
LEGAL INDIGENOUS RECOGNITION DEVICES

by Jacinta Ruru

Tangaroa piki ake
Tutarakauika piki ake
Ruamano piki ake
Taea nga kino o te wai
Kia puta ki Rangiatea
Ko te Marangai
Tau atu e rea.

Tangaroa (god of the sea) rise up
Tutarakauika (guardian of the whale) rise up
Raumano (an ancestor) rise up
Cleanse the impurities from the waters
So that they may rise to the heavens of Rangiatea
To fall again
Settling and sustaining the earth.¹

All peoples around the world have stories that honour the waters that surround coastlines, flow over lands and pool in valleys. Indigenous peoples do too. The Māori prayer above inspires a call for governments to 'rise up' to legislate for the values, rights and interests of Indigenous peoples to once again enable caring for waters. Indigenous peoples throughout the world know that health and wellbeing intimately mirror people and environment. There is no separation viewed between saltwater, freshwater and land, for all is one entity, often regarded as Earth Mother, upon which people rely for sustenance and owe duties of care. New innovative law and policy offer some hope for future Indigenous generations to regain some governance oversight of the environment.

On the world stage there is now a suite of legal devices that aspire to recognise cultural environmental management philosophies ranging from customary title for coastlines, legal personality for rivers to commercial use rights in fisheries. Law and policy can (and in some places, does) recognise Indigenous historic, traditional, cultural, spiritual and commercial relationships with saltwater, freshwater and coastal lands. I consider these new opportunities broadly, with grounding references in Aotearoa New Zealand, but

question if they go far enough, specifically when the new legal devices often merely introduce a Māori relationship with fresh and salt water into myriad other existing values. The balancing act that decision-makers need to undertake frequently requires Māori values to be compromised.

UMBRELLA LAW AND POLICY IN AOTEAROA NEW ZEALAND

Aotearoa New Zealand is an island country with 14,000 kilometres of coastline (the tenth longest in the world), and an exclusive economic zone that equates to 15 times the land area of the country, constituting the world's largest exclusive economic zone. The National-led government describes New Zealand's freshwater as 'liquid gold' and as our 'biggest opportunity to grow our economy'.² Saltwater is likewise described as a place that 'supports our economy and thousands of jobs'.³

Aotearoa New Zealand is also a country which now recognises that Māori have rights and interests in water and coastlines. These rights are grounded in the Treaty of Waitangi signed between the British Crown and many Māori chiefs in 1840 that officially only has legal standing if it has been incorporated into the relevant legislation.⁴

New Zealand's primary statute that is focused on regulating the use of land, air and water—the *Resource Management Act 1991* ('RMA')—requires that water be safe-guarded for its life-supporting capacity (s 5(2)(b)). The general RMA rule for water specifically is that if the proposed activity, for example, to take, use, dam or divert water, is not expressly permitted in a regional plan, then a resource consent is required (s 13).

The local government bodies charged with formulating regional plan rules and issuing resource consents to users all operate within a context of decision-making that must have regard to the RMA foundational principles. Most important is to promote the sustainable management of natural and physical resources (s 5). Other RMA principles provide platforms for interpreting sustainable

management. Section 6 lists matters of national importance, including that decision-makers must recognise and provide for the relationship of Māori and their culture and traditions with water. Section 7 lists matters that decision-makers must have particular regard to including kaitiakitanga. Section 8 is devoted entirely to the Treaty of Waitangi, stating that decision-makers must take into account the principles of the Treaty of Waitangi. Treaty principles are deliberately dynamic and still evolving. Some principles include the Crown's duty of active protection, general principles of reciprocity, and respect and commitments to engagement that go beyond mere 'window dressing' consultation with Māori communities.⁵

New Zealand's primary statute for regulating coastal and deep sea waters and lands – the *Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012* ('EEZ Act') – is similarly premised on promoting the sustainable management of the natural resources within this zone and on this shelf. The *EEZ Act*, for example, stipulates decision-makers to 'protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter' (s 10). Section 12 makes the Treaty of Waitangi directly relevant within this decision-making framework. The requirement is more prescriptive than in the *RMA*. For example, giving effect to the Treaty 'requires the Minister to establish and use a process that gives iwi [Māori tribes] adequate time and opportunity to comment on the subject matter of proposed regulations' (s 12b).

