The River as a Separate Legal Person: Implications for Sustainability Law and Governance

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When the Whanganui River in New Zealand was given separate legal person status in 2017, a new era in the rights of natural entities emerged. This provided increased involvement of local Māori in river management, and the opportunity for the interests of the river to be represented in court. Separate legal standing provides an exciting opportunity to advance Earth jurisprudence and the recognition of the rights of natural entities. A development of this type should be assessed, at least in part, for its practical effects. What does separate legal personhood in the river mean for sustainability regulation? Are the interests of the river through separate legal person status aligned with sustainability objectives? Does the new regulatory framework provide support for sustainability objectives? This article considers legal developments relating to the Whanganui River from a sustainability perspective, and whether the idea of separate legal personhood of a natural entity provides impetus for a new sustainability agenda.

I. Introduction

New Zealand's Parliament recognised the Whanganui River as a "legal person" on passage of *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) (Act).[1] The Act vests Crown-owned parts of the bed of the river to *Te Awa Tupua* (the river),[2] while not impacting public rights of use, including fishing, river navigation, private consents and permits to use the river.

The implications of legal personhood on a natural entity has relevance to sustainability governance, based on the notion that the river, if able to "state it's case" would presumably wish to remain in perpetuity in a sustainable state. In a legal context a separate legal person does not derogate from itself, and in that context, by definition, wishes to remain "sustainable". The main issue examined in this article is whether a natural entity as a legal person has enhanced legal status from a sustainability perspective, and can, and arguably should, assert its sustainability "rights". While granting legal person status to a river is not without precedent,[3] it is important to emphasise the New Zealand example is primarily a political settlement of past claims of local Māori (Iwi) and was not expressly designed as a vehicle to address sustainability governance. The arguments addressed here are in the context only of the Whanganui River as a legal person and is not a survey of overall developments on legal personhood for rivers. Despite this limitation, arguments raised may have relevance to other natural entities granted legal personhood. A main argument is, if sustainability is not an express or functional part of legal personhood, this potentially detracts from granting separate legal person status in the first place, since its absence implies political and other reasons are predominant, and possibly displace sustainability of the natural resource as a practical issue. The point is that while political or other justifications may be entirely valid primary motivators, this should not be at the expense of sustainability arguments if legal personhood of natural entities is to have full meaning.

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[1] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 14, 87.

[2] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 41.

[3] In 2013 an environmental group Community Environmental Legal Defence Fund assisted local officials in Mora County, New Mexico to draft an ordinance giving rights to natural ecosystems and bodies of water that resided in Mora County.

In support of the foregoing position it is instructive to define "sustainability" and "sustainability governance", and in doing so establish the relevance of these concepts to the *Te Awa Tupua* legislation. Most definitions of sustainability have a strong ecological component, emphasising the connection between human society and the natural environment.[4] Therefore, in acknowledging this view, the connection between human society, economic systems and the natural environment are indelibly linked. Daly refers to: "All economic systems are subsystems within the big biophysical system of ecological interdependence."[5] The interdependence highlights that economic variables need to be controlled in some way and to somehow make the idea of economic growth pay for itself or justify economic growth taken at the expense of the environment. While a general definition of sustainability such as, *meeting the needs of the present without compromising the needs of future generations*, provides a practical start to the basic definition of sustainability, it is clearly necessary to provide economic and societal overlay to the definition, to give it substantive meaning. Further, some definitions of sustainability add the idea of localized and decentralised systems that may be more sustainable and capable of addressing the balance that is inherently part of the definition of sustainability between economy and ecology.[6]

The Act, in giving legal status to *Te Awa Tupua*, also takes account of local Iwi, their view of nature and the wellbeing of the local economy. It is purporting to intervene in all these areas and thus, in view of the earlier assumptions about the definition of sustainability, is impliedly referencing sustainability. So, in talking about sustainability in the context of the Act this article is not positioning itself within existing literature on sustainability but breaking new ground in addressing sustainability from the perspective of separate legal status of a natural entity. In granting separate legal status to *Te Awa Tupua*, the Act does not include sustainability as part of the purpose or objective of doing so. However, because it is discussing the economic development and ecological protection of *Te Awa Tupua* and its surrounds, it is referring to factors relevant to sustainability. Consequentially, since the Act establishes a governance model for *Te Awa Tupua* it follows that sustainability factors should be part of governance. These factors could include sustainability measures, such as criteria and indicators of sustainability, placed in governance structures to ensure that economic and ecological matters covered in the Act are adequately dealt with.

In support of the foregoing propositions this article seeks to critically examine sustainability governance as an essential part of separate legal personality of natural entities. Part II covers the governance structure arising under the Act and includes the extent to which these structures address sustainability of the river. It acknowledges that the drafting of the Act has never purported to be focused on sustainability, although it is meant to embrace local Iwi requirements in terms of their relationship to the local environment and support for economic development. Part III examines the extent of local stakeholders in discretionary decision-making under the Act, and its impact on sustainability outcomes. This questions whether either broad or narrow discretion are beneficial to sustainability outcomes and seeks to address what regulatory adjustments are required to address sustainability objectives. In order to answer criticisms of imposing a sustainability agenda in an Act that has overarching economic objectives, Part IV includes examination of how well the Act addresses the economic aspects of river management. It progresses a core point that legal personhood of the river must address economic development with sustainability objectives in tandem. In other words, addressing economic and social issues without also addressing sustainability objectives lessens overall eco-efficiency. Part V examines the connection between Earth jurisprudence, indigenous worldviews and sustainability. This section acknowledges how the Act does address the traditional deeply felt connection between the local Iwi and their environment. In doing this, it presents a case that these connections inherently supporting sustainability objectives be expressly addressed in the Act. Part VI addresses legal risk under the Act and the question of how the extent of risk control ultimately impacts the likelihood of reaching sustainability objectives. Put another way, since the Act is addressing risk control, a failure to address sustainability objectives represents a regulatory gap which increases risk. Part VII concludes by combining key themes discussed in this article to address practical sustainability in regulation. This argues that any regulation of legal personhood in a natural entity must

[4] Jeremy L Caradonna, *Sustainability: A History* (OUP, 2014).

[5] Herman E Daly, "Introduction" in Herman E Daly (ed), *Toward a Steady-State Economy* (Freeman, 1973).

[6] Caradonna, n 4, 16.

also address practical sustainability. This means legal personhood must address practical outcomes in relation to the environment, which include sustainability outcomes.

As a politically based settlement, the Act provides for increased participation of local Māori in river management. While the Act is designed to recognise the connection between local Iwi and the environment, it is relevant to consider *Te Awa Tupua* as a separate legal person with sustainability as interlinked. *Te Awa Tupua* has personal meaning to local Iwi who view the river as a spiritual guide inseparable from their being, thereby recognising the river has a physical and metaphysical importance.[7] While the Act focuses on Iwi values which do not have express reference to sustainability, *Tupua te Kawa*,[8] represents the intrinsic values or essence of *Te Awa Tupua*, emphasising a spiritual and physical sustenance in the river and local Iwi, focusing on river health and wellbeing. Thus, granting separate legal personality to *Te Awa Tupua* creates a link to Iwi values with definitional relevance to sustainability objectives. This provides context for evaluation of governance structures in the Act and their capacity to address sustainability objectives.

New Zealand colonists imposed their own law over the river, separating water, river beds and the surrounding airspace. The Māori position differed by viewing *Te Awa Tupua* as a single entity not subject to private ownership and placing those living nearby as both river custodians and beneficiaries. The Whanganui legal settlement represents, as part of the political settlement, acceptance of these indigenous worldviews about *Te Awa Tupua*.[9] This creates complexity given that the Act brings together two types of governance arrangements over *Te Awa Tupua* that appear to have little in common. Does the creation of legal personhood lead to potential complexities such as competition or conflict between competing legal rights, including rights associated with environmental protection, conservation and sustainability? Just as legal personhood in companies has some unusual consequences, it is possible complexities may arise by granting separate legal person status to *Te Awa Tupua*. In corporations law, the company is separate from directors and shareholders,[10] enabling the company to sue its own director if it wished. The separate legal person status is clearly defined in the Act but there is limited definition as to when and how this status will be used. It is important to avoid having separate legal status of *Te Awa Tupua* as more appearance than reality in terms of its practical effect.

