THE BRAIDED RIVER OF LEGAL PERSONALITY: POWER, PROPERTY AND SOVEREIGNTY

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This article considers the instrumental and non-instrumental consequences of legal personality conferred on Te Urewera and the Whanganui River. These examples of legal personhood were born from Treaty settlements as a novel legal compromise between the Crown and Māori in the constitutional space. Legal personhood ultimately represents the Crown's unwillingness to truly incorporate tikanga into the dominant legal sphere and divest power, property and sovereignty to Māori as Treaty partners. The Te Urewera personhood framework was instrumental in shifting governance from central government to the Park's representative (the Te Urewera Board), but it is highly constrained by Crown influence. Comparatively, the guardian framework for the Whanganui River is instrumentally hollow. The River's representative can only exercise decision-making power when delegated such power, not as of right. Without legitimate ownership or power over the River, the Whanganui River framework is largely of symbolic value. Through the intricate guardian frameworks, legal personality has sidestepped the most pressing political stalemate over ownership of land between the Crown and Tūhoe and Whanganui iwi, respectively. The underlying tension of power and sovereignty remains. However, the non-instrumental outcomes of personhood are valuable. Legal personality gives tangible recognition to the Māori worldview, albeit in competition with the dominant legal system. The symbolism of personhood may also catalyse a shift from an anthropocentric to an ecocentric understanding of nature. Additionally, the new representative bodies of Te Urewera and the Whanganui River challenge our understanding of public law considerations. Animation of the Park and the River as legal entities may assist in stretching the New Zealand Bill of Rights Act 1990, particularly the right not to be deprived of life, to encompass environmental legal persons. Ultimately, the significance of Te Urewera and the Whanganui River as legal persons will depend on judicial interpretation. Until then, without the transfer of instrumental structures of true

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governance, legal personhood for the environment simply entrenches existing power imbalances while giving the symbolic appearance of greater influence.

I INTRODUCTION

In 2014, Te Urewera National Park became a legal person as part of the Ngāi Tūhoe Treaty settlement. Soon after, the Whanganui River was recognised as legal person by the Whanganui River Treaty settlement in 2017. These momentous Treaty settlements were followed by praise and excitement. Personhood was deemed to demonstrate "a profound shift" in power to Māori as an act of "nation building".[1] To some, legal personality for Te Urewera National Park and the Whanganui River was constitutional, or allegedly allowed for greater environmental protection. While such views are understandable, I encourage caution. Are we perhaps too distracted by the grandiosity of legal personhood to look to its practical effects on the exercise of public power and governance: is it constitutional? Or is it purely symbolic?

Legal personality for Te Urewera (the Park) and Te Awa Tupua (the Whanganui River) was born as a legally novel compromise between the Crown and Māori in the constitutional space. Te Urewera is the legal personality of Te Urewera and Te Awa Tupua is the legal personality of the Whanganui River. Instead of directly facing a Māori political claim to power, property and sovereignty over their taonga, legal personality has sidestepped a political constitutional stalemate. The underlying conflict of power and sovereignty remains. The Te Urewera Act 2014 has shifted governance of Te Urewera away from central government to a new co-governance entity. Yet, the invisible hands of the Crown still constrain this governance. Instead of radically reconfiguring Māori governance over the Whanganui River, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (the Whanganui River Act) has created an instrumentally hollow framework full of empty promises of power for the River. Ultimately, personhood as a symbol has distracted from the disconnect between legal personality and decision-making power. The powerful illusion of an entity which owns itself has also avoided the reality that, despite legal personhood being a "non-ownership" model, Crown ownership persists.

But despite lingering Crown control, personhood for Te Urewera and Te Awa Tupua is more than the sum of its legal parts. Legal personhood for the environment "imagines something more".[2] The "beauty of the concept" is how a Western legal model has been adopted in a way which "gives life to a river that better aligns with a Māori worldview that has always regarded rivers as containing their own distinct life forces".[3] Personhood animates Te Urewera and Te Awa Tupua in the law to reflect

1 Meg Parsons, Karen Fisher and Roa Petra Crease *Decolonising Blue Spaces in the Anthropocene: Freshwater Management in Aotearoa New Zealand* (eBook ed, Palgrave Macmillan, 2021) at 260.

2 Gwendolyn J Gordon "Environmental Personhood" (2018) 43 Colum J Envtl L 49 at 89.

3 James DK Morris and Jacinta Ruru "Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?" (2010) 14 AILR 49 at 58.

the relationship of Māori and their land. The pure symbolism of personhood could mould the consciousness of a nation. Seeing the Park and the River as living entities may assist in displacing the anthropocentric perception of nature in favour of an ecocentric approach. As a result, there could be more acceptance of the Māori worldview in the legal system and in the wider public eye, but also of environmental rights. Nonetheless, it remains that while tikanga and te ao Māori are given effect to in a symbolic and aspirational way, these practices are acceptable only to the extent they do not infringe on the dominant legal system or Crown control.

This article is an evaluative narrative. It uses the metaphor of *He Awa Whiria*, the braided river, to draw out both the instrumental and non-instrumental consequences of legal personality for the environment in public law relations. Instrumental consequences refer to the practical effect of the legal personhood legislation on the exercise of public power, whereas the non-instrumental consequences of legal personhood refer to the non-legal or symbolic effects. *He Awa Whiria* is a framework initially created by Macfarlane to represent how two streams of knowledge which exist independently can be dynamic, moving and shifting, and coming together and apart as the river flows.[4] Yet, despite the journey with shifting channels and sandbanks, both streams come together to end up in the same place. To consider the non-instrumental consequences, is to see legal personhood for its inherent, symbolic value alone. Instrumentally, we must consider legal personhood as a means to an end in resource management and Māori–Crown relations in the context of sovereignty, power and governance.

This narrative includes an evaluation of the form, function and consequences of the Te Urewera and Whanganui River Acts in New Zealand's public law sphere, both practically and symbolically. Part II outlines legal personhood as legal devices and contextualises the two Acts within the international context of rights to nature. Part III begins our journey at the headwaters (the beginning) of the river, and concludes that legal personhood was born as a compromise between Crown and Māori in the constitutional space over property, sovereignty and power. It is here at this nexus that the river branches into two streams. Both the instrumental and non-instrumental weave in and out of the three key cornerstones of this article, each representing a bend in the river: the instrumental consequences as demonstrated through power, property and sovereignty, the non-instrumental value of personhood in giving effect to the Māori worldview and ecocentrism, and the resulting challenges to concepts of governance. The first bend in the river is Part IV which discusses the practical effect of the Whanganui River Act on the ownership and management of Te Awa Tupua. Part V considers the same of the Te Urewera Act on Te Urewera. Upon reaching the conclusion that legal personhood has only given restricted power to Te Urewera and Te Awa Tupua, as Crown ownership and control

4 See Advisory Group on Conduct Problems *Conduct Problems: Effective Services for 8–12 Year Olds* (Ministry of Social Development, September 2011) at 63; and Angus Macfarlane, Sonja Macfarlane and Gail Gillon "Sharing the food baskets of knowledge: creating the space for a blending of streams" in Angus Macfarlane, Sonja Macfarlane and Melinda Webber (eds) *Sociocultural Realities: Exploring New Horizons* (Canterbury University Press, Christchurch, 2015) 52.

persists, Part VI considers whether the symbolic effect of legal personhood for Te Urewera is more than the sum of its legal parts. It considers how legal personhood can could encourage the law to see Te Urewera and Te Awa Tupua through a Māori worldview, thus changing treatment of Te Urewera and Te Awa Tupua for the better. Finally, Part VII discusses the rights and obligations resulting from environmental legal personhood which may challenge our understanding of judicial review and accountability for public bodies engaged in the exercise of power. It also considers how the Bill of Rights Act 1990 might engage with Te Urewera and Te Awa Tupua. This article will follow the river as the legal and non-legal consequences of legal personhood intersect and discover where the two streams come together to end their journey.

II AN ARTIFICIAL BRIDGE OVER TROUBLED WATERS

It is necessary to begin by defining and contextualising the Te Urewera and Whanganui River Acts within the broader international trend of legal personality for the environment. This context is important when understanding the primary purpose of the two Acts to be a means of managing human relationships between the Crown and Māori, not to protect the environment or to be bills of rights. Legal personhood, therefore, is an old legal device being used in a classic way to regulate relationships. The device bridges two conflicting worldviews constantly in tension over the turbulent waters of resource management and Te Tiriti o Waitangi (Te Tiriti).

Legal personalities are artificial creations of the law.[5] The legal device entitles the entity to rights and therefore respective duties. It empowers the entity to enter into contracts, to sue and be sued, and to demand observation of constitutional rights. Legal personality has no intrinsic existence until the law "calls forth" the personality from nothing.[6] Typically, this can be in three ways: by the judiciary, or by specific legislation or generic legislation.[7] The Te Urewera and Whanganui River Acts are specific legislation, as opposed to generic legislation, such as the Companies Act 1993, under which any number of legal persons can be created for the defined purpose.[8] The essential distinction between a natural person and a legal person is the delineation of rights and responsibilities. A natural person may act however they choose, so long as the law does not prohibit it. By contrast, an artificial person may only act within the confines of the legislative grant.[9] They are limited by the purpose and powers conferred by law, as "anything not given explicitly or implicitly is withheld".[10] For example, although

5 Andrew Butler and Petra Butler *Laws of New Zealand* The New Zealand Bill of Rights Act 1990: Legal Persons (online ed) at 34.

6 Susanna Kim Ripken *Corporate Personhood* (1st ed, Cambridge University Press, Cambridge, 2019) at 22.

7 Megan Exton "Personhood: A Legal Tool for Furthering Māori Aspirations for Land" (LLB(Hons) Dissertation, University of Otago, 2017) at 8.

8 At 12.

9 Joseph France *Principles of Corporations Law* (2nd ed, M Curlander, Baltimore, 1914) at 70.

10 At 70.

Te Urewera land is vested in the legal person, the right to alienate land is explicitly excluded from the landowner rights held by the representative of the Park.[11] Such restriction is aligned with the purpose of the legislation: to preserve Te Urewera "in perpetuity" not only for its natural and cultural value, but for its "national importance".[12] In this endeavour, the connection between Tūhoe and Te Urewera must be maintained, and the Park must be protected as a place of public enjoyment.[13] Restricting land alienation is necessary to meet these purposes of the specific personhood conferred by the grant.

Personifying Te Urewera and Te Awa Tupua manages the relationship between Māori and the Crown in resource management for specific resources. The derivative Acts prescribe the regulation of the Park and the River, re-organizing decision-making power between iwi and the Crown.[14] Thus, legal personhood is being used to regulate human relationships. In fact, this is the very reason for the existence of legal personality:[15]

> The broad purpose of legal personality, whether of a ship, an idol, a molecule, or a man, and upon whomever or whatever conferred, is to facilitate the regulation, by organised society, of human conduct and intercourse.

