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Māori Law Review
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Legislation – Ngā whakaturetanga

Te Awa Tupua (Whanganui River Claims Settlement) Bill
The endless quest for justice

Linda Te Aho

Introduction

Linda Te Aho continues her review of the new legal framework for Te Awa Tupua (the Whanganui River system) as part of the settlement of historical claims by Whanganui iwi about the Whanganui River.

Overview

> Te Awa Tupua is ingrained in our hearts and in our minds. … [T]his piece of legislation, with its framework that has a human face for our awa, is charged with the responsibility of ensuring that the health and well-being of Te Awa o Whanganui—Te Awa Tupua—is able to be maintained, not so much for us here today but for future generations. (Adrian Rurawhe)[1]

Te Awa Tupua (Whanganui River Claims Settlement) Bill gives effect to Ruruku Whakatupua (Whanganui River Deed of Settlement) signed in 2014 to settle the historical claims of Whanganui Iwi as they relate to the Whanganui River. Ruruku Whakatupua sets out in full the redress for the settlement of those claims. (See (2014) May Māori Law Review.) The Bill includes elements for which legislation is necessary and some provisions that Whanganui Iwi have specifically requested be included.

This review summarises the Bill, highlighting unique aspects of redress. To end I offer some observations about the settlement in the

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context of current debates around freshwater law and policy.

Discussion

A unique settlement

The Bill recognises that Te Awa Tupua is an indivisible and living whole and comprises the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements, and is declared a legal person with all the rights, powers, duties, and liabilities of a legal person.

Because the personification of the natural world is a fundamental feature of Māori law, these pronouncements are said to reflect Māori world thinking and they featured strongly in speeches delivered at the first reading of the Bill in the House of Representatives on 24 May 2016. Chairperson of the Māori Affairs Select Committee, Nuk Korako, described the framework as an "innovative use of the Western judicial system to manage the river in a way that is distinctly Māori", and "one of the most unique things of any settlement that has ever come before this House." Hon. Nanaia Mahuta noted that the settlement reflects "Ao Māori thinking, wairua Māori thinking." Her colleague Kelvin Davis said that "[i]t is about time that this House started recognising and legitimising the Māori world view." Pita Paraone shared his view that "the law is actually catching up with tikanga."

Summary of the Bill

Part 1 of the Bill defines key terms. Of particular interest is the definition of the bed of the Whanganui River: the space of land that the waters of the Whanganui River cover at its fullest flow without overtopping its banks. It includes the subsoil, the plants attached to the bed, *the space occupied by the water, and the airspace above the water* (emphasis added). This is a powerful provision not seen in other like settlements

and I make some observations about its importance at the end of this review.

Part 2 is the heart of the Bill and is divided into seven subparts.

Subpart 1 sets out the scope and effect of Te Pā Auroa, the Te Awa Tupua framework. The framework comprises the legal status of Te Awa Tupua and the intrinsic values that represent the essence of Te Awa Tupua. The framework is a relevant consideration in the exercise of certain statutory functions and powers.

It is in subpart 2 that Te Awa Tupua is recognised as "an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements" (cl 12).

Clause 13 sets out Tupua Te Kawa, the intrinsic values that represent the essence of Te Awa Tupua. Included in these important values is the iconic maxim, "ko au te Awa, ko te Awa ko au: I am the River and the River is me."

Clause 14 declares that Te Awa Tupua is "a legal person and has all the rights, powers, duties and liabilities of a legal person."

Clause 15 requires that in respect of 25 named statutes, decision makers "must recognise and provide for" the Te Awa Tupua status and the intrinsic values. The statutes include the Conservation Act 1987, the Fisheries Act 1996, the Local Government Acts of 1974 and 2002, and the Resource Management Act 1991 (in relation to preparing or changing a regional policy statement, regional plan, or district plan). Decision makers under the Heritage New Zealand Pouhere Taonga Act 2014, the Public Works Act 1981, and the Resource Management Act 1991, to the extent it is not within the previous clause, must have "particular regard" to the Te Awa Tupua status and values.

Subpart 3 establishes Te Pou Tupua, the human face of Te Awa Tupua, comprised of two persons: one to be nominated by iwi with interests in the Whanganui River and one to be nominated by the Crown. The functions of Te Pou Tupua centre on acting and speaking for and on behalf of Te Awa Tupua to promote and protect the health and well-being of Te Awa Tupua. A three person advisory group named Te Karewao is also established.