II. Governance Structure and Sustainability Impact

This section considers the governance structure in the Act and the impact on sustainability of *Te Awa Tupua*. The previous discussion in Part I argued there is an implied reference to sustainability, in respect to Iwi values and economic development, addressed in the Act. A consequence of this implied reference to sustainability is a requirement to include sustainability factors in governance arrangements. This view is, admittedly, contestable on the basis that the purpose of the Act is to primarily give effect to a political settlement.[11] The reference to the necessity of including sustainability measures into governance structures is strongly reliant on the Act upholding *Tupua te Kawa*, representing values that impliedly reference sustainably. Further, that decision-makers under the Act and other Acts referenced therein must have particular regard to *Tupua te Kawa.*[12]

Assessing governance structures includes efficacy in decision-making and their outcomes relevant to sustainability. Sustainable water management includes legitimacy and efficacy of management decisions

[7] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 13(c), which states: "*Ko au te Awa, ko te Awa ko au: I am the River and the River is me*".

[8] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 13, *Tupua te Kawa* comprise spiritual values representing the essence of *Te Awa Tupua*.

[9] Iorns Magallanes, "Māori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment" (2015) 21(2) *Widener Law Review* 273.

[10] *Salomon v Salomon & Co* [1897] AC 22.

[11] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 3.

[12] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15(2), (3), (4).

and equitable outcomes.[13] The context of "legitimacy" has been described by Hogl et al as consisting of input legitimacy, referring to the process by which outcomes are achieved, and output legitimacy, referring to the quality and importance of outcomes themselves.[14] Legal personhood of the river introduces a new factor to consider for both categories of "legitimacy" in water resource regulation. This "factor" relates to the legal effect of s 15(2) of the Act which states that persons exercising or performing a function, power or duty under it must recognise and provide for *Tupua te Kawa* comprising intrinsic values that represent the essence of *Te Awa Tupua*. The intrinsic values include the river as an indivisible and living whole that, "sustains" the life and natural resources within the Whanganui River.[15] These intrinsic values arguably posit sustainability at the centre of decision-making without expressly stating it. An indivisible whole that sustains the life and natural resources of the river is therefore part of necessary decision-making under the Act.

A. Purpose of the Act

The Act's purpose gives effect to the Deed of Settlement (Deed) over historical claims of the Whanganui Iwi over *Te Awa Tupua*, with Crown acknowledgment and apology to Whanganui Iwi for past wrongs.[16] While the purpose of the Act is about abiding by the Deed of Settlement, addressing these wrongs, this arguably should be read in conjunction with the emphasis given to *Tupua te Kawa*. Reference to the importance of the "indivisible whole", in *Tupua te Kawa* and how this aligns with the political settlement in the Act, must be viewed in the context that only part of the river bed is vested in *Te Awa Tupua.*[17] Only Crown land subject to conservation, national park or reserve status and subject to the same conditions applying under that legislation, is transferred to *Te Awa Tupua*. The vesting, however, does not impact separate proprietary interests in water, river flora and fauna, existing public use, private property rights or resource consents.[18] The *Resource Management Act 1991* (NZ) (*RMA*) provides for the right to allocate water being vested in the Crown. Local councils operate as consent authorities granting resource consents to take and use water on a "first come, first served" basis.[19] The *RMA* uses local councils, as consent authorities, who in the context of a variety of duties arising therein must also address the relationship of Māori culture and traditions with their ancestral lands. This includes, water, waahi tapu (sacred sites) and other taonga (treasures),[20] and kaitiakitanga (guardianship),[21] while also taking account of provisions in the Treaty of Waitangi.[22] Local councils can enter collaborative governance arrangements with the Māori population over natural resources, which includes devolving responsibility onto Māori groups.[23] Any legal person may apply to the Minister for the Environment for a water conservation order to protect environmental or cultural water values.[24] This regulation, while ostensibly encouraging collaborative decision-making between stakeholders, has potential for disputation with decisions made under the Act. Where a decision conflicts with Māori views of what is required for the health of *Te Awa Tupua*, a potential dispute scenario exists. This effectively posits potential disputation over what sustains *Te Awa Tupua* with other interests over the water resource. The separate legal personality of *Te Awa Tupua* enables

[13] K Hogl et al, "Legitimacy and Effectiveness of Environmental Governance – Concepts and Perspectives" in K Hogl et al (eds), *Environmental Governance: The Challenge of Legitimacy and Effectiveness* (Edward Elgar 2012).

[14] Hogl et al, n 13.

[15] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 13(a), (b).

[16] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 3, 69, 70.

[17] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) subpart 5.

[18] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 46.

[19] *Resource Management Act 1991* (NZ) s 30.

[20] *Resource Management Act 1991* (NZ) s 6.

[21] *Resource Management Act 1991* (NZ) s 7(a).

[22] *Resource Management Act 1991* (NZ) s 8.

[23] *Resource Management Act 1991* (NZ) ss 33, 36B, 58L–U.

[24] See generally *Resource Management Act 1991* (NZ) Pt 9 covering ss 199–217.

standing to seek a water conservation order, and the river as a party to a joint management agreement. Legal standing also entitles questioning of administrative decision-making and the possibility of *Te Pou Tupua* using legal standing to enforce Māori intrinsic values. The foregoing scenario raises legitimate questions as to whether such standing is used reactively to question administrative decision-making, or proactively to enforce environmental and possibly sustainability related objectives. The point being the risk of disputation across a range of economic and environmental issues requires a governance structure under the Act which recognises a measuring system for environmental, and arguably sustainability, elements relevant to *Tupua te Kawa*.

B. Te Pou Tupua and Exercise of Power

The *Te Pou Tupua* is the functional expression of separate legal person status and is the "human face" of *Te Awa Tupua* when acting in the name of *Te Awa Tupua*.[25] *Te Pou Tupua* consists of two-nominated members, one appointed by local Iwi with "interests" in the Whanganui River; and the other by the Crown.[26] The functions of *Te Pou Tupua* include, consistently upholding the *Tupua te Kawa* when acting in the interests of *Te Awa Tupua*. The use of these functions places metaphysical and spiritual values at the same level of importance as physical values of the river. This relative weighting recognises the interconnection between natural resources of *Te Awa Tupua* and the health and wellbeing of local Iwi. *Te Awa Tupua* is described as an indivisible whole, which implies non-physical elements be considered in maintaining the indivisible status of the river. Emphasising the inalienable connection of local Iwi to health and wellbeing of *Te Awa Tupua* suggests the former must be considered in decisions affecting river health. Tributaries and local communities connected to the river are also part of the indivisible whole, highlighting that the regions and communities appurtenant to *Te Awa Tupua* are part of this overall structure. The combined effect of these constituent parts arguably places the ecological and economic sustainability of *Te Awa Tupua* as a fundamental consideration of *Te Pou Tupua*. The problem is the Act does not refer to either aspect in the context of sustainability and *Te Pou Tupua.*

Questions also arise as to how *Te Pou Tupua* will use powers granted under the Act. The purpose of *Te Pou Tupua* is to be the human face of *Te Awa Tupua* and act in its name.[27] While consent of *Te Pou Tupua* to use water is not required, a consent may be required in relation to use of the river bed, triggered by being classified as an "affected person" pursuant to the *RMA*.[28] *Te Pou Tupua* can be an "affected person" for the purpose of applications for resource consents relating to water which provides an affected person with early notification benefits.[29] A consent authority, like a local council, may disregard an adverse effect on an affected person if a rule or national environmental standard permits an activity with that effect. This part of the Act is a concession to the practical reality of controlling water use and is considered here in the context of river sustainability. The status of *Te Awa Tupua* and the power of *Te Pou Tupua* to make decisions on river health must be read subject to this restriction on water. The requirement of decision-makers to have "particular regard" to *Te Awa Tupua* status, and *Tupua te Kawa* values pursuant to s 15(2), (3) of the Act, does mean they must be considered in decision-making relating to water use. However, *Te Pou Tupua*, has limited influence over enforcing sustainability objectives of the water resource as a whole when seeking to enforce Māori values enshrined in *Tupua te Kawa*. The Act gives no guidance on what constitutes a failure to give "particular regard" to *Te Awa Tupua* status or *Tupua te Kawa* intrinsic values, in any of the decision-making forums. As a result, there is limited guidance as to when *Te Pou Tupua* should intervene, and limitations on the extent of action should they elect to do so.