An example of this facilitation is the use of corporations. Corporations have a long history of legal personhood, bearing the benefit of legal standing and the burden of legal obligations. Legal personality regulates human relationships by making enterprise easier between human economic actors. The individuals who create corporations fade into the background and allow the corporation to enter legal relations and acquire corresponding legal obligations.[16] This article explains how the legal personhood frameworks of Te Urewera and Te Awa Tupua regulate the relationship between the Crown and Māori in the context of Te Tiriti.

It may be tempting to group legal personality for the environment in New Zealand within the broader international movement of rights for nature. In 2008, Ecuador introduced a new ground-breaking constitution which gave inalienable rights to nature. Nature was given the "right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions

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11 Te Urewera Act 2014, s 13.

12 Section 4.

13 Section 4; and Exton, above 7, at 14.

14 Katherine Sanders "'Beyond Human Ownership'? Property, Power and Legal Personality for Nature in Aotearoa New Zealand" (2018) 30 JEL 207 at 222.

15 Bryant Smith "Legal Personality" (1928) 37 Yale LJ 283 at 296 as cited in Sanders, above n 14, at 210, n 17.

16 Ripken, above n 6, at 22.

and evolutionary processes".[17] Ecuador conferred rights to nature by analogy to humans, but did not make nature a legal person like the Te Urewera and Whanganui River examples.[18] Instead, nature became the bearer rights simply as "nature" and not as a natural or legal person.[19] Bolivia followed suit and introduced the Law of Mother Earth in 2012, creating a legal framework for the rights of nature. The framework recognised indigenous cultural attachment to Pachamama (Mother Earth) by conferring rights thereon, including the "right to life, diversity, water, clean air, equilibrium, restoration, and pollution free living".[20] By doing this, both Ecuador and Bolivia sidestepped legal personality and instead removed human legal dominance over nature.[21] One example of environmental personhood most comparable to New Zealand was judicial recognition in India of the Ganges River as having legal personhood, although this status has since been removed by the Supreme Court of India.[22]

In this way, the New Zealand examples of legal personhood for the environment are pioneering and distinct: instead of conferring rights to nature in an anthropocentric way, the Te Urewera and Whanganui River Acts are true examples of legal personality for the environment. Additionally, the frameworks take on a novel constitutional aspect in Māori–Crown relations.

III HEADWATERS: A CONSTITUTIONAL COMPROMISE

Legal personhood is an old legal device being utilised in a unique way to settle long term constitutional clashes between the Crown and Māori. It is here that we find the source, or headwaters (beginning) of the braided river. Te Urewera and Te Awa Tupua are historically associated with the sovereignty of the Crown as conservation areas and key national resources. Thus, consistent pressure from Māori to exercise rangatiratanga over their taonga (Te Urewera and Te Awa Tupua) demonstrates a wider Māori challenge to the distribution of power and property.[23] The Crown's blanket refusal to return or transfer a fee simple title to Māori in response to this challenge "should be read as a claim to political power; a public assertion of the authority of the State to determine property rights".[24] Against this background, the source of legal personhood for Te Urewera and Te Awa Tupua

17 Hannah White "Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States" (2018) 43 Am Indian L Rev 129 at 140. See also Constitution of the Republic of Ecuador 2008, art 71.

18 Gordon, above n 2, at 52.

19 At 54.

20 White, above n 17, at 143.

21 Gordon, above n 2, at 54.

22 White, above n 17, at 151–152.

23 Sanders, above n 14, at 220.

24 At 221.

is clear. In order to break a long-term political stalemate, legal personhood allowed for a novel legal compromise between the Crown and Māori over property, sovereignty and power, which lie at the heart of the New Zealand constitutional narrative.[25] Once more, this highlights the political flavour of legal personality for nature as opposed to environmental protection.

Land ownership is tightly intertwined with the sovereignty of the emerging colonial state of the 20th century. In 1840, the British Crown and Māori rangatira (chiefs) signed Te Tiriti o Waitangi, which guaranteed Māori "full, exclusive and undisturbed possession of their lands".[26] However, what followed Te Tiriti was a story of "systematic dispossession" of Māori land through confiscations, individualisation of title, Crown purchasing of land, and compulsory acquisitions of land through the Public Works Act.[27] Land was undoubtedly a key tool in creating the colonial state, and conservation estates were no exception. In 1954, Te Urewera was made a national park, which transferred ownership of Tūhoe land to the Crown to be managed by the Department of Conservation.[28] The beds of navigable rivers were nationalised in 1903, delivering the Whanganui River bed, a significant resource, into Crown possession.[29] The transfer of Te Urewera and Te Awa Tupua into Crown ownership meant Te Urewera and Te Awa Tupua were to be governed under Western law with no regard (or very little regard) for Māori "cultural, historical, traditional and spiritual importance" of the areas.[30] Transferring ownership removed the ability for Māori to exercise rangatiratanga (authority) and kaitiakitanga, thereby separating Māori from their worldview. Kaitiakitanga refers to the exercise of guardianship encapsulated in the relationship of Māori to the natural world.[31] Kaitiaki, the people who exercise kaitiakitanga, carry the benefit of the land, but also the responsibility to care for it in a way which protects the resource for future generations.[32]

When the Treaty of Waitangi Act 1975 created a permanent commission of inquiry to investigate breaches of Te Tiriti, the return of customary land through the Treaty settlement process was a primary

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25 Andrew Geddis and Jacinta Ruru "Places as Persons: Creating a New Framework for Māori-Crown Relations" in Jason Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart Publishing, Oxford, 2020) at 257–258.

26 Matthew Wynyard "'Not One More Bloody Acre': Land Restitution and the Treaty of Waitangi Settlement Process in Aotearoa New Zealand" (2019) 8 Land 162 at 162.

27 At 162; and see Sanders, above n 14, at 222.

28 Vincent O'Malley "Historical Background" (2014) October Māori LR 3 at 4.

29 Sanders, above n 14, at 220.

30 Geddis and Ruru, above n 25, at 259.

31 Selwyn Hayes "Defining Kaitiakitanga and the Resource Management Act 1991" (1998) 8 Auckland U L Rev 893 at 894.

32 At 894.

concern for many Māori.[33] Yet, as an assertion of absolute sovereignty in determining property rights, the Crown established significant restrictions on land which could be returned to iwi. Consequently, the push and pull between the Crown and Māori in the context of Te Urewera and Te Awa Tupua was this: Māori sought the return of their lands which were (and remain) central to their identity, but which were "caged in the conservation estate".[34] However, the Crown specified that conservation land, or land managed by Department of Conservation, was not available as redress in Treaty settlement negotiations.[35] This amounted to one third of all land in New Zealand.[36] Further, the foreshore and seabed could not be owned,[37] the historical weight of common law prevented water from being owned, and Crown ownership of minerals trumped even private property rights. A constitutional stalemate ensued, preventing adequate redress being made to Tūhoe and Whanganui iwi which reflected the centrality of Te Urewera and Te Awa Tupua to their cultural identity.

The history of the Tūhoe–Crown settlement demonstrates this constitutional tension. Although not signatories of Te Tiriti, the Crown assumed sovereignty over Tūhoe territory and Tūhoe still suffered significant land confiscation and violence at the hands of the Crown.[38] One example is the Urewera District Native Reserve Act 1896. The Act intended to recognise the self-government of the Te Urewera people.[39] Such promises of self-government never came to pass, and Te Urewera became a national park in 1954 after further land loss.[40] Tūhoe has consistently fought for the return of Te Urewera as an innate part of their identity.[41] In 2009, an agreement was reached with the Crown that Tūhoe would hold ownership of Te Urewera for 10 years, and would manage the Park in partnership with the Crown before being reconsidered.[42] Yet, on the eve of signing the settlement, the Prime Minister, the Rt Hon John Key MP, removed Te Urewera from the negotiation table because he was

33 Wynyard, above n 26, at 7.

34 Geddis and Ruru, above n 25, at 260.

35 At 260.

36 Wynyard, above n 26, at 10.

37 Randall Bess "New Zealand's Treaty of Waitangi and the doctrine of discovery: Implications for the foreshore and seabed" (2011) 35 Marine Policy 85 at 85.

38 O'Malley, above n 28, at 3.

39 Carwyn Jones "Tūhoe Claims Settlement Act 2014; Te Urewera report of the Waitangi Tribunal" (2014) October Māori LR 13 at 14.

40 Waitangi Tribunal *Te Urewera Report* (Wai 894, 2017) at xlix. The National Parks Act 1952 created the Te Urewera National Park in two stages; the first stage in 1954 set aside 150,000 acres of land to form the National Park. The rest of the land was added in 1957 to establish the boundaries of the National Park (and the legal personhood of Te Urewera) which we understand today.

41 Rawinia Higgins "Te Wharehou o Tūhoe: The house that 'we' built" (2014) 10 October Māori LR 7 at 8.

42 At 10.

concerned with the political ramifications and effect on public access.[43] Parties returned to the negotiating table, where Tūhoe instructed their negotiating representative, Te Kotahi ā Tūhoe, not to settle without the return of Te Urewera.[44] The Crown refused to do just that. Only in 2014 was the stalemate broken by agreement to create legal personhood for Te Urewera, constructing a new kind of compromise between the Crown and Māori.

The Te Urewera Act conferred legal personality on Te Urewera and set up a corresponding guardian framework as part of the Ngāi Tūhoe Treaty settlement. Te Urewera is declared to be a legal entity with all the "rights, powers, duties, and liabilities of a legal person".[45] In beautiful legislative style, Te Urewera is described as "ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty".[46] It is acknowledged to have an "identity in and of itself", with its own mana and mauri (life force),[47] and as the anchor of Tūhoe culture, language, customs and identity.[48] Te Urewera establishment land ceased to be vested in the Crown, and vests instead in the new legal person.[49] Any land that was a conservation area, Crown land, a national park or a reserve, ceased to fall under those titles and their respective statutes.[50] Instead, the land is now governed by the Te Urewera Board: the legal representative of Te Urewera.

Similarly, iwi claims to the Whanganui River presented a constitutional challenge to Crown sovereignty. In 1999, the Waitangi Tribunal reported that Whanganui iwi were in possession of the Whanganui River at the time of Te Tiriti, and continue to claim rights which equate to ownership.[51] This declaration was met with public hesitation; the public were concerned that any meaningful settlement would interrupt public rights to water.[52] The Crown consoled the public by stating water could not be owned at common law and ownership of the River would not be transferred.[53] It was 18 years before a political compromise was made in the Whanganui River Act. The Act conferred legal

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43 Geddis and Ruru, above n 25, at 260.

44 O'Malley, above n 28, at 8.

45 Te Urewera Act, s 11.

46 Section 3(1).

47 Section 3.

48 Section 3.

49 Section 12.

50 Section 12.

51 Liz Charpleix "The Whanganui River as Te Awa Tupua: Place-based law in a legally pluralistic society" (2018) 184 Geogr J 19 at 20.