Subpart 4 establishes Te Kōpuka, a strategy group of up to 17 representatives and community stakeholders. The strategy group is a permanent joint committee of the Manawatu-Wanganui Regional Council and three District Councils, and must become the collaborative planning group if the regional council adopts a collaborative planning process in relation to freshwater management. The strategy group's primary function is to develop a strategy document, Te Heke Ngahuru, which must identify the issues relevant to the health and well-being of the River, provide a strategy and recommend actions to deal with those issues.

The vesting in Te Awa Tupua of Crown-owned parts of the bed of the River on settlement date is the focus of subpart 5. It also provides for future acquisitions. Once vested, the bed is inalienable (cl 43). Clause

46 provides that certain matters are not affected by vesting. For example, it is clear that vesting does not create or transfer a proprietary right in water or in wildlife, fish, plants, and so on. As is typical, existing access and use rights are preserved, as are existing property rights and existing resource consents.

A restoration fund of $30 million, named Te Korotete, is established in subpart 6 and is to be administered by Te Pou Tupua, on advice from Te Karewao. The fund's purpose is to support the health and well-being of Te Awa Tupua.

Subpart 7 sets out arrangements for protecting the name Te Awa Tupua, and for developing a register of commissioners qualified to sit on resource consent hearings relating to the River. This subpart also establishes collaborative processes for the future management of activities on the surface of the water, coordinating fisheries in the catchment, and developing regulations for managing customary food gathering.

Part 3 of the Bill sets out Whanganui Iwi redress.

In clause 69, the Crown makes a number of important acknowledgements, including that to Whanganui Iwi the enduring concept of Te Awa Tupua – the inseparability of the people and the River – underpins the responsibilities of the iwi and hapū of Whanganui in relation to the care, protection, management, and use of the Whanganui River in accordance with kawa and tikanga.

In clause 70 the Crown apologises to Whanganui Iwi. Clause 71 again emphasises the special relationship between Whanganui Iwi and Te Awa Tupua, an interesting point being the emphasis on the Iwi's responsibilities to Te Awa Tupua as tāngata tiaki in relation to the mana and mouri of Te Awa Tupua (cl 71(1)(b) and (2)(c)).

Importantly, clause 72 provides that for the purposes of the Resource Management Act 1991 the trustees of the iwi's post settlement governance entity, Ngā Tāngata Tiaki, are an iwi authority, a public authority, and are recognised as having an interest in Te Awa Tupua greater than, and separate from any interest in common with the public generally.

Part 3 also sets out provisions in relation to rights to carry out authorised customary activities and recognises the statement of significance in relation to the rapids of the Whanganui River, Ngā Ripo o Whanganui.

Part 4 sets out what are now fairly standard provisions relating to the settlement of historical claims and miscellaneous matters.

Part 5 reorganises governance entities and provides for transitional taxation matters. Notably, the Whanganui River Maori Trust Board, which has carried the weight of the claims for many generations, is to be dissolved along with the Pākaitore Trust and Te Whiringa Muka Trust. They are to be replaced with the iwi's post settlement governance entity, Ngā Tāngata Tiaki.

Observations

The Crown acknowledgements and apology in the Bill publicly recognise that the iwi and hapū of Whanganui, their tūpuna, and their uri have an inalienable connection with Te Awa Tupua and its health and well-being. Despite its promises in Te Tiriti o Waitangi, the Crown has systematically undermined the rights, interests and responsibilities of Whanganui Iwi in the management and use of the Whanganui River. Excluded from decision-making, Whanganui Iwi were not consulted when the diversion of water from Whanganui into the Tongariro Power Scheme was authorised in 1958. They have had to witness decades of disrespect for the mana and mouri of the River, and the harmful consequences to the River's health and well-being that followed.

In this settlement the Crown apologises for its wrongs, goes to great lengths to recognise the special relationship between the Whanganui Iwi and Te Awa Tupua, and provides strong redress to ensure that Whanganui Iwi and the health and well-being of the Whanganui River can no longer be ignored.