A similar set of questions arise in respect to how to protect the metaphysical elements of the river. The metaphysical component of *Tupua te Kawa* is important both as an expression of local Iwi's connection

[25] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 18.

[26] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 19.

[27] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 18(2).

[28] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 46(3).

[29] The status of an "affected person" gives a right of limited notification for an application for a resource consent under *Resource Management Act 1991* (NZ) s 95B (*RMA*). This should be read in conjunction with ss 63 and 95E of the *RMA*.

to the river, and the potential metaphysical alignment with sustainability. Metaphysical elements introduce an esoteric philosophical element on the nature of reality, causality and the river. Having particular regard for *Te Awa Tupua* status and *Tupua te Kawa* in decision-making creates some difficulty in assessing what that actually represents for metaphysical elements.[30] The introduction of metaphysical elements benefits a broader holistic concept of sustainability but adds a difficulty in how *Te Pou Tupua* should give effect to its expression. Metaphysics can help explain the features of reality that exist beyond the physical world, and this includes examination of space, time and causality. Sustainability has been considered academically at a metaphysical level,[31] so including metaphysical elements in the Act provides another avenue to assess sustainability. Separate legal status of *Te Awa Tupua*, must account for both intrinsic physical and metaphysical values enshrined in *Tupua te Kawa*.[32] Where decision-makers must "recognise and provide" and have "particular regard" for *Te Awa Tupua* status and *Tupua te Kawa* in decision-making, with both referred to as potential "determining factors" in discretionary decision-making, this suggests a mandatory application.[33] Exactly how "recognise and provide" for and having "particular regard" is demonstrated in discretionary decision-making is problematic because there is no objective standard to guide decision-makers. While it is reasonable to not fetter a discretion in this way, it is also reasonable for guidance on the exercise of discretion where there is a requirement for mandatory application.

C. Other Governance Structures and Sustainability

The failure to address sustainability factors in governance is apparent in a variety of governance structures in the Act. This includes an advisory group known as *Te Karewao*, consisting of one person appointed by Iwi with interests in *Te Awa Tupua* (excluding Whanganui Iwi), one person appointed by local authorities, and one person appointed by trustees of the *Nga Tangata Tiaki o Whanganui* trust.[34] The *Te Karewao* provides advice and support to *Te Pou Tupua*, and in the process must act in the interests of *Te Awa Tupua* and consistently with *Tupua to Kawa.* Ancillary to this body is a strategy group called the *Te Kopuka*, with the purpose of acting collaboratively to advance the health and wellbeing of *Te Awa Tupua.* This serves to monitor the implementation of the river strategy *Te Heke Ngahuru*,[35] which establishes management priorities which must also have particular regard for *Te Awa Tupua* status and *Tupua te Kawa*.[36] A person performing any function or duty under legislation listed in Sch 2 of the Act must have "particular" regard to the *Te Heke Ngahuru* river strategy.[37] These requirements allow for Māori involvement in river management, but do not specify content, measurement and monitoring capability or indicate what constitutes failure by *Te Kopuka* to have "particular" regard to *Tupua te Kawa* intrinsic values.[38] The contents of *Te Heke Ngahuru* include issues relevant to the health and wellbeing of *Te Awa Tupua.* How health and wellbeing is assessed is not subject to any clarification in the Act

[30] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 13.

[31] Dynesius Nyangau, "A Metaphysical Approach to Environmental Sustainability Alfred North Whitehead's Process Philosophy" (A Research Project Submitted in Partial Fulfillment of the Requirements for the Award of the Degree of Master of Arts in Philosophy, University of Nairobi, 2016) <http://erepository.uonbi.ac.ke/bitstream/handle/11295/98863/Nyangau%20Dynesius_A%20Metaphysical%20Approach%20to%20Environmental%20Sustainability-%20Alfred%20North%20Whitehead%E2%80%99s%20Process%20Philosophy.pdf?sequence=1>.

[32] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 14, 15.

[33] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15, in particular s 15(2) which refers to other Acts listed in cl 1 of Sch 2, must recognise and provide for *Te Awa Tupua* status and *Tupua te Kawa*, and s15(3) which refers to other Acts in cl 2 of Sch 2 in the Act, which lists Acts where "particular regard" must be made by decision-makers to *Te Awa Tupua status and Tupua te Kawa*, and s 15(5)(b) referencing *Te Awa Tupua* status and *Tupua te Kawa* may be seen as "determining factors" in decision-making.

[34] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 27, 28. The trust is a governance entity for the purpose of the Whanganui Settlement.

[35] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 35, 36, 37.

[36] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 29, 30.

[37] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 37(1).

[38] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 30(3).

which contains no measurement and monitoring capability requirement or standard to be met. Absence of specific measuring capability is not unusual in legislation and is often left to discretionary decision-making. However, where legal person status includes governance responsibility over the health and wellbeing of the river, their absence may arguably be construed as a regulatory gap.

Another area to assess governance capability is collaboration and the way stakeholders interact in decision-making. Degrees of collaboration between stakeholders are important in assessing how well the Act works. The Act represents a political settlement after an extended history of historical dispossession and environmental damage,[39] which recognises the rights of *Te Awa Tupua* and the Whanganui Iwi are interdependent and "intrinsically linked".[40] This has relevance to sustainability especially if the Whanganui Iwi seek to maintain existing river flows and water quality. Since the Act recognises the status of *Te Awa Tupua* as "an indivisible and living whole", comprising "physical and meta-physical elements", the question of maintaining that "whole" becomes effectively a sustainability issue especially in upholding the indivisibility of *Te Awa Tupua*.[41] This reflects the importance of environment to Māori identity, including the duty of active protection of Māori interests in the use of their lands and waters.[42] Legal personhood of *Te Awa Tupua* reinforces the Māori right to protect the resource and therefore sustainability objectives are arguably enforceable by *Te Pou Tupua*, when addressing *Tupua te Kawa* because of these arguably enforceable duties.[43] Since these values recognise a link between the health of the river and the health of the people living near the river, and the unity of the river as one physical and metaphysical entity, this arguably posits an implicit sustainability link. In summary, the problem from a regulatory perspective is how *Tupua te Kawa* is interpreted between stakeholders, and how it is enforced by *Te Pou Tupua.* How the rights of the river are perceived by decision-makers and how this impacts administrative decision-making becomes a fundamental question examined in the next section.[44]

III. Stakeholders and Discretionary Decision-Making

The extent of stakeholder discretionary decision-making in the Act inevitably impacts environmental and sustainability outcomes. While it is clearly acknowledged that sustainability is not an express objective of the Act, this article argues that the *Tupua te Kawa* notion of the river as an "indivisible" whole implies protection and impliedly the sustainability of the water resource. Discretionary decision-making arguably includes water sustainability questions, but the Act provides no guidance on addressing such issues. The express objective of the Act is to give effect to the Deed of Settlement with local Iwi, which includes the wellbeing of *Te Awa Tupua*.[45] In order to understand the full impact of discretionary decision-making on this objective it is necessary to understand how other legislation may impact this decision-making. The Act exists within a diverse regulatory framework represented in Figure 1.

[39] J Ruru, "Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand" (2013) 22 *Pacific Rim Law & Policy Journal* 311.

[40] Erin O'Donnell and Elizabeth Macpherson, "Voice, Power And Legitimacy: The Role of the Legal Person in River Management in New Zealand, Chile and Australia" (2018) 23(1) *Australian Journal of Water Resources* 35, 37.

[41] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 12.

[42] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

[43] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 18–19.

[44] M Good, "The River as a Legal Person: Evaluating Nature Rights-based Approaches to Environmental Protection in Australia" (2013) 1 *National Environmental Law Review* 34.

[45] The purpose of the Act is to give effect to the Deed of Settlement provisions. See s 3.

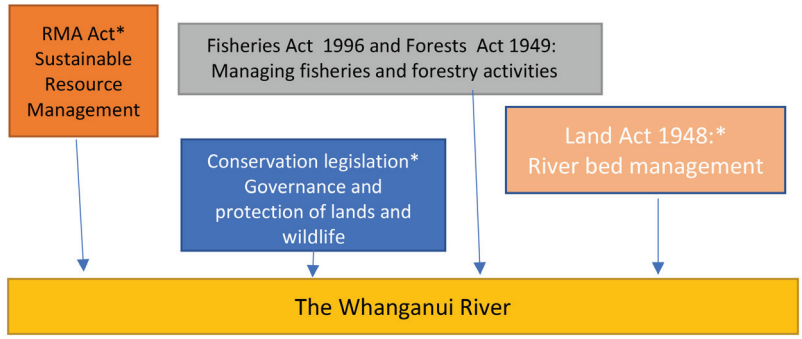

FIGURE 1. *Resource Management Act 1991* (NZ): sustainable management of natural and physical resources. *Conservation legislation*: Includes *Conservation Act 1987* (NZ), *National Parks Act 1980* (NZ), *Reserves Act 1977* (NZ) and *Wildlife Act 1953* (NZ). *Land Act 1948* (NZ): Management of most of Crown-owned bed of Whanganui river and its tributaries.