52 Parsons, Fisher and Crease, above n 1, at 266.

53 Mick Strack and David Goodwin "More Than a Mere Shadow? The Colonial Agenda of Recent Treaty Settlements" (2017) 25 Waikato L Rev 41 at 44.

personhood on the Whanganui River with all the "rights, duties and liabilities of a legal person",[54] and created a corresponding guardian framework (Te Pā Auroa). Te Awa Tupua is holistically defined to be an "indivisible and living whole … from the mountains to the sea, incorporating all its physical and metaphysical elements".[55] Now the River owns itself and is represented by Te Pou Tupua, the human face and agent of the river. The position of Te Pou Tupua is held jointly by two people,[56] and their role is, among other things, to "act and speak for and on behalf of Te Awa Tupua".[57] The political compromise used legal personality to "neutralise" the issue of water rights and iwi claims to the Whanganui River.[58] However, due to the complexity of interests in the Whanganui River, the logistics of the guardian framework are complex and the rights and powers conferred on Te Pou Tupua are diluted compared to those vested by the Te Urewera framework. The largely symbolic power of the Te Awa Tupua framework is discussed later in this article in Part VI.

It is here that we begin our river journey at the nexus of power, property and sovereignty. Legal personhood was used as a novel compromise in Treaty negotiations, where both Crown and Māori claimed authority over the Te Urewera and the Whanganui River.[59] Before the compromise, Crown and Māori were engaged in a reactive political dance, refusing to acknowledge the direct challenge to sovereignty and property rights posed by Tūhoe and Whanganui iwi. Tūhoe wanted self-governance and return of their taonga, while the Crown hesitated to relinquish control over Te Urewera. Legal personality sidestepped this constitutional clash. While it allowed for a working solution where Tūhoe exercise some decision-making power over Te Urewera, the ultimate question of sovereignty and the right to undisturbed possession leaves many questions unanswered. Lastly, the constitutional source of personhood indicates we must dispel the hope that legal personhood will provide greater environmental protection against human degradation and exploitation, as it is not the primary goal of the legislation.[60]

IV EXPLORING THE REALITIES OF THE WHANGANUI RIVER (TE AWA TUPUA) FRAMEWORK

Contextualisation of legal personhood demonstrates that the Te Awa Tupua framework flows from the mouth of the New Zealand constitutional narrative of power, property and sovereignty.[61] A

54 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.

55 Section 12.

56 Section 20.

57 Section 19.

58 Parsons, Fisher and Crease, above n 1, at 266.

59 Sanders, above n 14, at 209.

60 Geddis and Ruru, above n 25, at 256; and see generally Sanders, above n 14.

61 Geddis and Ruru, above n 25, at 258.

close examination of the instrumental consequences of the framework illuminates that legal personhood acts only as a vehicle for symbolic power, as it fails to alter Crown and local authority control over river management. This section inspects the legal effect of the framework on river management, power and property. It establishes that the framework tends to (and was intended to) "compliment, rather than override, existing legislation", and so central and local government retain their decision-making roles over Te Awa Tupua.[62] An examination of the representative body Te Pou Tupua demonstrates that no decision-making power is devolved as a consequence of legal personhood. Instead, Te Pou Tupua stands constantly poised to exercise discretionary delegated power. A lack of legally mandated decision-making power demonstrates that legal personhood is not automatically synonymous with managerial powers or direction-setting ability for Māori as of right.[63] The power of the framework is therefore instrumentally disappointing.

Lastly, comparison with the Waikato–Tainui co-governance scheme demonstrates that without instrumental structures, processes and powers devolving legally mandated power to Te Pou Tupua, legal personhood does nothing novel for Māori–Crown relations. The Waikato-Tainui framework gives effect to the te ao Māori understanding of the River more effectively than Te Awa Tupua, despite falling short of legal personality. The Waikato River Authority has mandated power to influence decision-making, meaning Māori can implement concepts of rangatiratanga and recognise the River as a living entity with mana and mauri. When compared with the Waikato-Tainui framework, legal personality for Te Awa Tupua is merely ornamental. There exists an elaborate illusion of transferred power, but those aspects closely associated with ownership and governance are missing. Legal personhood cannot transform lacklustre co-management or co-governance agreements into significant vehicles of iwi resource management without the necessary legislative support.

A A Symbol of Distraction

By closely examining the instrumental realities of Te Awa Tupua's guardian and governance framework, it becomes clear that the effect of the framework is symbolic. The rights conferred, powers given, and control maintained by the Crown add up to a framework that is instrumentally hollow.

The symbolic nature of the framework is immediately realised with the initial vesting of property to Te Awa Tupua. The River is first declared to be an "indivisible living whole", complete only with all its physical and metaphysical elements. However, the legislation only confers Crown-owned property in the riverbed to Te Awa Tupua.[64] The constituent parts which comprise the whole of the River—the water, the riverbanks, the aquatic life and the airspace above the river are not transferred

62 Office of Treaty Settlements *Regulatory Impact Statement: Te Awa Tupua (Whanganui River) framework* (April 2016) at 2.

63 Katie O'Bryan "The changing face of river management in Victoria: The Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 (Vic)" (2019) 44 Water International 749 at 779.

64 Te Awa Tupua (Whanganui River Claims Settlement) Act, s 41.

to the legal entity. Neither is land acquired under the Public Works Act, roads, infrastructure and land in the marine and coastal area.[65] Thus, the River is still compartmentalised into its constituent parts despite a symbolic vesting of the whole. Private property is also completely excluded from reach of the framework.[66] Moreover, despite a symbolic initial vesting to the legal person of any land falling under the Conservation Act 1987, National Parks Act 1980, or the Reserves Act, the framework immediately restores the land to be held and protected under those former statutes.[67] For example, although the fee simple estate of any Crown-owned parts of the bed of the Whanganui River vests in Te Awa Tupua pursuant to s 41(1) of the Whanganui River Act, any land that was a conservation area is immediately declared in s 42(1)(a) to be a conservation area under the Conservation Act 1987 once more and subject to the same conservation principles which applied before the vesting. Section 42(2) confirms that the functions and powers arising under the Conservation Act 1987 continue to apply instead of the those which would have otherwise been exercised by Te Pou Tupua. The same process occurs with the National Parks Act and the Reserves Act. Te Awa Tupua continues to be managed by the Crown. It can only be concluded that the reality of legal personhood for Te Awa Tupua is symbolic. The grandiosity of the gesture distracts from the instrumentally hollow rights and powers given to Te Awa Tupua.

Legal personhood is an ownership model, but the rights vested in Te Awa Tupua are a "mere shadow" of true ownership.[68] Western notions of property rights are defined by a bundle of rights model, which includes the right to exclude others, control land, possess the property, and sell or transfer the property. A tension exists between property rights indicative of true ownership and those rights conferred through legal personhood. Te Pou Tupua is explicitly excluded from preventing public access, but also from transferring or selling the property without legislation. Te Pou Tupua has no control in regulating activities on the River or within its catchment. Instead, this role is delegated to the "collaborative group", who review and manage river surface activities.[69] This collaborative group comprises representatives of iwi, the Department of Conservation, Maritime New Zealand, relevant local authorities, and only has a requirement to consult with Te Pou Tupua and the Minister. Iwi are simply another stakeholder and are given no greater say in controlling the River. Without power to regulate behaviour on the River through bylaws or as a consent authority, Te Pou Tupua cannot exercise proprietary control over Te Awa Tupua. It must be concluded that legal personhood is a symbol of ownership but not true ownership according to the Western framework. The Crown still maintains many of these landowner rights over Te Awa Tupua. The absence of these incidents of

65 Section 41(2).

66 Section 16.

67 Section 42.

68 Strack and Goodwin, above n 53, at 44.

69 Te Awa Tupua (Whanganui River Claims Settlement) Act, s 64.

ownership also demonstrates a lack of mandated decision-making power and control needed by Māori to exercise rangatiratanga and kaitiakitanga.

B The Disconnect between Legal Personality and Managerial Powers

The practical effect of the River's framework is to regulate decision-makers empowered by other statutes largely through the River strategy, rather than giving Te Pou Tupua decision-making powers. Thus, the instrumental operation of Te Awa Tupua's framework is lacking in potency, creating a disconnect between legal personality and managerial powers.

Beyond the misty haze of legal personhood, the legal effect of the Te Awa Tupua framework is rather lacklustre. At most, in consequence of its new status, Te Awa Tupua must be considered by decision-makers with greater weight than under the Resource Management Act 1991 alone. Local and central government agencies exercising statutory functions, powers and duties in relation to Te Awa Tupua, or controlling activities within its catchment, are now under a duty to consider the status of Te Awa Tupua and Tupua te Kawa (the intrinsic values that represent the essence of Te Awa Tupua).[70] The strength of this consideration requirement differs depending on the statute under which the decision-maker is acting. Decision-makers acting under any of the 25 statutes in cl 1 of sch 2 must "recognise and provide for" the status of Te Awa Tupua and Tupua te Kawa.[71] These statutes notably include the Local Government Act 2002, Conservation Act, National Parks Act 1980, and the Resource Management Act in relation to preparing or changing a regional policy statement, regional plan or district plan.[72] Decision-makers acting under the statutes in cl 2 of sch 2 need only have "particular regard" to the Te Awa Tupua status and Tupua te Kawa.[73] This includes the Public Works Act and the Resource Management Act generally—both Acts with significant powers.

Both of these duties place greater obligations on decision-makers to consider Te Awa Tupua and Tupua te Kawa, but they are not practically the most effective at protecting the river or empowering the river to have autonomy over itself. To "recognise and provide for" prevents the decision-maker from simply acknowledging the consideration and subsequently disregarding it, but the statute does not predicate how exactly to "provide" for Te Awa Tupua, or even that the decision-maker is bound to provide for the matter in the final decision at all.[74] The lesser requirement to have "particular regard

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70 Section 11.

71 Section 15(2).

72 Schedule 2.

73 Section 15(3). Tupua te Kawa is a broad idea which includes the "physical and spiritual aspects of the environment provided by the Whanganui river system" which are the intrinsic values which represent the essence of Te Awa Tupua: see Christopher Rodgers "A new approach to protecting ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017" (2017) 19 Env L Rev 266 at 270. See also Te Awa Tupua (Whanganui River Claims Settlement) Act, s 13.

74 Office of Treaty Settlements, above n 62, at 6.

to" means the decision-maker must take note of Te Awa Tupua as an important consideration and carefully weigh it, but retains the ability to proceed on the basis that other considerations take precedence.[75] Ultimately, neither consideration requirement disregards the discretion of decision-makers or the requirement for decision-makers to operate in a manner consistent with the purpose of their empowering Acts.[76] Consequently, the River remains highly regulated by various local governments and a hodgepodge of legislation. Personhood hides an almost unchanged River framework which has little concrete influence in River management. However, the consideration required by other decision-making bodies will allow Te Pou Tupua to challenge decisions through judicial review in order to uphold its legal rights.