Perhaps the most interesting aspect of the Bill, not flagged in the Deed of Settlement, relates to the definition of the bed of the River. A Waitangi Tribunal report from 2012 found that Māori had rights and interests in their water bodies for which the closest English equivalent in 1840 was ownership. The Tribunal went on to say that those rights were then confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that the Treaty bargain provided for some sharing of the waters with incoming settlers. The nature and extent of the proprietary right was the exclusive right of iwi and hapū to control access to and use of the water while it was in their rohe.[2]

The Crown and iwi leaders have been exploring various mechanisms in the context of current debates about how the Crown might give effect to these rights and interests.[3]

Negotiated freshwater settlements such as this focus on restoring and protecting the health and well-being of water bodies, and deliberately avoid the issue of recognising iwi and hapū rights and interests in the water itself. They fund, to varying degrees, restoration projects and improve planning processes and relationships between local government and Māori.[4] Some vest Crown-owned parts of the riverbeds and lakebeds in iwi.

While the Waikato River settlement did not incorporate the return of riverbeds, the Te Arawa Lakes Settlement Act 2006 did vest a number of lakebeds in Te Arawa. But there the Crown explicitly retains ownership of the 'Crown stratum', the space occupied by water and the space occupied by air above each Te Arawa lakebed.

The Whanganui River settlement is distinctive in a number of ways. It gives emphasis to the profound relationships that Whanganui Iwi have with Te Awa Tupua in a very Māori way. In recognising Te Awa Tupua and vesting in Te Pou Tupua the Crown-owned portions of the bed of the Whanganui River the settlement provides leverage for more effective

recognition of the rights and interests of the River itself. While the settlement falls short of the Waitangi Tribunal's recommendations in its substantial Whanganui River Report of 1999,[5] the vesting of the Crown-owned parts of the bed in its fullest sense possible provides the strongest tools possible within the current negotiations framework to ensure that the rights and interests of Te Awa Tupua are recognised in ways that align with the values and responsibilities of Whanganui Iwi.

Alongside the Bill's provisions protecting and promoting the rights and interests of Te Awa Tupua, and the Whanganui Iwi, another interesting aspect of the settlement is the emphasis on the principle of responsibility, perhaps drawing from new jurisprudence emerging in current debates about developing better law and policy.

Sir Edward Taihākurei Durie, on behalf of the New Zealand Māori Council, has proposed a new approach, a paradigm shift, for the governance of water. The proposed new approach involves an independent governance body that would accommodate Māori law, rights, and interests and would be oriented to shared responsibility for water.[6] It is telling that the name of the iwi's post-settlement governance entity for the Te Awa Tupua settlement is Ngā Tāngata Tiaki, people who care for the River.

Closing comments

The unique redress and the deep sense of spirit that the settlement evokes go a long way to atoning for decades of dishonourable Crown behaviour. I take this opportunity to add my acknowledgements to the generations of Whanganui people who have fought this "endless quest for justice."[7] This settlement is impressive and long-overdue. It is an inspiration to present and future generations.

Finally, I echo the Crown's acknowledgement that the approach taken by the Whanganui Iwi in respect of this settlement represents significant compromise and generosity of spirit and promotes a collaborative, inclusive approach to the Whanganui River and its future governance and management with the recognition and protection of Te Awa Tupua at its heart.[8]

Notes

[1] Adrian Rurawhe, First Reading speech, Te Awa Tupua (Whanganui River Claims Settlement) Bill, 24 May 2016. See https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL68939_1/te-awa-tupua-whanganui-river-claims-settlement-bill. References to clauses of the Bill in this article are to the Bill as introduced to the House of Representatives on 2 May 2016.

[2] Waitangi Tribunal, *Interim report on the National Freshwater and Geothermal Resources Claim* (Wai 2358) 2012, 110. See (2012) September Māori Law Review.

[3] In *New Zealand Māori Council v Attorney General* [2013] NZSC 6, the Supreme Court noted the Crown's acceptance that some hapū will have interests in particular waters and their interests are protected by Article 2 of the Treaty of Waitangi. See (2013) March Māori Law Review.

[4] For example, the Waikato Regional Council Healthy Rivers Plan Change project and process: http://www.waikatoregion.govt.nz/healthyrivers/.

[5] There the Tribunal recommended, among other things, that the Crown negotiate with Whanganui Iwi with a view to vesting the river *in its entirety* in an iwi ancestor, and that resource consent applications in respect of the River would require the approval of the iwi governance entity (emphasis added).

[6] Durie, Sir E. T, Law, Responsibility and Maori Proprietary Interests in Water: http://www.maoricouncil.com/category/water-policy-framework/.

[7] Hon. Christopher Finlayson, First Reading speech, Te Awa Tupua (Whanganui River Claims Settlement) Bill, 24 May 2016.

[8] Clause 69(19).