Several central government policy documents sit underneath these statutes and also stress the importance of the Treaty of Waitangi. For example, the preamble to National Policy Statement for Freshwater 2014 states upfront:⁶

The Treaty of Waitangi (Te Tiriti o Waitangi) is the underlying foundation of the Crown-iwi/hapū relationship with regard to freshwater resources. Addressing tāngata whenua [Māori] values and interests across all of the well-beings, and including the involvement of iwi [tribes] and hapū [subtribes] in the overall management of fresh water are key to meeting obligations under the Treaty of Waitangi.

As another example, objective 3 of the New Zealand Coastal Policy Statement 2010 reads:

To take account of the principles of the Treaty of Waitangi, recognise the role of tangata whenua [Māori] as kaitiaki [guardians] and provide for tangata whenua involvement in management of the coastal environment by:

- recognising the ongoing and enduring relationship of tangata whenua over their lands, rohe and resources;
- promoting meaningful relationships and interactions between tangata whenua and persons exercising functions and powers under the Act;

- incorporating mātauranga Māori [Māori knowledge] into sustainable management practices; and
- recognising and protecting characteristics of the coastal environment that are of special value to tangata whenua.

INNOVATIVE TREATY SETTLEMENT STATUTES

Moreover, since the mid 1980s, the Crown has been committed to recognising its historical breaches of the Treaty of Waitangi and moving forward with negotiated tribal reconciliation packages. More than thirty Treaty settlement claim statutes have now been enacted with different tribes. These settlement statutes provide financial, commercial and cultural redress for past Crown actions or inactions. Many of these statutes include mechanisms that recognise the tribal importance of water. Some settlements have been particularly revolutionary in developing cultural redress options that give tribes co or joint environmental management responsibilities for lakes and rivers.

One prominent example is the negotiated co-management of New Zealand's longest river, the Waikato River. The Waikato River statutes, enacted in 2010, are symbolic of a remarkable agreement between Government and four different tribal groups.⁷ The law commits to cleaning up the pollution in the river to a standard that embraces Māori notions of health and wellbeing. The Waikato River legislation has at its heart the Crown recognition that the Waikato River is a tribal ancestor and endorses the development of a new vision and strategy that will act as the primary direction-setting document for the governance of the Waikato River. The bi-culturally constituted Waikato River Authority has been created to drive this vision and strategy. As part of the Authority's work, it administers and distributes a multimillion-dollar contestable river clean-up fund. Also, the legislation requires joint management agreements to be enforced between each relevant local government body and the Authority.

Statutory acknowledgements are very common within many settlement statutes. For example, the *Ngai Tahu Claims Settlement Act 1998* statutorily acknowledges the significance to Ngai Tahu of 14 rivers and 20 lakes that lie within the Ngai Tahu tribal boundary. If an area has a statutory acknowledgement attached to it, consent authorities must forward summaries of resource consent applications to the tribe.

Some tribes have been successful in negotiating ownership of lake and river beds (not water) in their Treaty settlements. For example, pursuant to the *Te Arawa Lakes Settlement Act 2006*, the fee simple in the Te Arawa lakebeds are vested in the tribal trustees of the Te Arawa Lakes Trust. Yet, the ownership is restricted. For example, the Trust cannot alienate the lakebeds. The Act explicitly states that this

vesting of the lakebeds does not include any rights in relation to the water in the lakes, or the aquatic life. The Trust is now able to contribute to the management of the lakes alongside the local government representatives on the Rotorua Lakes Strategy Group. This Group seeks to achieve sustainable management of the lake, while recognising and providing for the traditional relationship of the Te Arawa tribe with these lakes.

The Treaty settlements have introduced a worldview into the legislative regime for governing and managing water. For example, the beautifully written *Nga Wai o Maniapoto (Waipa River) Act 2012* includes extensive acknowledgements for why and how the Waipa River is so special to the Maniapoto tribe. The Act uses poetic language to convey the river's central importance to Maniapoto, for example: 'The river chants its farewells to our departed ones, its murmuring waters bid welcome to our newborn and to our illustrious visitors from afar' (preamble 16(c)).