It is also significant that the River strategy (Te Heke Ngahuru), which decision-makers must heed, is created by the River's strategy group Te Kōpuka and not Te Pou Tupua.[77] Thus, if legal personality transfers any influence on how the River is governed, this influence is given to Te Kōpuka rather than Te Pou Tupua. Membership of Te Pou Tupua is designed to reflect the partnership of the Crown and Māori under Te Tiriti.[78] Thus, one member is appointed by the Crown, and one member is appointed by iwi with interests in the Whanganui iwi.[79] By contrast, Te Kōpuka is a strategy group for Te Awa Tupua, made up of 17 representatives of iwi and stakeholders in the River. Such stakeholders include iwi, local authorities, government departments, and commercial, environmental and recreational representatives.[80] The group's purpose is to act collaboratively to advance the health and wellbeing of Te Awa Tupua through the River strategy—Te Heke Ngahuru.[81] Iwi are simply another stakeholder in this group.

C Latent Discretionary Powers

Te Pou Tupua does have *some*, albeit latent, ability to exercise decision-making power over Te Awa Tupua. Local authorities, regional councils, territorial authorities, and the New Zealand Walking Commission can delegate limited powers to Te Pou Tupua prescribed by the Whanganui River Act. Thus, Te Pou Tupua can receive delegated powers at the discretion of other decision-makers. Some of these discretionary powers are weighty and could provide Te Pou Tupua the opportunity to exercise decision-making power over the River. It is unfortunate that in practice, these discretionary powers

75 At 6.

76 Te Awa Tupua (Whanganui River Claims Settlement) Act, s 15.

77 Section 37.

78 Section 10.

79 Section 20.

80 Section 29.

81 Section 36.

have not been delegated.[82] This section outlines these potential discretionary powers, and how Te Pou Tupua shapeshifts in order to receive them. I conclude that although these proxy powers were intended to have a legal effect, they are instrumentally hollow. Any intended legal effect has not been realised. The powers are, perhaps unintentionally, symbolic.

The functional reality of Te Pou Tupua as a public entity is rather amorphous. Te Pou Tupua takes the form of either an institution, a public body, or a body corporate in order to receive delegated power. Te Pou Tupua is treated as a public body for the purpose of being eligible for appointment to a joint committee under the Local Government Act.[83] In this role, Te Pou Tupua can engage in public decision-making over Te Awa Tupua with other public bodies or local authorities. The extent of this delegation is undefined, implying that the decision-making power able to be delegated to Te Pou Tupua is broad and weighty. However, in order to receive any power, a local authority must actively choose to delegate to Te Pou Tupua. To date, Te Pou Tupua has not been appointed to a joint committee—which is perhaps characteristic of the rare use of joint management agreements since their introduction in by s 18 of the Resource Management Amendment Act since 2005.[84] A joint management agreement is an agreement between a local authority and an iwi authority or group that represents hapu, to perform a local authority's powers and duties under the Resource Management Act. As to their rare use in practice, O'Bryan argues that this may change given Te Pou Tupua is regarded as a more neutral body than iwi authorities, due to its nature as a dual partnership of Crown and Māori.[85] Te Pou Tupua has not been appointed as a joint committee for any purpose,[86] meaning the possibility of delegated power is largely instrumentally hollow. The powers exist, but what use is proxy power if it is never used?

Te Pou Tupua is treated as a public body in being eligible for appointment as a controlling authority under the Walking Access Act 2008.[87] Controlling authorities of a walkway are responsible for maintaining walkways for the safety and pleasure of the public and providing control over proper use of the walkway.[88] Additionally, controlling authorities are able to impose charges for use of facilities and have control over finances needed for their function. If appointed to this role, Te Pou Tupua could have some power to protect taonga (treasured possessions) or restrict access to wāhi tapu

82 Joint Committee Appointments under Section 30 and 30A of the Local Government Act (Obtained under Official Information Act 1982 Request to the Department of Internal Affairs).

83 Te Awa Tupua (Whanganui River Claims Settlement) Act, s 17(b).

84 Katie O'Bryan "Giving Voice to the River and the Role of Indigenous People: The Whanganui River Settlement and River Management in Victoria" (2017) 20 AILR 48 at 59.

85 At 59.

86 Joint Committee Appointments under Section 30 and 30A of the Local Government Act, above n 82.

87 Te Awa Tupua (Whanganui River Claims Settlement) Act, s 17(g).

88 Walking Access Act 2008, ss 35 and 37.

(sacred places), while "at the same time establishing economic opportunities around public access including interpretation services and education".[89]

Te Pou Tupua is treated as a public authority when delegated powers under the Maritime Transport Act 1994.[90] The Act is significant in the regulation of maritime safety and protection of the marine environment.[91] Regional and territorial councils have powers to regulate maritime related activities, ports, harbours and waters in their regions.[92] Under s 33X, a regional council can transfer any of its responsibilities to another public authority, thus including Te Pou Tupua. This potential delegated power, although it has not yet been used, grants significant control of Te Awa Tupua to Te Pou Tupua.

Most significantly, Te Pou Tupua can be delegated functions held by regional councils under the Resource Management Act. As the main resource management legislation, this could be a powerful delegation.[93] Although these powers can be relinquished at any time,[94] it means Te Awa Tupua can be delegated decision-making power over the River for reviewing objectives, policies, control of the use of the land for conservation, in relation to the bed of a water body and possible introduction of plants.[95] These are public powers exercised typically by regional councils.

This assessment shows that the instrumental force of the Te Awa Tupua framework is lacking. Such is the basis for caution early in our River journey. The granting of legal personhood is here disconnected from managerial powers and influence over the River. Te Pou Tupua's ability to shapeshift and accept delegated power must not distract from the lack of power conferred on Te Awa Tupua as of right, or that ownership is not truly conferred to the River as a legal entity. These discretionary powers are an assertion of continuing Crown sovereignty, where power remains in the hands of the Crown or local authorities to delegate.

D Is Legal Personality Merely Symbolic?

If we set legal personality to one side and look only at the legal framework of the Whanganui River Act, it is not as powerful when compared to other co-governance and co-management agreements born of various Treaty settlements in the mid-2000s.[96] Comparison with the Waikato

89 Ministry for Primary Industries *Report on the Findings of the Review of the Walking Access Act 2008* (September 2019) at 24.

90 Te Awa Tupua (Whanganui River Claims Settlement) Act, s 17.

91 Maritime New Zealand "Legislation we administer" Maritime New Zealand <www.maritimenz.govt.nz>.

92 Maritime Transport Act 1994, s 33C.

93 Resource Management Act 1991, s 33.

94 Section 33(8).

95 The functions of regional councils are set out in s 30 of the Resource Management Act.

96 Parsons, Fisher and Crease, above n 1, at 253.

Authority demonstrates that, without instrumental structures, processes and powers devolving legally mandated power to Te Pou Tupua, legal personhood is not particularly significant or novel in developing Māori–Crown relations.

The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 created true co-governance for the Waikato River management without the device of legal personhood. Although the Waikato River falls short of being a legal person in law, the framework places the River firmly within the Māori worldview, much like the Te Pā Auroa framework. The river is described as a "tupuna (ancestor)" of Waikato-Tainui, which has "mana (spiritual authority and power) and in turn represents the mana and mauri (life force) of Waikato-Tainui".[97] The river is a single, indivisible being which encompasses its waters, banks, beds, streams, aquatic life, and everything in between. Much like Te Awa Tupua, the recognition of the river as indivisible and existing with mana and mauri explicitly places the river within the Māori worldview and highlights the living nature of the river. The heart of the river management framework is Te Mana o te Awa. This is the river's integrity and its right to be healthy in the interest of itself, which is an essential prerequisite for Te Mana o te Wai.[98] In this way, river is described as a tupuna with life and existing as a holistic being without the legal device of personhood.

The Waikato River Authority is the co-governance entity for the river and comprises five Crown and five iwi members (one from each iwi). Through the Vision and Strategy document, the Authority can set the direction for managing the river.[99] The Vision and Strategy document is explicitly stated by Parliament "to be the primary direction-setting document for the Waikato River and activities within its catchment".[100] The document is part of the Waikato Regional Policy Statement, and prevails over inconsistent provisions in a national policy or coastal policy statement.[101] Thus, when decision-makers are planning in accordance with their regional and national policies under the Resource Management Act, they are required to take the Vision and Strategy document into account. Indeed, every local authority must review its regional or district plan to see whether it gives effect to the Vision and Strategy document and amend for any inconsistencies.[102] Additionally, if any changes are made to conservation management strategies and plans under the Conservation Act, National Parks Act 1980, Reserves Act, Wild Animal Control Act, or Wildlife Act, an explicit statement must be

97 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 8.

98 Linda Te Aho "*Te Mana o te Wai*: An indigenous perspective on rivers and river management" (2019) 35 River Res Applic 1615 at 1619.

99 Office of the Auditor-General *Principles for effectively co-governing natural resources* (February 2016) at 9.

100 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 5.

101 Section 12; and Parsons, Fisher and Crease, above n 1, at 292.

102 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 13.

made explaining how the Vision and Strategy is given effect to. The result is significant decision-making power in the hands of the co-governance entity, half of which represent iwi interests.

Comparatively, the strategy for Te Awa Tupua is Te Heke Ngahuru (strategy document). It is simply another consideration for other decision-makers to have regard to, but which does not fetter their discretion in any way. It lacks the "bite" and influence awarded to the Vision and Strategy. Moreover, the strategy group (Te Kōpuka) only has up to five iwi members among 12 other stakeholders in the river.[103] This is a significantly diluted iwi influence when compared to the direct engagement of iwi as part of the Waikato River Authority. When comparing these two legislative frameworks it becomes clear that legal personhood is decorative when it lacks supporting processes and structures to deliver instrumental changes.

The Waikato-Tainui framework is a clear example of a co-governance framework which ensures greater "Māori participation and decision-making authority within freshwater management" through a kaupapa Māori lens.[104] Iwi are directly involved in strategic decision-making which has tangible implementation in resource management decisions. Through the instrumental structures and powers conferred to the co-governance entity, there is significant symbolic recognition of the river as valuable and part of Māori worldview. Altogether, the Waikato-Tainui co-governance framework better recognises the river as a living entity and its relationship with iwi than legal personhood does alone in the Whanganui River Act. Legal personality alone is symbolic: it cannot transform lacklustre "co-management" frameworks into a meaningful exercise of kaitiakitanga for Māori without supporting instrumental features. Nor can legal personality be a novel pathway to an enduring Treaty partnership if the structures and governance arrangements which lie underneath the symbolic legal device are lacking.