While the Act ostensibly provides a community focused collaborative approach to river use and management, this must be understood in the context of its interaction with other regulation. There is potential for conflict between decision-makers within this regulatory framework. How *Te Pou Tupua* exercises separate legal personality within this framework is critical in evaluating the Act and its capacity to address beneficial outcomes. The actions of *Te Pou Tupua* and other decision-makers under legislation listed in Sch 2 of the Act,[46]means the status of *Te Awa Tupua* and the values inherent in *Tupua te Kawa*, must be recognised by a wide range of decision-makers within a wide regulatory framework of Acts. In order to address this, persons exercising or performing a function, power or duty under this listed legislation in this framework shall "recognise and provide" for *Te Awa Tupua* status and *Tupua te Kawa*.[47] The Act does not remove, restrict or prevent the exercise of discretion a decision-maker has in exercising a function, power or duty under the listed legislation.[48] This discretionary remit goes further in permitting a decision-maker to consider the *Te Awa Tupua* status and *Tupua te Kawa* values as "determining factors" when exercising discretionary decision-making under the Act.[49] This includes a requirement for non-derogation, meaning existing regulatory frameworks are unaffected, unless expressly provided for, and existing private property rights and public access are protected.[50] As a consequence of non-derogation and the broad discretionary ambit of the regulatory framework, the level of influence of *Te Pou Tupua* and local Iwi have over the river must be understood within this context. This context includes the "particular regard" that must be had for *Te Awa Tupua* status and *Tupua te Kawa* values by decision-makers under legislation such as the *RMA*. The point here is that specific powers given to local councils, for example, to address control of land for the maintenance and enhancement of ecosystems impliedly address a specific sustainability related objective.[51]

The *RMA* also regulates preparing or changing a regional policy statement, regional plan or district plan. Each of these regulatory instruments must both recognise and provide for, as well as have particular regard to *Te Awa Tupua* status and *Tupua te Kawa* values. Reference to "particular regard" in this context

[46] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15(1), (2). This list is reproduced in Appendix 1 of this article.

[47] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15(2). Note the status of separate legal person arises under s 12 and the values are stated in s 13 of the Act.

[48] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15(5)(a).

[49] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15(5)(b).

[50] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 16.

[51] *Resource Management Act 1991* (NZ) s 30(1)(c).

suggests a higher level of recognition in decision-making than "recognise and provide for".[52] The former denotes a positive obligation to actively consider status and values in decision-making and suggests the decision-maker must give greater weight than "recognise and provide" for in the final decision. These obligations do not remove or restrict the exercise of a broader discretion in respect to other regulatory requirements. The point is that the obligation contained here to recognise the status and values of *Te Awa Tupua* imposes a regulatory requirement, without application methodologies or measurement capability, on a range of regulatory instruments governing economic planning and development. The problem highlights an apparent regulatory gap about how to identify and address a failure to have a particular regard to *Te Awa Tupua* status. This type of gap is not uncommon in legislation relating to environmental and sustainability related objectives, which substantially remain aspirational without clarity on how they are to be achieved and consequences for non-achievement.

The collaborative framework and limitations on the level of legal influence of *Te Pou Tupua* will also be tested over ownership and control of the riverbed. The settlement allows for state owned enterprises and private interests to retain their interests in the riverbed, with the exception of parts of the riverbed held under the *Conservation Act 1987* (NZ), *Reserves Act 1977* (NZ), *National Parks Act 1980* (NZ) and *Land Act 1948* (NZ). Parts of the river bed covered in these Acts are now vested in *Te Awa Tupua*. This vesting does not create any proprietary interest in water, and consent of the *Te Pou Tupua* is not required for use of water. However, consent may be required for use of the bed of the river controlled by *Te Pou Tupua*. Except for national parks, the Crown's rights in parts of the riverbed and private rights, the remaining interests in the riverbed are now the responsibility of *Te Pou Tupua*, who hold these sections in fee simple ownership and therefore represent an inalienable ownership right. While the non-derogation clauses are designed to ensure the status quo of legislation under existing regulatory frameworks are maintained, it does give some degree of influence over parts of the river bed to *Te Pou Tupua.* This influence however, is not intended to derogate from the wider freshwater policy review processes or determine rights in water or override existing property rights. Therefore, stakeholders and others seeking to apply for consents and concessions over these parts of the riverbed, must seek permission from *Te Pou Tupua*. Such consents likely will not be granted if the ability of the Whanganui Iwi to exercise customary activities is impacted.[53] The foregoing highlights *Te Pou Tupua* has limited influence over parts of the river bed, which limits capacity to address broader scale sustainability objectives. While demarcation over limits to authority between stakeholders is clearly necessary, this requires greater clarity where conflict may arise between legitimate economic development applications and maintaining some aspects of *Tupua te Kawa* values. The particular issues relating to economic factors referred to here are examined further in Part IV.

IV. Emphasising the Economic in Sustainability

The Act and the Deed of Settlement refer to requirements relating to environmental, cultural, social and economic health and wellbeing of *Te Awa Tupua*, Whanganui Iwi and other Iwi.[54] The *Te Kopuka* are empowered to identify and promote economic, cultural, social and environmental health and wellbeing of the river.[55] The diverse nature of membership of the *Te Kopuka* increases the opportunity for collaborative decision-making regarding economic, environmental and arguably sustainability related matters.[56] The success of protecting river health and wellbeing, however, depends on how well *Te Pou Tupua* administer the *Te Korotete* fund, designed to provide financial support to advance the wellbeing of the river. Given the *Tupua te Kawa* emphasises the close interaction between the wellbeing of the

[52] Particular regard obligations refer to the following Acts: *Heritage New Zealand Pouhere Taonga Act 2014* (NZ), *Public Works Act 1981* (NZ) and *Resource Management Act 1991* (NZ).

[53] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) Pt 3 subpart 3. The *Te Awa Tupua* framework allows for the Whanganui Iwi to carry out authorised customary activities without the need to seek consents, concessions, permits or licenses on a case-by-case basis.

[54] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 1.

[55] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 29.

[56] EC Hsiao, "Whanganui River Agreement: Indigenous Rights and Nature" (2012) 42(6) *Environmental Policy and Law* 371.

local Iwi and the health of the river, it is implicit on economic development in the region. The general tenor of the Act associates the economic wellbeing of the natural and human elements connected to Iwi culture with the overall wellbeing of the river. The enhancement of economic development builds capital that can address environmental and sustainability outcomes.[57] The opportunity to address both economic and ecological sustainability therefore arises under the Act, and this requires a more defined role in sustainable economic development for the advisory role of *Te Karewao* and *Te Kopuka*, and the collaborative role of the strategy document called *Te Heke Ngahuru* and use of funds in *Te Korotete*. This arguably highlights the importance of the use of principles of ecologically sustainable development being adopted for each of these regulatory instruments to address the overall strategy relating to *Te Awa Tupua*, and decision-making relating to the health and wellbeing of the river.

The success of legal personhood is contended in this article, at least in part, on how well *Te Pou Tupua* can represent the separate legal status of *Te Awa Tupua* in respect to both economic and ecological sustainability. The Act in assigning to *Te Pou Tupua* an obligation to protect *Te Awa Tupua* arguably means they have the equivalent of a statutory fiduciary responsibility over the river that includes economic components.[58] The balance between economic and ecological elements is an inherent requirement of ecologically sustainable development. It is not clear how the *Te Pou Tupua* is expected to do this in the absence of viable criteria and indicators of river health and clearly defined sustainability objectives encompassing both economic and ecological factors. Given diverse elements go into what constitutes the health and wellbeing of the river, it appears incumbent on *Te Pou Tupua* to either develop appropriate criteria and indicators to address river health and wellbeing or negotiate them separately with local and national governments. This should account for how local Iwi control the environment and the requirements for their consent over economic activities connected to the river.[59] Such a process depends on alignment between Iwi ideas of river health and sustainability and scientific-based criteria, which is problematic given varying ecological risk perceptions.[60] Any risk perception in tune with the intent of the Act, must recognise a dynamic interaction between the economic and environmental needs of *Te Awa Tupua*, with appropriate regard for Iwi priorities. Principles of ecologically sustainable development require a bespoke set of criteria and indicators reflective of both the economic and social needs of the region, and in this context should be reflective of *Te Awa Tupua* and the local Iwi community.

