind of arrangement, and indeed, there are many benefits of agreement-making,[186] it is not as powerful as having specific outcomes set out in legislation. The recognition of Te Awa Tupua as a legal entity has occurred though the enactment of legislation. The likelihood of similar legislation being passed in Victoria is more remote, partly because it would require the Victorian government to change the way it implements settlements, partly because it involves a new concept (the river as a legal entity), and partly because it involves scarce water resources which have always been (and continue to be) a politically charged and highly sensitive topic.[187]

3 Relationship with Native Title and Traditional Owner Rights

As discussed elsewhere,[188] the *NTA* and its Victorian counterpart, the *TOS Act*, provide little to native title holders and Traditional Owners by way of management of inland water resources, only rights to take and use water. In Victoria, those water rights have been limited in native title determinations to date to domestic and ordinary use,[189] and under the *TOS Act*, to personal, domestic and non-commercial communal needs.[190] So giving a river legal personality is likely to have minimal impact on native title and Traditional Owner

184 What sufficient consultation would look like is beyond the scope of this article, but it is more than a right to make submissions or an opportunity to comment. It would include: sufficient resourcing to enable the participation of Traditional Owners in consultations; the timely provision of information, such information to be provided in an appropriate form; consultation meetings to be held at appropriate locations including on country; and a genuine dialogue between parties.

185 The settlement of the Noongar native title claim in WA is the first native title claim to involve settlement legislation which recognises the Noongar people as the Traditional Owners of a large area of the south-west of WA, including Perth: *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA). However, the remainder of the Noongar settlement is contained in various Indigenous land use agreements, frameworks and strategies.

186 See, eg, Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004); Marcia Langton et al (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006).

187 This has been clearly evidenced in recent times by the demonstrations about the Victorian North-South Pipeline, controversies surrounding the Wonthaggi desalination plant, the public burning of copies of the draft Murray-Darling Basin plan, and the anger expressed at the public forums for Victoria's 2012–14 Water Law Review, witnessed by the author.

188 Katie O'Bryan, 'More Aqua Nullius? The *Traditional Owner Settlement Act 2010* (Vic) and the Neglect of Indigenous Rights to Manage Inland Water Resources' (2016) 40 *Melbourne University Law Review* 547.

189 Except for the Wimmera Clans determination, which does not recognise any native title rights in water, all of the consent determinations are identical. See, eg, *Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474, determination order 6.

190 *Traditional Owners Settlement Act 2010* (Vic) s 79 (definition of 'traditional purposes') ('*TOS Act*').

water rights and vice-versa. Further, as it would occur pursuant to state legislation, if there was any conflict with the Commonwealth *NTA*, pursuant to section 109 of the *Commonwealth Constitution*, the *NTA* would prevail.[191]

4 Heritage Protection

The role of heritage protection authorities ('HPAs') (registered Aboriginal parties, 'RAPs', in Victoria) also needs to be considered. As noted earlier, the *Te Awa Tupua Act* provides that Te Awa Tupua is deemed to be a body corporate for the purposes of applying to be an HPA pursuant to the *RMA*.[192] It would appear that the PSGE could also set up a body corporate to apply to become an HPA.[193] Such authorities are able to seek heritage protection orders for the protection of particular places; that is, they are site specific orders.

The Victorian regime under the *Aboriginal Heritage Act 2006* (Vic) ('*Aboriginal Heritage Act*') is a little different in that a RAP is appointed for a large area rather than a particular site or place. If the RAP is a native title holder or a TOGE with a recognition and settlement agreement under the *TOS Act*, the appointed area will be the area in which the group holds native title or has been recognised as the Traditional Owner Group. However, it is very unlikely that a river as a legal entity (represented by a guardian) would satisfy the criteria that the Aboriginal Heritage Council must take into account when making a decision on a RAP application. These include: whether the applicant is a native title party; the terms of any native title agreement; and whether the applicant represents the Traditional Owners of the area or Aboriginal people with historical or contemporary interest in the area.[194] Primacy in heritage protection under the *Aboriginal Heritage Act* is clearly to be given to Traditional Owners.

As noted earlier in relation to the Whanganui River Settlement, the guardian of a river with status as a legal entity does not represent Traditional Owners or indeed Aboriginal people; it represents the river. This is likely to preclude it from becoming a RAP. It would also be precluded from becoming a RAP over any area where there are native title holders or Traditional Owners recognised pursuant to a *TOS Act* agreement, as there can only be one RAP for such areas.[195] Thus the *Aboriginal Heritage Act* would need to be amended to enable a river as a legal entity to become a RAP, an amendment that is unlikely to be supported by Traditional Owners.

In any event, the *Aboriginal Heritage Act* is largely ineffective as a tool for Traditional Owners to participate in the management of water resources in a holistic way.[196] Therefore, even if the *Aboriginal Heritage Act* were amended to enable a river as a legal entity to be given RAP status over itself (including its catchment), this would not add to the ability of Traditional Owners to manage

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191 This would not be the case in relation to the *TOS Act*.
192 *Te Awa Tupua Act* s 17(f).
193 See above n 156.
194 *Aboriginal Heritage Act 2006* (Vic) s 151(3) ('*Aboriginal Heritage Act*').
195 *Aboriginal Heritage Act* s 151(2), (2A).
196 O'Bryan, *From Aqua Nullius to Aqua Minimus?*, above n 88, 213 ff.

water resources. It would instead add an extra layer of bureaucracy and potential for confusion and conflict with Traditional Owners.