E Conclusion

In sum, there is no meaningful shift in power to Te Awa Tupua by using legal personhood as a legal device. At most, Te Awa Tupua is given greater consideration in other decision-makers' powers. Further, the "lens" through which it is considered is a te Ao Māori lens, which will "change how decision-makers and others view and understand the Whanganui River".[105] However, without local government leadership, or judicial understanding of the Māori worldview, there is no guarantee that this will be effective. Despite the ownership model of legal personhood, ownership persists in and remains tightly bound to the Crown. Legal personhood is therefore a symbolic power and transfers no meaningful exercise of rangatiratanga and kaitiakitanga to Māori.

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103 Section 32.

104 Parsons, Fisher and Crease, above n 1, at 294.

105 Office of Treaty Settlements, above n 62, at 2.

V TE UREWERA: POWER, PROPERTY AND SOVEREIGNTY

The Te Urewera Act was intended to be instrumental in changing how governance over Te Urewera occurred. During the third reading of the Te Urewera Act, the Minister of Conservation indicated the framework would demonstrate Māori are "equally good at managing that treasure [Urewera] as any department might".[106] Such a suggestion denotes that the Te Urewera framework would be highly instrumental in setting up the powers, functions and structures for this change of governance to occur. Indeed, the Board is now engaged in an exercise of public power over the management of Te Urewera. Management previously exercised by the Department of Conservation under the National Parks Act has shifted to the Board. However, the framework preserves a high level of Crown control over all actions and decisions of the Board. Consequently, there is no true constitutional shift in who exercises power. Rather, the Te Urewera framework reallocates how exactly governance is exercised by reshuffling powers in a complex co-governance framework. This reallocation is examined here through the different branches of the instrumental river to understand the complexities of the framework and highlight continued Crown control over Te Urewera.

A Controlled Shift in Governance

The Te Urewera Board is engaged in an exercise of public power over the management of Te Urewera. The Act explicitly states that the Te Urewera Board is responsible for the "governance" of Te Urewera in accordance with this Act, indicating an instrumental shift of control from the Department of Conservation.[107] To perform this obligation, the Board is highly involved in preparing, approving and overseeing the Te Urewera management plan, making bylaws, and authorising activities undertaken in Te Urewera.[108] The Te Urewera Board also acts "on behalf and in the name of" Te Urewera and advocates for the interests of Te Urewera in any statutory process or public forum.[109]

Preparation and approval of the Te Urewera management plan has shifted from the Department of Conservation to the Board.[110] Management plans are the primary direction-setting documents for conservation areas.[111] The plans operate in 10-year cycles and establish the management objectives for Te Urewera.[112] Before the Te Urewera Act, the plan would be drafted by the Director-General of

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106 (23 July 2014) 700 NZPD 19463.

107 Te Urewera Act, s 17.

108 Section 18(1).

109 Section 18(1).

110 Section 18.

111 Department of Conservation "National park management plans" <www.doc.govt.nz>.

112 Department of Conservation, above n 111.

Conservation in consultation with the relevant Conservation Board.[113] Following consultation with the public and after any necessary amendments, the management plan would be approved by the New Zealand Conservation Authority, who must have regard to the views of the Minister.[114] This complex process demonstrates a high level of ministerial involvement. The Minister has the power to direct the Authority according to central government policy and is fully accountable under the convention of ministerial responsibility. Departments typically exercise governance powers in areas which are high risk for central government. From this, we can infer that the management plan is an important, yet contentious power previously held intentionally close to central government.

Under the new arrangements, the Board must prepare and approve the management plan for Te Urewera. The shift of managerial power to the Board as a co-governance entity marks a clear transition of power away from central government. However, this governance is controlled. In preparing the draft management plan, the Board is still required to hear submissions from the public, and to discuss principle matters of the plan with the Chief Executive of Tūhoe Te Uru Taumatua (the representative of Tūhoe) and the Director General of Conservation.[115] The Board can approve the draft management plan[116] only after requesting comments from the Conservation Authority and recommendations from the Minister and the chair of the trustees of Tūhoe Te Uru Taumatua.[117] Thus, the Board exercises important public powers with high public and political risk typically reserved for government departments. While the Board is exercising these powers with greater independence than the Department of Conservation, some ministerial control remains. Cumulatively, the instrumental reality of the framework marks a strong shift in the exercise of central power to the Board, albeit with constraints. Restrictions on the Te Urewera Board's independence, such as the obligation consider comments from the Minister, are remnants of Crown control.

The power to enact bylaws has shifted from the Minister of Conservation to the Te Urewera Board. Prior to the Te Urewera Act, only the Minister of Conservation could pass bylaws for Te Urewera National Park.[118] Now, the Te Urewera Board has the power to enact bylaws to regulate activities in Te Urewera, oversee the safety and preservation of the area and address the management of the Park. If the Board intends to make a bylaw, advice must be sought from the Chief Executive of Tūhoe Te Uru Taumatua, the Director General of Conservation, and other appropriate organisations.[119] The bylaws are then drafted with the Chief Executive and Director General to submit to the Minister for

113 Conservation Act 1987, s 17F.

114 Section 17G.

115 Te Urewera Act, sch 2 cls 20 and 21.

116 Schedule 2, cl 23.

117 Schedule 2, cl 22.

118 National Parks Act 1980, s 56.

119 Section 70.

approval.[120] Such incidents of authority, albeit constrained, lend themselves to the practice of rangatiratanga for the Board. Iwi members are able to exercise some authority and decision-making power over the area. The shift of power from the Minister of Conservation to the Board demonstrates the instrumental effect of the framework. Bylaws are typically associated with local authorities, such as elected regional councils and territorial authorities.[121] Now, through this devolution of power, this governance has shifted so that the Board is engaged in an exercise of public power. However, the discrete veto power of central government must not be overlooked—the Minister must approve any bylaws. An alternative explanation for ministerial oversight is to ensure democratic accountability. Local authorities are elected, ensuring democratic accountability for any bylaws passed. Thus, ministerial oversight of bylaws made by the Te Urewera Board ensures there is a democratic element in the Board's exercise of public power. If this is the intention behind the oversight, the unlucky by-product is restricted independence of the Board's governance. Additionally, the extent of this oversight could be overbearing or unobtrusive depending on the Minister or government of the day.

As a landowner, the Te Urewera Board also has some influence over activities which may occur in Te Urewera. For example, the Board was able to make the decision to close Te Urewera during Alert Level 3 of the COVID-19 pandemic.[122] Further, as landowners the Board must grant a permit for any roads or construction taking place on Te Urewera.[123] The Board may also grant activity permits and leases and licences.[124] However, this power is fettered by the purpose of the Act and the management plan.[125] Activities which require an "activity permit" include entering specially protected areas, making or altering roads, farming, recreational hunting, or other actions which affect plant or animal life.[126] The Board may establish its own process for receiving, processing and determining applications for activities requiring authorisation,[127] but the granting of an activity permit or concession must not be contrary to the Act.[128]

Overall, there has been a shift of governance over Te Urewera from the Department of Conservation to the Te Urewera Board as a co-governance body. Therefore, the framework has

120 Section 70(2).

121 Legislation Design and Advisory Committee *Legislation Guidelines: 2018 Edition* (2018) at 64.

122 Te Urewera Board "Te Urewera Board Confirms Temporary Te Urewera Closures for Level Three" (20 April 2020) Scoop Independent News <www.scoop.co.nz>.

123 Te Urewera Act, sch 3 cl 3.

124 Section 62.

125 Section 62.

126 Section 58.

127 Section 59.

128 Section 57.

immense instrumental effect. However, when examined closely, the strong powers given to the Te Urewera Board begin to unravel. The inherent imbalance of power between the Crown and Māori seems to echo throughout the framework. What is revealed is underlying Crown control.

B What Lies Beneath the Water: Underlying Crown Control

Underlying Crown control of the Board can be compared to the surface of a river. When the water finally settles, the surface reflects back to the viewer their individual desired outcome of legal personality. For some, this desire is an idyllic shift in power, property and sovereignty to the legal person as a constitutional act. Yet, the reflection of the water prevents a clear view of what lies beneath the surface. When the stillness is broken and the water moves again, the instrumental operation of Crown control hidden in the waters below is revealed. Despite a shift in governance to the Board, the Crown still holds tightly to any real exercise of independent power.

While it seems as though the Board exercises significant regulatory power over Te Urewera, there remains a high level of Crown control. While the Board has certain authority and decision-making ability over Te Urewera, this can only be exercised within parameters which do not threaten Crown control. The Board may pass bylaws, but these must be overseen by the Minister. The Board can authorise activities in Te Urewera, but the Crown Minerals Act 1991 cannot be overruled. Theoretically, this can only be small "non-invasive forms of prospecting",[129] but the assertion of sovereignty over resources is significant. The Board has the power to create and oversee the operation of the management plan. However, this is constrained by the need to request comment from the Conservation Authority and receive recommendations from both the Minister and the chair of the trustees of Tūhoe Te Uru Taumatua. The Crown may authorise mining under Crown Minerals Act without authorisation by the Te Urewera Board. Cultural, recreational and educational activities, without specific gain or reward for the activity, do not require a permit.[130] A further restriction on the Board's jurisdiction is the Fish and Game Council. Where the Fish and Game Council has jurisdiction in Te Urewera, the Board and relevant council must enter a memorandum of understanding to show how the two entities will carry out their statutory functions.[131] Regardless of any agreement, the Fish and Game Council can still exercise its powers under s 40 of the Conservation Act.[132] These powers are extensive and include the power to seize property and search persons.[133]

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129 Parsons, Fisher and Crease, above n 1, at 24.

130 Te Urewera Act, s 56 (b).

131 Section 61.

132 Geddis and Ruru, above n 25, at 24.

133 At 24; and Conservation Act, s 40.

Most significantly, Crown control is embedded in the Board's membership and voting processes. The Board has nine members: six appointed by Tūhoe and three appointed by the Minister.[134] While this suggests strong Tūhoe presence on the Board and control over decision-making, the Act stipulates that the Board must strive to make decisions by "unanimous agreement".[135] Where the chair of the Board determines that decision by consensus is not practicable, a decision may be made by voting.[136] However, a majority vote must be made with the support of at least 80 per cent of the members, but not fewer than two Crown appointed members *must* support the vote.[137] Here, the Crown is holding yet another well-disguised veto power over any decision of the Board, despite the Board's majority Tūhoe membership. Thus, the potential for Tūhoe to exercise rangatiratanga or kaitiakitanga over Te Urewera is significantly constrained by Crown-appointed Board members representing the agenda of contemporary governments.