The role of *Te Pou Tupua* may need a wider list of capabilities to meet sustainability objectives that address the wider economic remit. The economic aspects of *Tupua te Kawa* values arguably requires criteria and indicators that reflect sustainability measures within the essence of *Tupua te Kawa* when referring to physical sustenance of *Te Awa Tupua*.[61] This includes criteria and indicators aligned with *Te Awa Tupua* as an indivisible whole with inalienable interconnection with local Iwi, river conservation and economic development.[62] This could embrace a view that economic development and resulting goods and services from the river resource depend on the viability of the natural ecosystem, which advances an anthropocentric view without compromising a sustainability objective.[63] Recognising the alignment of economic development and river ecosystems with management input from *Te Pou Tupua* would enhance the Act. Recognition in the Act of this interconnection is arguably tacitly present in the principle of *ko au te Awa, ko te Awa ko au*, (I am the river, and the river is me), and the multi-faceted definition of

[57] Aikaterini Argyrou and Harry Hummels, "Legal Personality and Economic Livelihood of the Whanganui River: A Call for Community Entrepreneurship" (2019) 44(6–7) *Water International* 752.

[58] Argyrou and Hummels, n 57, 756.

[59] G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP, 2012).

[60] S Sachdeva, "The Influence of Sacred Beliefs in Environmental Risk Perception and Attitudes" (2017) 49(5) *Environment and Behaviour* 583.

[61] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 13.

[62] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 69(17).

[63] JM Peterson and N Hendricks, "Economics of Water" in K Conca and E Weinthal (eds), *The Oxford Handbook of Water Politics* (OUP, 2016).

river health and wellbeing.[64] This principle moves beyond seeing the river simply as a resource, but rather a living entity indivisible from human activity. However, there are no practical methodologies associated with implementing this principle. To address this in practical terms requires some express recognition of a value system associated with *Te Awa Tupua* ecosystem services, balancing protected natural systems with economic activity within sustainable thresholds. This is something referred to as a new social contract with nature,[65] a contract that recognises the primacy of nature supporting economic activity. This means nature must be protected to ensure such economic activity can viably continue. *Te Pou Tupua*, should therefore be empowered to recognise and enforce the primacy of nature and the interconnection and balance requirements between ecological protection and economic development.

The foregoing alludes to the possibility of the Act addressing a type of social contract between different stakeholders on ecological and economic balance. The idea of a social contract with nature combines property within the ecosystem and society, with physical and metaphysical elements while balancing ecological protection with human activities intergenerationally.[66] This balancing process appears to be facilitated in the Act in allowing for collaboration between local Iwi and all levels of government to consult *Te Pou Tupua*.[67] This is also demonstrated in the Act, involving co-ordination of fisheries with river catchments involving "protection, management, and sustainable utilisation of fisheries and fish habitat managed in the Whanganui River".[68] This includes protection of the economic and social wellbeing of the *Te Awa Tupua* community and ensuring social, economic and ecological sustainability. The Act, however, does not provide a means to monitor and measure this process and, as discussed in Part III, a lot is left up to discretionary decision-making. A social contract of this type emphasises economic activity as part of a wider contractual objective, subject only to recognising the primacy of the ecological system which sustains it. This differs from the European anthropocentric view of economic and ecological balance of sustainability. This new social contract is more complex because it would require a balance in the context of environmental, social, cultural, and economic components of *Te Awa Tupua* within its physical, metaphysical, natural and human elements. This could require *Te Pou Tupua* to uphold the right of Iwi to engage in sustainable economic activity. This means greater use of criteria and indicators of allowable economic activity in balance with ecological protection is required. Inclusion of bespoke criteria and indicators of ecologically sustainable development in the Act relevant to river communities will provide greater certainty for coordinated development, and a framework for regular sustainability reporting and the development of a type of social contract. While the intent of the Act to effect a political settlement is admirable, this would be enhanced by a clearer roadmap of how economic development occurs within viable levels of ecological protection. To address this fully also requires consideration of the broader metaphysical, social and philosophical aspects of Māori culture, that arguably allude to sustainability of the river resource.

V. Earth Jurisprudence, Indigenous World Views and Sustainability

This Part is not intended as a review of existing Earth jurisprudence and how it relates to sustainability. The focus is on how the Act adds a Māori perspective to this subject and presents the argument that this view has direct relevance to sustainability. The Act demonstrates a serious attempt at aligning the essence of *Te Awa Tupua* with Māori worldviews on the environment and, in our contention, by implication river sustainability. Therefore, the extent of how these views are aligned and progress a sustainability agenda should be considered, and in doing so, consider whether the Act makes a meaningful addition to Earth jurisprudence. Earth jurisprudence argues that nature has rights which are enforceable in order to protect

[64] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) ss 7, 13(c).

[65] Argyrou and Hummels, n 57, 760.

[66] N Tomas, "Māori Concepts of Rangatiratanga, Kaitiakitanga, the Environment and Property Rights" in DP Grinlinton and P Taylor (eds), *Property Rights and sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers, 2011).

[67] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 64(2).

[68] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 66.

Earth's ecology.[69] This view, emphasising the rights of nature, evolved with development of Wild Law, highlighting the dependency business has on ecology.[70] The ideas implicit within Earth jurisprudence have some alignment with the establishment of *Te Awa Tupua* separate legal personality under the Act. While an Act designed to effect a political settlement with local Iwi, may not represent a substantial precedent for the development of Earth jurisprudence, it is positing the legal rights of a natural entity via legislation that still adds to the body of work on Earth jurisprudence. If separate legal personality of a natural entity is to mean anything, it arguably should extend to a right of the river to sustain itself.

Recognising the primacy of Earth's ecology at a political level has occurred in Bolivia implementing the Law of the Rights of Mother Earth,[71] followed by the Framework Law of Mother Earth and Integral Development for Living Well.[72] These laws establish several rights of nature including pure air and water and prioritising respect and defence of the rights of Mother Earth over commercialism. Another example is the Ecuadorian Government introducing Art 71 of their *Constitution*, setting out the rights of nature to exist, persist, maintain and regenerate its cycles, and recognising indigenous conceptions of living well (*Buen vivir*) as a consideration in development planning.[73] Including rights of nature into a Constitution arguably creates an enforceable right, potentially supportive of ecologically sustainable development objectives.[74] Article 71 does call upon public authorities to enforce the rights of nature. Although these legal developments establish rights of nature, a substantive issue is how to enforce these rights. For example, a statement of a right in a Constitution, arguably requires at least two things in order to create practical enforceability.[75] The first, procedural clarity on an enforcement process, and second, establishing clarity over who has standing. Continued clashes in Ecuador between environmental and social forces against commercial interests (and state controls over natural resource sectors) demonstrate that more is needed than just a change in the law.[76]

Recognising Earth's primacy requires radical political changes with wide social acceptance. Historical analogies of radical change are usually preceded by long held resentment and oppression.[77] There is no current groundswell of oppression or radical discontent likely to give rise to sudden and unexpected change arising from pressure to meet a sustainability objective. For Earth jurisprudence to have meaning, it must explain how prioritising ecology is achievable through evolutionary political and social change. Legal personhood of *Te Awa Tupua* demonstrates recognition of indigenous philosophies and rights of nature. However, this does not represent alignment between Iwi social and political systems and other political and social systems within collaborative decision-making.[78] Despite a connection between the

[69] Thomas M Berry, *The Great Work: Our Way into the Future* (Crown, 2000).

[70] C Cullinan, *Wild Law: A Manifesto for Earth Justice* (Chelsea Green, 2nd ed, 2011).

[71] *Ley de Derechos de la Madre Tierra* [Law of the Rights of Mother Earth]. Plurinational Legislative Assembly, Law071 of the Plurinational State, 21 December 2010 (Bolivia).