On the horizon is legislation that will recognise the legal personality of the Whanganui River. A Treaty of Waitangi claim settlement agreement in principle has been signed between the Crown and the Whanganui tribe to recognise the river as a person with its own rights and interests. The river will have two guardians, one from the Crown and one from the tribe to protect and represent the river.⁸

On the coastal front, a similar suite of new cultural recognition devices have been created. In 1992, the 'Sealord deal', articulated in the *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*, was a significant pan-tribal settlement giving Māori tribes commercial sea fish quota rights (now represented in the *Maori Fisheries Act 2004*). Since 1992, regulations have been created to help identify and protect traditional customary fishing management practices.⁹ The *Marine and Coastal Area (Takutai Moana) Act 2011* provides some opportunities for Māori to exercise their customary rights and interests in the marine area. One possibility is the creation of a new customary marine title tenure. To prove this, a tribe would need to provide evidence in court that they have held the area in accordance with Māori customary law, and that it has been exclusively used and occupied from 1840 to the present day without substantial interruption.

HOW EFFECTIVE IS THIS LAW?

While the legislative and policy schemes provide for better Māori engagement in the management of coastal and freshwater, the platforms are vulnerable. Many issues still remain unresolved with Māori rights and interests in salt and fresh water still politically and legally hot. While the Treaty settlement statutes have been able to achieve much, they have been negotiated within tight Government restrictions. Many tribes and Māori communities remain unsatisfied

with operation of the current provisions, particularly in the broad statutes that are relevant to all such as *RMA* and *EEZ*. This is not surprising.

An analysis of the case law helps demonstrate why some of this dissatisfaction exists. A study I have undertaken—in analysing the results of *RMA* cases where Māori have appealed regional councils' decisions to issue resource consents to others to take or pollute water—shows clearly that Māori nearly always and consistently lose in the courts.¹⁰ While Māori have had some wins under the *RMA*, these are few and far between. This is because the Māori relevant provisions in the *RMA* are but just a set of principles that sit amongst long lists of competing considerations that also require decision-makers to have a certain level of regard. The wins that Māori have had under the more recent *EEZ* legislation concerning extraction licences may be temporary as new applications to do the same things have since been lodged.¹¹

Aotearoa New Zealand is currently reviewing many environmentally focused statutes including the *RMA*. The reform will likely enhance the recognition-type provisions for Maori interests, but it needs to go substantially further in recognising the fundamental interests of Māori: sustainable cultural relationships with the environment.

The general Māori voice on this issue, as captured in a Ministry for the Environment report dated 2005, is that 'the appropriate role for Māori in water management is one of partnership with the Crown rather than a stakeholder relationship'.¹² And the issue of who owns water—the Crown or Māori 'must be addressed before any major changes to water management can be considered'.

Land and water are essential to Māori health and wellbeing, including cultural and spiritual identity and survival. Aotearoa New Zealand is still in the early stages of appropriately negotiating a legislative regime that embraces Māori rights and interests in fresh and salt waters.

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1 These words are an opening prayer by Hohepa Kareopa that are the first words in Waitangi Tribunal, Report on the Crown's Foreshore and Seabed Policy (2004).