These restrictions over the Board's powers demonstrate that power is only transferred in a non-threatening way. Legal personhood was intended to be a non-ownership model. It is disappointing, therefore, that the instrumental reality of the Te Urewera framework is that "symbolically ownership disappears but practically it persists".[138] The Crown still has a limiting power on rangatiratanga and kaitiakitanga through the functions, structures and powers of the framework despite the appearance of independent power. Sanders highlights how Te Urewera is inalienable, it cannot be mortgaged or sold, and the power to exclude—the fundamental proprietary power—is absent because the public maintains its right of access. Thus, behind the façade of legal personhood, "legislation unbundles the incidents associated with ownership and reapportions them within co-management and co-governance frameworks".[139] Property remains central to the structure of the framework and in the wider context of land and water management. The Resource Management Act and other statutes still play a large role, even more so in the context of Te Awa Tupua.[140]

C Conclusion

Ultimately, legal personhood of Te Urewera should be regarded as Crown refusal to outright shift sovereignty or decision-making power into the hands of Tūhoe. Instead, the Te Urewera Act is another co-governance framework which entrenches the existing power imbalance between Māori and the Crown. While the Te Urewera Board is exercising similar powers to that of a government department,

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134 Te Urewera Act, s 21.

135 Section 33.

136 Sections 34 and 36.

137 Section 36.

138 Sanders, above n 14, at 209.

139 At 209.

140 At 222.

the Board is still ultimately constrained by the Crown. Thus, despite the indication that the Te Urewera Act would allow Māori to exercise governance over Te Urewera, like any department might, the framework has not realised this. In some ways, the grand gesture of legal personhood has diverted our attention away from the legal framework, which gives an illusion of greater independent power for the Board than there is in practice.

VI THE NON-INSTRUMENTAL STREAM

In this section, the sandbanks of the braided river shift once more, pushing us to consider the non-instrumental consequences of legal personhood. Thus far, we have concluded that the Te Urewera and Te Awa Tupua juristic personhood models offer tentative and relatively small steps towards true co-governance or true Māori management of resources. But legal personhood must offer something more than pure co-management and co-governance frameworks. By chipping away at the practical ramifications of personhood we are left with its inherent symbolic value, particularly in the case of Te Awa Tupua. Thus, in this section we let the river guide us to discover the non-instrumental flow-on effect of legal personhood, including the incorporation of the Māori worldview into the dominant legal system and potential effect on environmental rights. As a caveat, it must be acknowledged that the depth of the Māori worldview cannot truly be encapsulated here. The spiritual and plural nature of the concept is hard to truly capture in a Pākehā framework.[141]

Following this journey along the river, it is clear that legal personality incorporates the Māori worldview into the dominant legal system in a meaningful way. Personhood changes how the law interacts with the Park and River, reflecting the symbiotic relationship Māori have with the land. Recognising this relationship is a valuable step towards legal pluralism, as it increases the influence of tikanga Māori in resource management sphere than its influence previously under the Resource Management Act. Yet, competition with the dominant legal sphere undermines the significance of legal personhood. Lastly, this section will discuss the symbolic shift in perception of the Park and River as living entities. This shift may assist in reforming the perception of natural resources to an ecocentric approach. The resulting legal language of personhood is constitutive in creating a greater political appetite for the protection of nature.

A Incorporation of the Māori Worldview

Granting legal personhood is an innovative way to incorporate the Māori worldview into the dominant Western framework of resource management. Recognition of Te Urewera and Te Awa Tupua as legal persons reflects the Māori worldview, in which the environment and the individual are a "mutually interdependent whole".[142] Māori have a holistic relationship with the environment, which is derivative of the relationships created through Ranginui (sky father) and Papatūānuku (earth

141 See generally Hayes, above n 31.

142 Rodgers, above n 73, at 270.

mother).[143] Humans and the natural world descend from this relationship, and are related and interconnected through whakapapa (genealogy).[144] Thus, Māori relate to the environment as equals, so that Te Urewera and Te Awa Tupua are regarded as living tūpuna (ancestors).[145] Legal personhood personifies this relationship in the law, honouring the Māori worldview in a tangible way. Te Awa Tupua and Te Urewera are able to engage in a net of complex personal relationships with Māori and the wider New Zealand public as equals. Further, in the Māori worldview, natural elements as descendants of Ranginui and Papatūānuku are to be protected through regulations of tapu (sacredness) and rāhui (prohibition), which guide conduct.[146] Both Te Urewera and Te Awa Tupua are explicitly recognised as living entities with their own mana and mauri.[147] In combination with shifting ownership from the Crown to the living entity itself, legal personhood of the River and Park reflects their relationship with Māori as tūpuna better than other co-management or co-governance arrangements. Such recognition of the Māori worldview may represent a step towards a more plural legal system, where tikanga is incorporated into the dominant legal system.

However, a distinction must be made between the legislative incorporation of the Māori worldview and the device of legal personhood. Personhood symbolically elevates the Park and the River to a status which closely resembles the Māori relationship with their taonga, but it is the legislation itself which allows incorporation of the Māori worldview. To illustrate this distinction, recall the Vision and Strategy document which sets the direction of management of the Waikato River. The Vision and Strategy effectively incorporated the Māori worldview of the River without the use of legal personhood. Thus, it is the legislative definition and framework of Te Urewera and Te Awa Tupua which forces a shift towards greater recognition of the Māori worldview.

Prior to becoming legal persons, the relationship between the law and Te Urewera and Te Awa Tupua, respectively, sat within a Western legal framework. Western legal traditions assume sovereignty over the environment and the world. It is clear from the phrase "an Englishman's home is his castle" that private property rights sit at the centre of Western law and society. Indeed, Western legal history tells an anthropocentric story of nature and resource management, which sought to "compartmentalise and divide"[148] rights to nature and water based on private property and legal rights.[149] For example, for the purpose of determining the extent of use rights, "rivers were separated

143 Hayes, above n 31, at 893.

144 At 893.

145 At 893.

146 At 893.

147 Te Urewera Act, s 3; and Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 71.

148 Kennedy Warne "Places as person, landscape as identity: Ancestral connection and modern legislation" (2020) 76 New Zealand Geographer 72 at 73.

149 Te Aho, above n 98, at 1616.

into beds, banks and water and into tidal and nontidal, navigable and non-navigable parts".[150] Nature was primarily seen as an economic resource which needed to be managed for utilitarian means. This Western conception of nature has dominated resource management in New Zealand since the introduction of the British colonial legal system in 1840, much to the detriment of our rivers and parks. Since 1991, the extent to which the resource management system recognised the Māori worldview has been confined to the subservient provisions of the Resource Management Act. When making decisions for the environment, local authorities are required to recognise Māori relationships with ancestral waterbodies and kaitiakitanga.[151] An additional obligation exists to consider the principles of Te Tiriti.[152] Thus, when making decisions regarding the Whanganui River before personhood, local authorities would need to recognise the relationship but not see the River or management through a te ao Māori lens.

The legislative understanding of Te Awa Tupua and Te Urewera has now been altered, helping to superimpose the Māori worldview onto resource management. Te Awa Tupua and Te Urewera must now be viewed through a te ao Māori lens when considered in legislation. Te Awa Tupua must be considered as an "indivisible and living whole" from the mountains to the sea, and as incorporating all its "physical and metaphysical elements".[153] Consideration of Te Awa Tupua must stem from "the intrinsic Tikanga and values of Whanganui iwi's belief system" as the foundation of the definition and management of the River.[154] The combination of such strong obligations on decision-makers alters the River's interaction with the law to reflect a te ao Māori understanding of the River. The reality of the legislative change is accurately captured by Gerrard Albert, the chief negotiator for Whanganui iwi in Treaty settlements, who said the holistic view of Te Awa Tupua now reflected in legislation "is the river I recognise, the river I know".[155]

Likewise, decision-makers outside the Te Urewera Board considering the interests of Te Urewera "must act" to recognise the intrinsic relationship of iwi and hapū to Te Urewera.[156] Tūhoetanga, which gives expression to Te Urewera, must also be respected.[157] The Te Urewera Board itself carries similar obligations. Even as a co-governance body over which the Crown has significant decision-making power, the Urewera Board must "recognise and reflect" Tūhoetanga and "provide"

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150 At 1616.

151 Resource Management Act, ss 6(e) and 7(a).

152 Section 8.

153 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, s 12.

154 Charpleix, above n 51, at 24.

155 Warne, above n 148, at 73.

156 Te Urewera Act, s 5(d).

157 Section 5(c).

appropriately for relationships of iwi and hapū and their culture and traditions with Te Urewera when making decisions.[158] In performing its functions, the Board can give expression to Tūhoetanga and Tūhoe concepts of management such as rāhui (prohibition), tapu me noa (tapu is the concept of sanctity which in noa, the sense that when the tapu is lifted, the place returns to its normal state), mana me mauri (the living and spiritual force of a place) and tohu (symbolic depictions).[159] The Board's ability to breathe life into these concepts by capturing them within their exercise of power is unlike any other statutory body.[160] In light of the Board's significant exercise of public power, these requirements ensure the Māori worldview is tangibly reflected in governance of the Park.

In the same breath, it must be conceded that legal personhood is limited by its operation within a Western legal framework. New Zealand is a legally plural society, with two spheres of law constantly in operation: tikanga Māori (the indigenous legal system) and common law (the dominant, colonial legal system). Tokawa suggests there are four ways in which a colonial legal framework can interact with indigenous systems of law: total avoidance, cooperation (where each system operates within a clearly defined jurisdiction), incorporation (absorption) or rejection.[161] New Zealand currently demonstrates a tendency towards incorporation which essentially "truncates" tikanga Māori, but there are some examples of cooperation.

Legal personhood is undeniably another demonstration of incorporation, albeit a step in the right direction, for it is constantly in a battle for recognition within the dominant legal sphere. The Whanganui River Act defines Te Awa Tupua as an indivisible whole, but the settlement will have to contend with other statutory and common law understandings which continue to compartmentalise the River.[162] For example, only the riverbed is vested in Te Awa Tupua. Other constituent parts of the "indivisible whole", such as the water, aquatic life, banks, and ecosystems, which form part of the river in te ao Māori, are cut up and excluded from the legislation. These excluded parts of the river are not afforded greater consideration by decision-makers. Further, parts of the river are privately owned and part is subject to the Marine and Coastal (Takutai Moana) Act 2011, which prevents individual or Crown ownership.[163] Thus, as Charpleix states:[164]

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158 Section 20.

159 Section 18.

160 Jacinta Ruru "Te Urewera Act 2014" (2014) October Māori LR 16 at 16.

161 Kenji Tokawa "Indigenous legal traditions and Canadian *Bhinneka Tunggal Ika*: Indonesian lessons for legal pluralism in Canada" (2016) 48 J Legal Plur 17 at 25 as cited in Charpleix, above n 51, at 25.

162 Parsons, Fisher and Crease, above n 1, at 262.

163 At 262.

164 Charpleix, above n 51, at 24.

> While the legal recognition of Te Awa Tupua as an expression of the Māori relationship with the Whanganui river is innovative, the settlement largely operates within the parameters of the British legal model and Western notions of rights.

Consequently, legal personhood does not unconditionally incorporate tikanga Māori into the dominant legal system.