[72] *Ley Marco de la Madre Tierra y Desarrollo Integral para Vivir Bien* [Framework Law of Mother Earth]. Plurinational Legislative Assembly, Law 300 of the Plurinational State, 15 October 2012 (Bolivia).

[73] An English version of the Constitution can be found here; *Political Database of the Americas* <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

[74] CM Kauffman and PL Martin, "Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail" (2017)92 *World Development* 130.

[75] Reference to "practical sustainability" primarily refers to incorporating core sustainability values in business practices balancing environmental, social and economic criteria and indicators. See Nasrin R Khalili, *Practical Sustainability: From Grounded Theory to Emerging Strategies* (Palgrave Macmillan, 2011).

[76] R Lalander, "The Ecuadorian Resource Dilemma: Sumak Kawsay or Development?" (2016) 42(4–5) *Critical Sociology* 623.

[77] The French Revolution is arguably the most radical seismic change in history, based on timing, process and extent of change. The causes were multi-faceted but inequitable taxation and clear social division between the aristocracy, bourgeoisie and the proletariat was a big element. The point of this example is to highlight this degree of division does not exist in relation to arguments on Earth's primacy.

[78] Mereana Barrett et al, "Legal Personality in Aotearoa New Zealand: An Example of Integrated Thinking on Sustainable Development" (2020) 33(7) *Accounting Auditing and Accountability Journal* 1705; compare Mihnea Tanasescu, "Rights of Nature, Legal Personality, and Indigenous Philosophies" (2020) 9(3) *Transnational Environmental Law* 249.

rights of nature and indigenous philosophies, the motivation for recognising this connection in the Act is primarily political. A political settlement may be limiting of a wider interpretation of the importance of indigenous philosophies and the rights of nature.[79] In other words, a purely political settlement may limit the precedent for legal personhood of natural entities as a means to prioritise ecology over economy in recognising the rights of nature. The question becomes; does the Act advance indigenous worldviews on the rights of nature, enabling *Te Pou Tupua* to use the legal personhood of *Te Awa Tupua* to support the rights of nature? Put simply, can the rights of nature connected to *Te Awa Tupua* under the Act be upheld at law, and by implication establish the primacy of ecology over economy in terms of a practical prioritisation?

The connection between the rights of nature and indigenous philosophies assumes an ecocentric position with natural entities seen as having inherent value.[80] The Act recognises ecocentrism by the obligation to recognise and provide for *Tupua te Kawa* in decision-making.[81] This is reinforced by the function of *Te Pou Tupua* to uphold *Tupua te Kawa*.[82] The position is further reinforced by recognition in the Act of the interconnected relationship between Whanganui Iwi and *Te Awa Tupua*.[83] The Crown acknowledges the Whanganui Iwi have an inalienable interconnection with *Te Awa Tupua*, and its health and wellbeing, with associated responsibilities to uphold it. The Act also recognises the relationship is a taonga (treasured possession), based on tikanga (custom and traditional values), with Whanganui Iwi responsible for the mana (spiritual power) and mauri (life force) of *Te Awa Tupua*. These inclusions support an ecocentric view of the rights of nature. This ecocentric position must be understood, however, in the context of other parts of the Act, which require political collaborative processes. If the Act is seen as upholding Whanganui Iwi views on the rights of nature on one hand, while also enabling political, collaborative processes on the other, we are left with a watered down ecocentric position. In short, the Act requires greater clarity over how *Tupua te Kawa* is implemented at a political, economic, social and ecological level, in the context of Māori worldviews of nature.

The Act represents an outcome of protracted litigation and settlement negotiations over breaches of the Treaty of Waitangi.[84] Therefore, it is a primarily political settlement which grants legal personality to *Te Awa Tupua* which includes a transfer of authority embracing indigenous views on the inalienable connection of subject lands to local Iwi. The care of nature for Māori is expressed as *kaitiakitanga* referring to "trusteeship" which emphasises managing the resources of the environment.[85] The inclusion of indigenous worldviews of the environment as part of a wider political settlement suggest the general tenor of the Act is to give effect to a political settlement and Māori worldviews of nature rights as a secondary consideration. As a consequence of this position, if correct, then it remains unclear what level of priority this worldview should be given in economic and political discourse. As a political settlement that adopts a management plan for *Te Awa Tupua*, interesting consequences arise from this. Legal personality may be an extension of management capability, and not necessarily expressly designed to give expression to Māori thinking on the rights of nature.[86] The Act, therefore, arguably does not transfer an enforceable right of nature to *Te Awa Tupua*, with only tacit recognition of river status as an "indivisible whole", in all its "physical and metaphysical elements". Instead separate legal personality status represents something to be played out in a collaborative management framework, and not as an

[79] Tanasescu, n 78.

[80] Earth & Sustainability Science Research Centre, *Why Ecocentrism Is the Path to Sustainability* <http://www.essrc.unsw.edu.au/news/why-ecocentrism-key-pathway-sustainability>.

[81] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 13, 15(2).

[82] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 19(1)(b).

[83] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 71.

[84] This follows the *Treaty of Waitangi Act 1975* (NZ) which established the Waitangi Tribunal which assessed claims arising from breaches of the Treaty of Waitangi. See also K Sanders, "'Beyond Human Ownership'? Property, Power and Legal Personality for Nature in Aotearoa New Zealand" (2018) 30 *Journal of Environmental Law* 207.

[85] M. Kawharu, "Environment as a Marae Locale" in R Selby, P Moore and M Mulholland (eds), *Māori and the Environment* (Hula Press, 2010) 221–237, 227.

[86] Tanasescu, n 78, 17.

enforceable right to be asserted in potential conflict with stakeholders asserting other claimed rights. If this view is correct, we cannot assume separate legal personality asserted by *Te Pou Tupua* will necessarily adopt a particular position on sustainable development. In short, indigenous philosophies relating to *Te Awa Tupua* must be seen in context of management structures established under the Act with consequent risk it not be seen as a right of nature established by legislation. One concept arguably implicit with sustainability regulation is the idea of precautionary risk management which is designed to forestall or prevent serious environmental damage. This article argues that granting separate legal personality to a natural entity should include appropriate risk management methodologies which is covered in Part VI.

VI. Legal Risk with Te Awa Tupua Regulation

Risk in this section is primarily referring to environmental and legal risk where sustainability related objectives are not considered. Once again the reader is asked to consider arguments raised earlier, particularly in Parts I–III, justifying why sustainability related factors should be considered at all. If these arguments are accepted then risk potentially arises in two contexts; the first examining legal risk within the *Te Awa Tupua* regulatory framework itself, including listed legislation where "particular regard" and "recognise and provide" for must be had to *Te Awa Tupua*.[87] The second is where the regulatory framework may restrict or limit environmental protection, and thereby potentially impede reaching sustainability objectives. Legal risk, therefore, is examined generally as to inherent problems arising from separate legal personality of a natural entity. The context here is in respect to the wider regulatory objectives of the Act, which represented as a political settlement, may inhibit broader environmental and potentially sustainability related goals. For example, where wider representation of diverse communities on regulatory entities such as *Te Karewao* may lessen likelihood of agreement relating to broader environmental goals.

The guardianship model for separate legal personality, incorporating a distinctly Māori environmental worldview reflected in *Tupua te Kawa*,[88] represents a distinct embrace of physical and metaphysical elements interconnected with local Iwi. The *Te Pou Tupua* guardian, with one Crown and one Whanganui Iwi nominated member creates a potentially "bi-partisan" guardianship entity, although appointees are expected to act on behalf of *Te Awa Tupua.* This must be done consistently in accordance with *Tupua te Kawa*, which in embodying these Māori worldviews provides no methodologies on how this should be achieved.[89] *Te Pou Tupua* may enter into contracts with Crown agencies, including local authorities, which includes granting of consents relating to resources associated with *Te Awa Tupua*. *Te Pou Tupua*, when acting in accordance with *Tupua te Kawa* effectively prioritises Māori worldviews over other environmental and sustainability related options. In short, the guardianship model is not a model that necessarily incorporates or prioritises environmental or sustainability related themes in a specific measurable capacity. This view is reinforced by Cl 9.3 of the Deed of Settlement, which emphasises that no one owns water, even though the local Iwi effectively regard their rights as extending to proprietary rights in nature, which prima facie are conflicting views. While there is nothing in the foregoing that prevents sustainability related objectives being advanced, there is also no provision to expressly include them either. The point here is that separate legal personality of the river is, in essence, designed for political and not environmental prioritization. If this is the intent, then the Act has likely achieved its purpose. This article argues that the benefits of separate legal personality demand a wider remit, which does not deny the essential nature of the political settlement, but rather balances it with other worthwhile objectives.