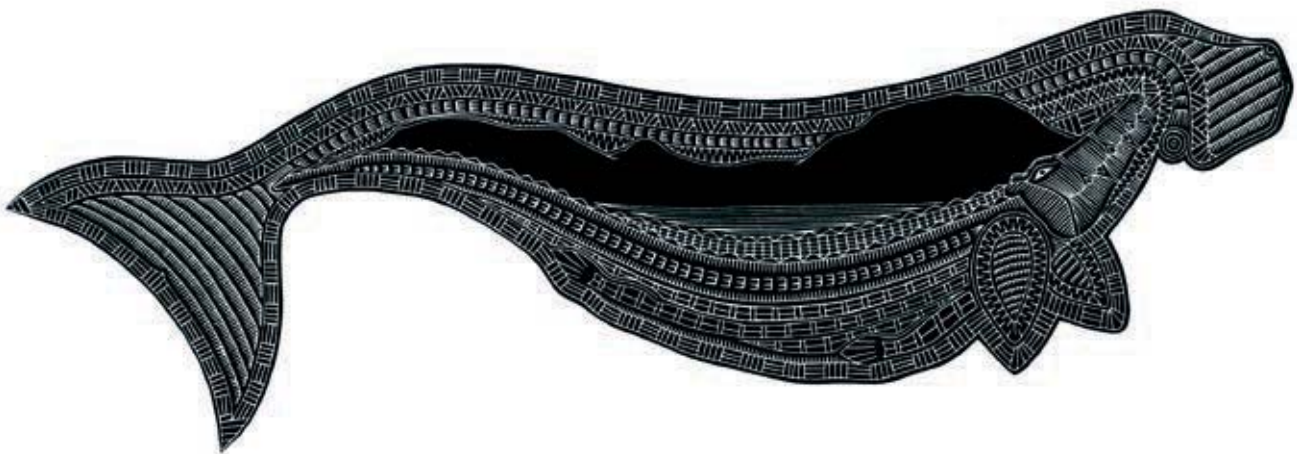
2 David Carter, 'Speech to Beef and Lamb NZ Future Farming Conference' (Speech delivered at the Beef and Lamb New Zealand Future Farming Conference, 22 March 2012) <<http://www>.

- beehive.govt.nz/speech/speech-beef-%20lamb-nz-future-farming-conference>.
- 3 Ministry for the Environment, 'A New Marine Protected Areas Act' (Consultation Document, Ministry for the Environment, January 2016) 7.
 - 4 *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308. For example see *R v Mason* [2012] NZHC 1361.
 - 5 For example, see *Ngati Makino Heritage Trust v Bay of Plenty Regional Council* [2014] NZEnvC 25.
 - 6 Ministry for the Environment, 'National Policy Statement for Freshwater Management 2014' (National Policy Statement, New Zealand Government, 4 July 2014).
 - 7 *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (NZ)* and *Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 (NZ)*. For discussion see; Linda Te Aho, 'Indigenous Challenges to Enhance Freshwater Governance and Management in Aotearoa New Zealand – The Waikato River Settlement' (2010) 20 *Journal of Water Law* 285.
 - 8 Christopher Finlayson, 'Whanganui River Agreement Signed' (Ministerial Press Release, 30 August 2012) <<https://www.beehive.govt.nz/release/whanganui-river-agreement-signed>>. See now the *Te Awa Tupua (Whanganui River Claims Settlement) Bill* that had its first reading in Parliament in May 2016.
 - 9 See; Fisheries (Kaimoana Customary Fishing) Regulations 1998 (NZ); Fisheries (South Island Customary Fishing) Regulations 1999 (NZ); Fisheries Act 1996 (NZ).
 - 10 See, eg, Jacinta Ruru, 'Undefined and Unresolved: Exploring Indigenous Rights in Aotearoa New Zealand's Freshwater Legal Regime' (2010) 20 *Journal of Water Law* 236, pinpoint.
 - 11 See, Benjamin Ralston and Jacinta Ruru "Landmark EPA Decision" [2014] NZLJ 284, pinpoint.
 - 12 See, Ministry for the Environment, *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (Ministry for the Environment and Ministry of Agriculture and Forestry, ME 674, July 2005) at vii.

My Totem, 2012

Tala Gaidan

*Relief print from floor linoleum block, printed with black on Arches BFK, Edition of 20
870mm x 280mm*



This artwork is about my Totem - Koedal (crocodile) and Dhangal (dugong).

My totem has been carried by my ancestors from Mabuia Island.

The totem Koedal (crocodile) belongs to the people of Wagadagam tribe which means in our language Koey Buai. I am connected to the Koey Buai tribe through my mother.

Her Aka (grandmother) Puiu Warri (nee Peter) becomes my great grandmother.

My other totem Dhangal (Dugong) comes from Mabuia—a tribe called Panai.

Panai also meant in language Migi Buai. I am connected to the Panai Migi Buai tribe through bloodline of my great great grandfather Aporia Warri.

He comes from the Panai Migi Buai tribe. The islands in the middle of the image represent my beautiful island home of Badu.