In sum, legal personhood as a legal device symbolically honours the Māori worldview within the dominant legal sphere. Te Awa Tupua and Te Urewera are now regarded as living entities with their own mana and mauri, which reflects the symbiotic relationship of Māori and their tūpuna. The altered legislative understanding of the river forces a reformed perception into the Māori worldview in a broader movement towards greater pluralism. There are strong obligations placed on decision-makers to consider Te Awa Tupua through a te ao Māori lens. Te Urewera must similarly be considered in a way that respects the cultural relationship with the land, and the Board itself can give effect to Tūhoe concepts of management. Therefore, non-instrumental value of personhood is symbolic, but also implements some material effects on the perception of the river. Yet, the move towards legal pluralism must not be overstated. Legal personality is an example of incorporation of tikanga Māori into the dominant legal sphere (albeit imperfectly), but the influence that legislative understandings of Te Urewera and Te Awa Tupua will have still depends on decision-makers and judicial interpretation.

B Anthropocentrism to Ecocentrism

Personhood takes place amongst a broader "re-evaluation of the place of human interests in relation to nature".[165] The non-instrumental symbolism of legal personhood could also act to shift the perception of nature in the law from a Western understanding of nature to an ecocentric approach.

Te Urewera and Te Awa Tupua could be a stepping stone for a more radical use of legal personhood for future environmental protection. Legal language can be "constitutive".[166] The consequences of legal labelling can shape how we view the world, including how we see examples of legal personality.[167] For example, our perception of corporate personality, once a legal anomaly, has developed into a common legal device. Thus, defining Te Urewera and Te Awa Tupua as legal personalities is a powerful use of legal language and could help to animate the Māori worldview in the public sphere.[168] Focusing on the hopeful consequences of symbolism could lead to personhood provisions which are more radical and beneficial for both Māori governance and environmental rights. This could be a step closer to the original intention of legal personhood for the environment as

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165 Gordon, above n 2, at 52.

166 Ripken, above n 6, at 49.

167 At 50.

168 At 50.

introduced by Stone.[169] As a more ecological approach becomes accepted and the language around Te Urewera and Te Awa Tupua changes, this could create a political appetite for greater protection of environmental rights. For example, Palmer and Butler have proposed a new constitution of New Zealand which includes the human right to environmental protection and a right to an environment which is not harmful to health.[170] While this still adopts an ontological approach by placing protection of humans as the centre of the right, it could be a stepping stone to entrenched rights protecting the environment.

However, it must be remembered that personhood for Te Urewera and Te Awa Tupua was born of political and constitutional stalemates; personhood was not intended to be the vanguard of stronger environmental rights. Māori concepts of management and kaitiakitanga are not always synonymous with environmental preservation. Kaitiaki is a caretaker role, in which Māori exist as a guardian and keeper of the environment.[171] In this role, Māori ensure the mana, mauri and life force of their taonga is healthy. Tension results because kaitiakitanga can include customary use of a resource in a sustainable way, which directly contradicts many environmental protection goals. A recent debate which illustrates this tension is customary harvesting of kererū. By exercising Tūhoetanga and recognising customary management as required by the Te Urewera Board, this could imply sustainable harvesting of kererū.[172] Naturally, staunch environmentalists highlight this is in direct contradiction to the Wildlife Act.[173] These tensions highlight the difficulties of recognizing both worldviews under a legal personality model, and perhaps explain the complex balancing of rights in the frameworks.

VII ACCOUNTABILITY

Here the braided river reaches its final bend at another constitutional pillar: accountability. Casting back to the headwaters of river, we remember that such constitutional issues of power, property and sovereignty are directly engaged by the device of legal personhood. The instrumental exercise of public power by the Te Urewera Board and Te Pou Tupua have been examined. This section considers the duties resulting from legal personhood status which challenge our understanding of pluralistic accountability, judicial review, and the New Zealand Bill of Rights Act 1990. This section concludes

169 See Christopher Stone *Should Trees Have Standing? Law, Morality, and the Environment* (3rd ed, Oxford University Press, Oxford, 2010).

170 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 18.

171 Nin Tomas "Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights" in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers, Leiden, 2011) 219 at 226.

172 Sean Weaver "The Call of the Kererū: The Question of Customary Use" (1997) 9 The Contemporary Pacific 383 at 383.

173 At 383.

that the Te Urewera Board is a novel public body and so should be subject to public law considerations much like any other public body accountable to the public in a representative democracy. Although Te Pou Tupua exercises no mandated decision-making power as of right, it will also likely be subject to public law norms. However, legal personality presents challenges for the fusion of two legal systems. Personhood is largely "paternalistic" in how the framework expects Māori to exercise power and to be held accountable for the exercise of those powers. There may be space for an understanding of accountability that better recognises and incorporates tikanga. Lastly, this section discusses how far the benefit and the burden of the Bill of Rights Act can extend to Te Urewera and Te Awa Tupua.

A Public Law Principles

The Te Urewera Board and Te Pou Tupua are novel forms of legal entity. Thus, there is a question of whether the entities will be subject to public law considerations, such as the Bill of Rights and judicial review. This is important, for where public power has been entrusted to an entity, there exists a "corresponding burden" of accountability to the public as part of a constitutional commitment to representative democracy.[174] As the machinery of government has expanded into different organisational forms, traditional lines of accountability and the public–private divide have adapted and blurred. Thus, it is important to consider whether the Te Urewera Board and Te Pou Tupua should be subject to public law considerations and whether there are any complications in the applicability of judicial review or the Bill of Rights Act.

Whether an entity is subject to public law principles is a question perennially occupying the courts. The increasingly varied organisational forms used to deliver public services have made this a tricky evaluation, sometimes depending on the identity of the actor, but at other times the underlying "function, duty and power" of the actor.[175] To sidestep this tricky evaluation, Cane advocates instead for a normative approach whereby the question to be asked is whether the performance of a function "ought to be subject to control in accordance with public law principles".[176] Therefore, I have taken a normative approach to suggest that because the Te Urewera Board and Te Pou Tupua are engaged in an exercise of public power, the entities should be subject to public law norms. In part, this is due to the degree of control which the Crown still maintains over the entities, but also because of the form and function of the entities.

Before considering whether public law principles are appropriate for the Te Urewera Board and Te Pou Tupua, it is important to note the unorthodox administrative nature of the Board. We see this clearly in changes the Te Urewera Act made to s 27(3)(bb) of the Public Finance Act 1989. A new category of entity was to be included in the government's annual consolidated financial statements by

174 Paul Finn "Public trust and public accountability" (1993) 65(2) Australian Quarterly 50 at 52.

175 Andrew S Butler "Is This a Public Law Case?" (2000) 31 VUWLR 747 at 749.

176 Peter Cane *Administrative Law* (5th ed, Oxford University Press, Oxford, 2011) at 10.

the Treasury.[177] Te Urewera is to be included as a "Legal entity created by Treaty of Waitangi Settlement Acts".[178] A new category signifies that the Te Urewera Board is intended to sit outside the eight pre-existing categories of entity.[179] Further, the Te Urewera Act explicitly updates the definition of "Crown" or "Sovereign" in the Public Finance Act to exclude "an entity named or described in Schedule 6", which includes the Te Urewera Board.[180] This highlights that the Board is not part of, and is intended to operate at arm's length from, central government. Lastly, the Public Audit Act 2001 includes the Te Urewera Board in sch 2: "specific public entities not falling within any class".[181] The purpose of the Public Audit Act is in part to reform and restate the law relating to the audit of public sector organisations.[182] Section 5 defines "public entity" to include those entities listed in sch 2. By including the Te Urewera Board within the definition of public entity, Parliament has clearly turned its mind to the public or private nature of the Te Urewera Board. Thus, due to its engagement in the exercise of public power over Te Urewera while existing as a new legal entity, the Board should be regarded as a new type of public body.

As the Te Urewera Board is engaged in an exercise of public power previously held by the Department of Conservation, I normatively suggest that public law considerations are the appropriate principles of control. These public powers notably include the power to create and oversee the management plan and the creation of bylaws. The Te Urewera Board also administers public funds derived from the Crown,[183] and is subject to the Public Audit Act.[184] The Te Urewera Board, like most public bodies, is also subject to the Ombudsman Act 1975, Public Records Act 2005 and the Official Information Act 1982.[185] However, the Te Urewera Board sits outside the established machinery of government while exercising these public powers in the public interest. The unique combination of these realities suggests that the Te Urewera Board is a new form of public entity which occupies a new niche in New Zealand's public law landscape. Choosing an existing organisational form brings well-established precedent for governance and accountability, but it may be necessary to

177 Section 15 of the Te Urewera Act amended s 27(3)(bb) of the Public Finance Act 1989.

178 Public Finance Act, sch 6.

179 Public Finance Act, s 27. These eight categories of entity are as follows: all Crown entities named in the Crown Entities Act 2004; schedule 4 or schedule 4A companies; all mixed ownership model companies listed in schedule 5; State enterprises; offices of Parliament; the reserve bank of New Zealand; or any other entity whose financial statements must be consolidated into the financial states of the government reporting entity to comply with generally accepted accounting practice.

180 Te Urewera Act, sch 5.

181 Schedule 5 of the Te Urewera Act amended sch 2 of the Public Audit Act 2001.

182 Public Audit Act 2001, s 3(b).

183 Te Urewera Act, s 57.

184 Section 42.

185 Section 42.

create a new organisational form.[186] New forms of entities have been gradually created in the past which vary in their proximity to government and Ministers, blurring traditional lines of accountability. As a new organisational form, there is no judicial precedent as to the standards of accountability and public law considerations applicable to the Te Urewera Board. Public law considerations such as judicial review and the Bill of Rights Act are arguably the best accountability mechanisms for the Te Urewera Board as it engages in its governance responsibilities. It is necessary that the Courts are able to adjudicate the extent of the governance and accountability mechanisms.

Comparatively, Te Pou Tupua does not exercise any decision-making power in its dormant state. Its primary functions are administrative, as landowner for Te Awa Tupua. Should Te Pou Tupua be devolved any decision-making powers, accountability to the public is exercised through the relevant local authority. Joint committees are treated as part of local authorities from which they are formed,[187] and are subject "in all things to the control of the local authority".[188] It has been previously concluded that any discretionary powers which Te Pou Tupua may be delegated are public powers. Thus, it is natural that Te Pou Tupua should also be subject to public law considerations, in combination with accountability through the derivative local authority.

The amenability of these entities to judicial review is important for ensuring there is accountability to the public. It is also important, given the Crown influence over these entities, that there exists an accountability mechanism to ensure customary law is being upheld. In recent litigation, the High Court and Court of Appeal did not question the amenability of the Tūpuna Maunga o Tāmaki Makaurau Authority, a co-governance body, to judicial review of its decisions.[189] This suggests that the amenability of the Board and Te Pou Tupua to judicial review is a settled issue.

However, to simply class the representative bodies of Te Urewera and Te Awa Tupua as public bodies subject to public accountability mechanisms is arguably contradictory to the purpose of the Te Urewera Act and the Whanganui River Act. Such accountability places the very Māori worldview which the statutes seek to protect within a te ao Pākehā accountability framework. In this way, legal personhood presents an issue for the fusion of these two legal systems. Perhaps when asking the normative question of how these new entities should be held accountable, the answer should look towards accountability mechanisms grounded in tikanga.