This article has attempted to address where sustainability related elements emerge in the Act. Arguably, the clearest sustainability-related measure in the Act is the recognition of *Te Awa Tupua* as "an indivisible and living whole … from the mountains to the sea".[90] The concept of an indivisible whole is relevant

[87] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15(2), (3).

[88] Ruru, n 39.

[89] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 19(2)(a).

[90] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 12, 13b.

from a sustainability perspective because it associates the health of the river with remaining in a unified state. Recognising *Te Awa Tupua* as a single indivisible entity has potential application to sustainability criteria and indicators that measure the volume and biodiversity of the river. Anything that takes away this unified status is potentially a detraction from this concept, and therefore, from *Tupua te Kawa* itself. Separate legal personality giving standing for the river to be represented in court, is arguably the best defence to any attack on *Tupua te Kawa.* Any damage to *Te Awa Tupua* is potential context for *Te Pou Tupua* initiating legal action. However there is nothing in the Act to suggest such action will take place in respect to any sustainability related objective. In order to overcome this limitation, the Act arguably requires amendment to address particular sustainability related criteria and indicators of river health to which *Te Pou Tupua* can respond. This represents a primary risk management strategy that enables a clearer road map for *Te Pou Tupua* enforcement and risk management strategies.

There are other potential risk factors in the Act pertaining to controlling environmental risk. The Act stipulates that *Te Awa Tupua* be treated as a public authority under the *RMA*.[91] The *RMA* states a local authority comes within the definition of a consent authority.[92] There is also a possibility that *Te Awa Tupua* may enter a joint management agreement with local consent authorities regarding river management,[93] or a local consent authority may transfer power to a public authority which potentially includes *Te Awa Tupua.*[94] This leads to the possibility of *Te Awa Tupua* represented as a consent authority, from which a resource consent is required. This creates a potential conflict between the intent of the Act and the *RMA* over consents relating to use of the river resource. For example, a joint management agreement with a local authority may include consent authority permissions from *Te Awa Tupua.* While this outcome might have a positive result for sustainability objectives should a joint agreement adopt a sustainability objective, the position is by no means clear. While it is not suggested the foregoing scenario is likely, nor that it may lead to a negative outcome, the real issue is the potential conflicts of interests between stakeholders, and how they are resolved. This has wider risk control implications in the event that a conflict scenario is not resolved.

The separate legal status of *Tupua te Kawa*, expressed through *Te Pou Tupua*, creates another risk scenario given it creates an administrative layer between the direct involvement of local Iwi. *Te Pou Tupua* represents the river (not local Iwi), and, in doing this, must uphold *Tupua te Kawa*.[95] The Act does make clear that *Te Pou Tupua* must engage with and report to local Iwi on matters relating to *Te Awa Tupua.*[96] Although this is a positive thing, there is no mechanism for how this engagement should work, or measurement of what upholding *Tupua te Kawa* means in terms of practical outcomes for the environment, sustainability and the interests of local Iwi.[97] The lack of direct involvement of *Te Pou Tupua* with *Te Heke Ngahuru* and *Te Kopuka* and its restricted management function in interacting with the *RMA*, highlight limits on management inputs.[98] The position would be different if the process for consistent application of *Tupua te Kawa* had a more prescriptive methodology that included the *Te Pou Tupua*. A reality check is needed to highlight that the Act cannot cover all risk contingencies, and it serves no purpose to raise potential risks that have limited likelihood of arising.

However, deficiency in the Act is an absence of any procedural clarity which guarantee how *Tupua te Kawa* values or environmental and sustainability measures are achieved. The absence of sustainability criteria and indicators also creates potential procedural problems including difficulties proving

[91] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 17(e).

[92] *Resource Management Act 1991* (NZ) s 2.

[93] *Resource Management Act 1991* (NZ) s 36B.

[94] *Resource Management Act 1991* (NZ) s 33.

[95] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 19(2).

[96] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 19(2)(b).

[97] Reference to practical sustainability refers primarily to a process of incorporating core sustainability principles into business practice addressing social financial, environmental and economic criteria and indicators of sustainability. See, eg, Khalili, n 75.

[98] Katie O'Bryan, "Giving a Voice to the River and the Role of Indigenous People: The Whanganui River Settlement and River Management in Victoria" (2017) 20 *Australian Indigenous Law Review* 48.

causation as a factor in any enforcement process.[99] For example, the requirement of a person exercising a discretionary power to have "particular regard" to *Te Awa Tupua* status and *Tupua te Kawa* makes it difficult to determine when this is not done.[100] How do you determine when particular regard is absent, and how do you determine causation between this absence and its practical effect? In creating separate legal personhood of *Te Awa Tupua*, the Act fails to specify a procedural process for upholding *Tupua te Kawa* and any associated environmental and sustainability benefits. The foregoing addresses some, but not all, of potential risk issues arising under the Act. The key point emerging from this discussion of risk, is that innovation in the separate legal person status of a natural entity brings with it potential risk factors that require monitoring. Further, that the extent of risk arising with separate legal person status is arguably reduced by a clearer use of criteria and indicators of sustainability. In doing this, procedural and practical processes are enabled that provide a means to reduce risk. Accordingly, it is appropriate to consider a framework for considering sustainability in the Act from the perspective of sustainable water management and the factors required to achieve it. Put another way, if separate legal personality of a river is to have any real meaning it must address sustainable water management which includes things addressed in this article, including governance, risk, extent of discretionary decision-making and balance between economic and ecological factors.

Water is a multifunctional and multidimensional resource and as such there is a need to assess how the Act addresses the inherent complexity arising from this. The Integrated Water Resources Management program,[101] for example, emphasises cross sectoral co-operation and seeks to co-ordinate sustainable management and development of land, water and other resources. The main aim here is to optimise social and economic benefits while protecting the sustainability of the ecosystem. Similarly, the development of the water footprint concept, as for the analogous ecological footprint concept, was designed to provide consumption-based indicators of water use.[102] The point of these examples, is to highlight that in examining global dimensions of water use, water footprint analysis incorporates the use of indicators as a necessary part of water governance arrangements. This provides a potential framework for analysis of *Te Awa Tupua* governance from both a bottom up and top down perspective. The former, an item by item approach used to estimate the water footprint based on consumption of water in the production of goods and services. The latter, referring to a macro orientated approach associated with overall water inputs and outputs. The item by item approach in the bottom up method is considered suitable for assessment of a sub-national community and which arguably could be adapted for the *Te Awa Tupua* region. It is probably premature to conjecture about this type of methodology at this juncture in *Te Awa Tupua* governance. Addressing such assessment regimes may be the subject of future amendment to the Act. The point is that the opportunity for this type of regulatory assessment framework is arguably a necessary corollary of granting separate legal person status to the river. Put another way, the river needs to have a mechanism to assess itself, in order to give proper effect to this status. By implication this necessarily involves assessment of criteria and indicators that relate to both the environment and sustainability. Failing to address this in the current form of the Act arguably represents a regulatory gap that hopefully will be addressed in future amendments.

VII. Conclusions on Legal Personality and Practical Sustainability

The Whanganui River Settlement and the Act are innovative in granting separate legal status to *Te Awa Tupua* and increasing Māori involvement in river management. This article clearly acknowledged the Act was primarily a political settlement but advances the argument that its wider intent has a clear environmental and possible sustainability ambit. This article sought to examine the actual and potential

[99] Laura Hardcastle, "Turbulent Times: Speculations about How the Whanganui River's Position as a Legal Entity Will Be Implemented and How It May Erode the New Zealand Legal Landscape" (2014) 4 *Māori Law Review*.

[100] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15(3).

[101] Details of this program may be found here; UNDESA, *International Decade for Action "Water for Life" 2005–2015* <https://www.un.org/waterforlifedecade/iwrm.shtml>.