In summary, giving a river legal status in Victoria would not give it any ability to use the *Aboriginal Heritage Act* to have a role in the management of water resources. And even if the *Aboriginal Heritage Act* were amended to enable this to occur, the *Aboriginal Heritage Act* is limited in what it can achieve, and it would create a potential for conflict with Traditional Owners.

5 Which of Victoria's Rivers Would Be Suitable?

Even if the abovementioned issues are satisfactorily addressed, a further issue would be the identification of suitable river. Rivers that would be particularly appropriate for recognition as a legal entity are arguably those rivers which have less complicated management structures and involve fewer interests – for example, those rivers which fall within the country of a limited number of Traditional Owner groups and Catchment Management Authorities ('CMAs') and which lie entirely within Victoria's external boundary. In that respect, a number of the Gippsland Rivers might be suitable, such as the Mitchell River or the Thomson River. Both of these rivers lie entirely within Victoria and the traditional country of the Gunaikurnai people, and both rivers only involve one CMA respectively.[197] Similarly, the Wimmera River lies within the traditional country of the Wimmera Clans, and involves only one CMA.[198]

However, given that the Wimmera Clans settled their native title claim in 2005 and the Gunaikurnai people in 2010, along with the fact that several other claims are still waiting to be settled, there may be little incentive for the State to open negotiations with either group in relation to recognising one of these rivers as a legal entity. On the other hand, the native title settlement might provide the basis for opening negotiations. If the State were to agree to do so, it certainly would be an ideal opportunity to test an innovative form of recognition.[199]

The alternative is to find another river similarly suitable for which a settlement under the *NTA* or *TOS Act* has not yet been reached. In that regard, having a multiplicity of interests and management responsibilities in a river may not necessarily be an impediment, and may in fact be a sound justification for the creation of a legal entity to represent the entire river. The *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* does not grant legal personality to the Yarra River (and the Yarra River is not currently the subject of a native title or *TOS Act* claim). However, it does specifically 'provide for the declaration of the Yarra River and certain public land in its vicinity for the purpose of protecting it as one living and integrated natural entity'[200] with the existence of numerous interests and management responsibilities across a wide range of entities

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197 The Thomson River lies within the West Gippsland CMA's boundary, and the Mitchell River lies within the East Gippsland CMA's boundary.

198 The Wimmera CMA.

199 The State has agreed with the Wimmera Clans to commence a re-negotiation of their native title settlement agreements, so it is clearly possible: Native Title Services Victoria, *Current Clients* (2014) <http://www.ntsv.com.au/our-work/our-clients/>.

200 *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 1(a).

necessitating a coordinated, holistic approach. It should also be noted that the Whanganui River also has a multiplicity of interests and entities with management responsibilities, which was not an impediment to the granting of legal personality to the Whanganui River in the Whanganui River Settlement.

IV CONCLUSION

The Aotearoa New Zealand case study of the Whanganui River Settlement and the discussion above indicates that the recognition of a river as a legal entity with its associated guardianship structure is not so far removed from existing water governance structures in Victoria, such as the VEWH, as to be entirely beyond contemplation as a means of giving a greater role to Indigenous people in river management. It is therefore not a radical idea, but could instead be viewed as an extension or adaptation of an existing concept. There are a number of potential obstacles and difficulties that would need to be dealt with, including its relationship with Traditional Owner entities and the settlement context in which any such arrangement would be negotiated. An important step towards its realisation would be to have mandated Indigenous representation on the VEWH, and for Indigenous cultural values to be more explicitly referred to in the objects of the VEWH and in the environmental water reserve objective.[201] As noted earlier, the Victorian government has taken a first tentative step towards achieving these goals with a commitment to appoint an Aboriginal Victorian as a commissioner on the VEWH,[202] and to recognising Aboriginal values and objectives of water. Whether this will lead to legislatively mandated representation on the VEWH is yet to be seen. Despite the comprehensiveness of the 2016 Victorian Water Plan and its clear intention to enhance participation of Aboriginal people in water management, it does not envisage any major change to the current state-wide legislative arrangements for water management.[203] However, if other stakeholders and water users become exposed to a more prominent role for Indigenous people at a state-wide level (statutorily or otherwise), then the river as a legal entity concept could become more acceptable and trialled in legislation for individual rivers or river catchments. The *Yarra River Protection Act* provides some hope that individual rivers and catchments can be the subject of legislation which at least mandates Indigenous representation on water governance structures. However, a reluctance to tinker with the state-wide legislative framework, and the retention of existing structures to take on the holistic management of specific

201 The VEWH manages water holdings for the purposes of 'maintaining the environmental water reserve in accordance with the environmental water reserve objective': *Water Act 1989* (Vic) s 33DC(a). 'The environmental water reserve objective is the objective that the environmental water reserve be maintained so as to preserve the environmental values and health of water ecosystems, including their biodiversity, ecological functioning and quality of water and the other uses that depend on environmental condition': *Water Act 1989* (Vic) s 4B(1).

202 *Victorian Water Plan* (2016), above n 176, 172 (Action 10.8).

203 There are two exceptions – the Victoria Planning Provisions: ibid 91 (Action 5.5); and commitments to align with the Murray-Darling Basin Plan: ibid 132 (Action 8.6).

rivers, such as the Yarra River,[204] suggest that granting legal personality to a river in Victoria is still a step too far.

204 The Victorian Government proposes that the existing Melbourne Water Corporation be the lead agency to develop the initial Yarra River Strategy and coordinate its delivery: Department of Environment, Land, Water and Planning (Vic), 'Yarra River Action Plan' (2017) 8, 13 (Action 2).