Tikanga uses a broader and more collective approach to accountability for leaders in the exercise of power. Rather than formal vertical lines of accountability between the exercise of public power and a voting electorate, tikanga is characterised by public discussion as a focal point. We see this in the

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186 Legislation Design and Advisory Committee, above n 121, at 95.

187 Local Government Act, s 30A(5).

188 Section 30.

189 *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425 at [17]; rev'd [2022] NZCA 30, [2022] 3 NZLR 175, but not on the amenability of the Authority to judicial review.

prevalence of the hui and marae, which can act as a forum for collective accountability of leaders and those exercising power.[190] Māori are accountable to the collective iwi, but also to the environment as part of that collective.[191] In addition, there is direct accountability in what an actor must formally perform, but also "personal accountability to the people generally … as well as their requirements in terms of the legal constitution" or tikanga.[192] Thus, consequences such as a loss of reputation within the collective are considered more punitive than fines or sanctions. Discussing the intricacies of tikanga-based accountability and how such an accountability framework could work in practice is outside the scope of this article.[193] However, it is important to acknowledge that accountability mechanisms exist in te ao Māori, and that these mechanisms are different to Western accountability frameworks.

Thus, personhood presents a challenge for the fusion of two legal systems. Which accountability framework should be employed? Could both be employed? For example, tikanga could be used as a judicial review standard when holding Te Pou Tupua and the Te Urewera Board to account. We are seeing a greater recognition of tikanga in this way, but the court has had trouble concluding what constituted tikanga in specific situations.[194] Until this question is answered, the appropriate control mechanism for the Board and Te Pou Tupua are standard public law principles. The entities' exercise of public powers and the Te Urewera Board's status as a new form of public body lend itself to this conclusion.

B The Benefit and the Burden of the New Zealand Bill of Rights Act

As a legal personality with all the "rights, powers, duties, and liabilities of a legal person",[195] both the Te Urewera Board and Te Pou Tupua theoretically have access to benefits of the Bill of Rights Act. However, they may also be subject to burdens under the statute as public bodies. Section 29 of the Bill of Rights Act states that the Act applies for the benefit of all legal persons as well as natural persons "so far as practicable" or except where the provisions of the Act so provide.[196] There has been little case law regarding applicability of s 29, but legal persons consistently invoke the Bill of Rights

190 Kerry Jacobs "Evaluating accountability: finding a place for the Treaty of Waitangi in the New Zealand public sector" (2000) 13 AAAJ 360 at 376.

191 At 376.

192 Office of the Auditor-General *Public accountability: A matter of trust and confidence: A discussion paper* (September 2019) at 15.

193 See generally Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

194 At 94 in reference to *Te Rūnanga o Te Ati Awa v Te Ati Awa Iwi Authority* HC New Plymouth CP 13/99, 10 November 1999.

195 Te Urewera Act, s 11; and Te Awa Tupua (Whanganui River Claims Settlement) Act, s 4.

196 New Zealand Bill of Rights Act 1990, s 29.

Act in proceedings.[197] While no right explicitly excludes legal persons, some rights will naturally be inapplicable. For example, it is hard to see how democratic and civil rights in ss 12 to 18 can be applied to legal persons generally, such as corporations and crown entities. However, due to the non-instrumental symbolism of legal personality, certain rights could be extended to protect Te Urewera and Te Awa Tupua.

The right not to be deprived of life is perhaps the right most applicable to Te Urewera and Te Awa Tupua. This right is engaged when an act or omission will produce a fatality, not when the quality of life that a person enjoys is affected.[198] If the right is applicable to Te Urewera and Te Awa Tupua, it could provide protection against repeal of the Te Urewera and Whanganui River Acts.[199] As these Acts have made Te Urewera and Te Awa Tupua legal persons in the first place, repealing them would engage the right to life since Te Urewera and Te Awa Tupua would be no longer be legal persons and would "die" without these Acts. To repeal the statues would breach Te Urewera and Te Awa Tupua's right to life, stripping them of their legal recognition as living entities imbued with mana and mauri. However, since the right to life is only engaged when fatality could occur, if Parliament were to simply infringe on the rights or health of these legal entities without threatening their existence, the right not to be deprived of life would be of no use.

It may be argued that the right not to be deprived of life can only extend to the protection of natural persons and not legal persons because "life" refers to human life.[200] It is here that the non-instrumental value of personhood can possibly mould the jurisprudence. The purpose of the Te Urewera and Whanganui River Acts is to legally bestow upon the environment its traditional recognition as an ancestor within the Māori worldview.[201] To do this, Te Urewera is recognised as having its own "mana and mauri" and an identity in and of itself.[202] Similarly, Te Awa Tupua is defined as an "indivisible" and "living whole" and intrinsically connected to the iwi and hapū of the Whanganui river, captured appropriately by the saying "I am the river the river is me".[203] Unlike corporations, personhood is serving a purpose beyond the instrumental. Te Urewera and Te Awa Tupua are living entities, and thus the protection of this right should extend to legal persons if they are to be recognised correctly within the Māori worldview.

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197 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis NZ, Wellington, 2015) at 149.

198 Butler and Butler, above n 5, at 75.

199 Exton, above n 7, at 42.

200 Butler and Butler, above n 5, at 35.

201 Te Urewera Act, s 3.

202 Section 3.

203 Warne, above 148, at 73.

Of course, the rights and freedoms contained in the Bill of Rights Act are not absolute. Rights are subject to "reasonable limits" as can be demonstrably justified in a free and democratic society.[204] What is reasonable or justified is a balancing exercise, but ultimately Parliament can limit any right it sees fit. Considering the anthropocentric character of New Zealand culture, limitations affecting Te Urewera and Te Awa Tupua are likely to be more easily justified. At best, the Attorney-General report under s 7 of the Bill of Rights Act will highlight the inconsistency of other Bills with the rights of Te Urewera or Te Awa Tupua. This may act to bring any irregularities to the attention of the public. However, considering most decisions concerning the management of these areas take place at a local level, it is questionable how effective s 7 reports will be.

Importantly, however, if the Te Urewera Board and Te Pou Tupua are public bodies, as has been normatively suggested, they will also bear the burden of the Bill of Rights Act. The Bill of Rights Act applies only to acts done by the legislative, executive or judicial branches of government, or by any person or body in the exercise of a "public function, power, or duty conferred or imposed on that person or body".[205] As the Board is exercising a public power, and Te Pou Tupua is able to exercise public power, they must adhere to standards of the Bill of Rights Act in the performance of their public functions.[206] Theoretically, the burden should place no hurdle on the ability to invoke the benefit of the Bill of Rights Act when government or another public authority infringes on freedoms. Any other reality would be unfortunate. For example, while the Law Society occasionally performs public functions which bring it under s 3(b) of the Act, this does not mean that if the police choose to execute a search warrant, the burden of the Bill of Rights Act prevents the Society from claiming the s 21 right against unreasonable search and seizure.[207] The burden may place additional duties on these entities in the exercise of their public functions, but it should not inhibit the benefits of falling under the Bill of Rights Act.

VIII AT THE RIVER'S END: LOOKING FORWARD

This article has followed the braided river of the instrumental and non-instrumental consequences of legal personality. While personhood for Te Awa Tupua has symbolic power, it has failed to deliver ownership and legally mandated power to the River's representative Te Pou Tupua. Mostly this is seen through a shift in how the River is perceived by other regulatory acts through a te ao Māori lens and the possibility of power being delegated to the entity. Conversely, personhood for Te Urewera was intended to be instrumental in the transfer to the Te Urewera Board of decision-making power over the Park. The Te Urewera Board is a co-governance body and a new public authority exercising jurisdiction over the Park in a manner previously exercised by the Department of Conservation. On

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204 New Zealand Bill of Rights Act, s 5.

205 Section 3.

206 Butler, above n 175, at 751.

207 Butler and Butler, above n 197, at 152.

the surface it seems that the Te Urewera Board is exercising significant independent power, but it is highly constrained by Crown influence. Crown voting requirements in the quorum is the most significant constraint. Thus, the ability of Tūhoe to exercise mana motuhake (self-determination), rangatiratanga and kaitiakitanga is restricted. Through the intricate guardian frameworks, legal personality has sidestepped the most pressing political stalemate between the Crown, and Tūhoe and Whanganui iwi, respectively. The underlying tension of power and sovereignty remains. No radical change has occurred in who exercises power, but rather there has been a reconfiguration of how exactly power is exercised in complex personhood frameworks.

The non-instrumental impact of legal personhood is also significant. Juristic personhood for Te Urewera and Te Awa Tupua gives tangible recognition to the Māori worldview and moves towards a plural legal order. However, "recognition alone is not enough to guarantee just outcomes".[208] It is disappointing that personhood still competes with a Western legal theory of resource management. Nonetheless, it is necessary to begin somewhere. Personhood may pave the way towards greater recognition of the Māori worldview but also to rearrange the relationship between humans and nature to an eco-centric model.

Legal personhood of the environment presents challenges to our understanding of governance and public law considerations. I have suggested that the nature of Te Urewera and Te Awa Tupua means they ought to be subject to public law considerations such as judicial review and the Bill of Rights Act. There remains a question of where tikanga fits into the accountability framework. The Bill of Rights Act, particularly the right not to be deprived of life, may stretch to protect the legal personality of Te Urewera and Te Awa Tupua. The non-legalistic consequences of personhood may assist in this endeavour. It is still unclear how these issues will play out in the courts and how broadly the Te Urewera and Whanganui River Acts will be interpreted. Parsons describes the interpretative risk evident in this task because there are few Māori decision-makers who understand Māori concepts and ways of thinking. In New Zealand, the power to interpret legislation rests in the hands of judges and government officials, the disproportionate majority of whom are non-Māori and who operate within a te ao Pākehā framework.[209]

At the mouth of the braided river, legal personhood ultimately represents the Crown's unwillingness to truly incorporate tikanga and divulge its sovereignty to Māori as Treaty partners. Power is given to Māori, but with constraint. Māori legal and cultural concepts are accepted in the personhood model "only if they do not threaten the Crown control or challenge the Crown's power".[210] Without the supporting legal architecture of radical co-governance, legal personhood is another "symbolic [act] of redress while actually further entrenching in law and practice the real basis of its

208 Parsons, Fisher and Crease, above n 1, at 341.

209 At 264.

210 Charpleix, above n 51, at 25.

control".[211] Legal personhood in the Treaty settlement context is simply an extension of co-management and co-governance frameworks which serve to "enhance the single settler legal order", and which better acknowledge tikanga "for the sake of national cohesion rather than actually creating a plural legal order".[212]

211 Strack and Goodwin, above n 53, at 51.

212 Parsons, Fisher and Crease, above n 1, at 266.