[102] Details of this program may be found here; Water Footprint Network, *Fair & Smart Use of the World's Fresh Water* <https://www.waterfootprint.org/en/>.

connections between sustainability and separate legal person status of a natural entity. Given the important advance separate legal status of a river represents to Earth jurisprudence and Wild Law, it is incumbent on researchers to consider the implications of separate legal status for sustainability regulation. *Te Awa Tupua* status gives the river legal standing to protect *Tupua te Kawa* values, which have physical and metaphysical significance. While the Act is not a legal precedent easily replicated or applied, due to the unique political circumstances of the settlement, it does represent a significant advance in the legal rights of natural entities. Granting separate legal person status to *Te Awa Tupua* and requiring "particular regard" and to "recognise and provide" for *Tupua te Kawa* values, aligns legal status with specific Māori values strongly focused on their unique worldviews on nature and connection to the environment. The problem from a sustainability perspective arises in respect to how *Tupua te Kawa* is defined, measured and upheld.

This article discusses how regulatory entities created under the Act provide a structure for Māori involvement in the management of *Te Awa Tupua.* The focus on Māori participation in river management was also emphasised in the guardianship model of *Te Pou Tupua.* The guardianship role represents the human face of *Te Awa Tupua* with the function to "uphold" health and wellbeing of *Te Awa Tupua* status and consistently uphold *Tupua te Kawa* values.[103] This function of *Te Pou Tupua* includes developing "appropriate" mechanisms for engaging with, and reporting to Iwi with interests in *Te Awa Tupua*, as a means of recognising the inalienable connection of local Iwi to the river. While this clearly focuses on the management function, it provides no criteria or indicators for how the management focus on *Te Awa Tupua* status and *Tupua te Kawa* values are achieved. Allowing a wide discretion is not unusual in some categories of natural resource legislation, however the Act, in establishing a management structure for Māori participation, ideally should have parameters in discretionary decision-making particularly with the measuring and monitoring function. As with *Te Karewao* and *Te Kopuka*, the guardianship model represented in *Te Pou Tupua* is not necessarily intended to have a sustainability focus. What has been emphasised throughout this article is recognition that the intent of the Act was for separate legal status of *Te Awa Tupua* as a political settlement with local Iwi, which included enabling their involvement in river management. To the extent this does not more actively embrace sustainability objectives, arguably represents a missed opportunity and a regulatory gap.

The path to sustainability involves a dynamic equilibrium within an ecosystem between economic development and ecological health. If separate legal status of a natural entity is to have substantive meaning, it must recognise and provide for this dynamic equilibrium. Recommending changes to the Act, means no actual or implied criticism of what is, by any standard, innovative change that potentially has invigorated Earth jurisprudence. Rather, the emphasis is on recognising separate legal personhood of a natural entity as addressing sustainability objectives because they represent a natural alignment. If this is not done, it represents a missed opportunity which risks the expression of separate legal personhood status as not prioritising sustainability objectives. The connection between separate legal personhood of natural entities and sustainability objectives provides an opportunity for establishing a substantive legal precedent.

Māori beliefs embrace the view there is no separation between human beings and nature. This is clearly embraced within *Tupua te Kawa*, and while these values must be recognised in decision-making, it is not clear how this equality with nature is given practical expression. An opportunity exists for the economic approach to this relationship to be properly recognised within the ecological core represented by *Te Awa Tupua* and its surrounding communities. The Act makes no reference to principles of ecologically sustainable development, which, while not surprising given its objectives, still represents an omission. Their inclusion allows for a fuller application of sustainable development of the entire region and provides a platform for building a dynamic equilibrium between economy and ecology. This equilibrium does not have to prioritise economic growth or ecological protection, but rather explain and enhance the interconnection and mutually supportive role of both. This requires both a qualitative and quantitative shift in how the Act deals with building economic growth in the region. It would do this through recognising the importance of "replacing the economic norm of quantitative expansion (growth)

[103] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 19(1), (2)(a).

with that of qualitative improvement (development) as the path of future progress".[104] In its current form the Act does not clarify the nature of qualitative improvement to the economic growth function within the region. In other words the opportunity for a closely monitored and measured control of economic growth within the ecosystem of *Te Awa Tupua* has been missed. This would represent a focus on human socio-economic development premised on maintaining the health of the subject ecosystem.[105] The Act has missed an opportunity to embrace ecological sustainability as a prerequisite for economic development.[106]

The foregoing represents a constructive critique rather than an outright rejection of the current format of the Act. The evaluation herein is a critique of how the Act deals with the primacy of the ecological system as the essential support base for economic development. Since the Act has taken the radical step of creating separate legal personhood status of *Te Awa Tupua*, it needs to take at least one further step in giving this status credentials to address ecological primacy as a precursor for economic development. The innovation represented in the Act is lessened by the marginalisation or even avoidance, depending on interpretation, of the core importance of the ecological core of sustainability. Yes, there is recognition of *Tupua te Kawa* values where "particular regard" must be had to them in decision-making. However, given the lack of parameters around discretionary decision-making, this risks failing to account for ecological factors within these values.

Separate legal personhood of *Te Awa Tupua* represents an example and potential exemplar for future sustainability regulation. In its current form this exemplar status is characterised more by what is left out rather than what is currently included. The opportunity in the Act is to become more sustainable in order to avoid risk stated as "unless law is made sustainable, it will protect unsustainable conduct".[107] We do not want to see, for example, different Iwi groupings promoting a narrow economic agenda that does not respect the dynamic equilibrium between economy and ecology. In embracing legal personhood of *Te Awa Tupua* it is incumbent to also address sustainability which properly accounts for sustainable development of the river and its communities.

Potential reform of the Act must not deconstruct or dilute the important advance it represents for Māori participation in river management. The recommendations associated with sustainability are designed to add to this notable development. The recommended inclusion of principles of ecologically sustainable development, for example, provides opportunity to avoid short term thinking in river management. These principles have the capacity to enhance, not detract from *Tupua te Kawa* values, but they require a clear set of bespoke criteria and indicators for sustainability of *Te Awa Tupua*. The absence of criteria and indicators relating to environment and sustainability related matters, including economic elements, limits capacity to detect breach, monitor environmental performance and engage in regular reporting on the health and status of *Te Awa Tupua.* It is hoped that future developments in the separate legal status of *Te Awa Tupua* can embrace these important requirements. The separate legal status of *Te Awa Tupua* is innovative in breadth of vision in river management, but is not yet a development that fully promotes sustainability objectives. In that respect the Act, while commendable for how it includes indigenous peoples in river management, does not yet represent a substantive advance in sustainability regulation.

APPENDIX 1

Section 15(2) of the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) applies to the following Acts:

(1) *Biosecurity Act 1993* (NZ);
(2) *Conservation Act 1987* (NZ);
(3) *Fisheries Act 1996* (NZ);

[104] HE Daly, *Beyond Growth: The Economics of Sustainable Development* (Beacon Press, 1996).

[105] L Westra, *Ecological Integrity and Global Governance: Science, Ethics and the Law* (Routledge, 2016).

[106] K Bosselmann, *The Principle of Sustainability. Transforming Law and Governance* (Routledge, 2nd ed, 2016).

[107] S Westerlund, "Theory for Sustainable Development; Towards or Against?" in HC Bugge and C Voigt (eds), *Sustainable Development in National and International Law* (Europa Law Publishing, 2008).

(4) *Forests Act 1949* (NZ);
(5) *Freedom Camping Act 2011* (NZ);
(6) *Harbour Boards Dry Land Endowment Revesting Act 1991* (NZ);
(7) *Land Drainage Act 1908* (NZ);
(8) *Local Government Act 1974* (NZ);
(9) *Local Government Act 2002* (NZ);
(10) *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ);
(11) *Marine Mammals Protection Act 1978* (NZ);
(12) *Marine Reserves Act 1971* (NZ);
(13) *Maritime Transport Act 1994* (NZ);
(14) *National Parks Act 1980* (NZ);
(15) *Native Plants Protection Act 1934* (NZ);
(16) *New Zealand Geographic Board (Ngā Pou Taunaha o Aotearoa) Act 2008* (NZ);
(17) *Queen Elizabeth the Second National Trust Act 1977* (NZ);
(18) *Reserves Act 1977* (NZ);
(19) *Resource Management Act 1991* (NZ) (in relation to preparing or changing a regional policy statement, regional plan, or district plan);
(20) *River Boards Act 1908* (NZ);
(21) *Soil Conservation and Rivers Control Act 1941* (NZ);
(22) *Trade in Endangered Species Act 1989* (NZ);
(23) *Walking Access Act 2008* (NZ);
(24) *Wild Animal Control Act 1977* (NZ); and
(25) *Wildlife Act 1953* (NZ).