Environmental Trusteeship of the Global Commons: Can New Zealand Take the Lead?

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"At the beginning of the twenty-first century, humankind's dependence on the life-sustaining commons of the planet, in the first instance the climate, has become more obvious than ever before. Humanity's collective impact on the planet's natural systems has led some to herald that we are seeing a shift from one geological age, the Holocene, to a new geological age, the Anthropocene, distinguished by the planetary-scale influence of humankind. The influence of human behaviour on the atmosphere and other natural systems is so significant, it is argued, as to have ushered in a new ecological epoch." [1] *This article explores the concept of the global commons and the challenges they face at this juncture of human history. It endeavours to understand the role that states, acting as environmental trustees, can play in ensuring the restoration, sustainable use and preservation of Earth, our home, for future generations. It also contains an analysis of the development of the concepts of rights for nature and legal personality, and their role as tools of trusteeship. It looks closely at the case of New Zealand and*

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1 Friedrich Soltau "Common Concern of Mankind" in Cinnamon P Carlane, Kevin R Gray and Richard G Tarasofsky (eds) *The Oxford Handbook of International Climate Change Law* (Oxford University Press, Oxford, 2016) at 203 (citation omitted).

seeks to understand whether recent developments in law and resource management are giving meaningful effect to the concept of trusteeship, and what learnings might be applied to global commons governance.

1. THE GLOBAL COMMONS

The commons are shared areas and resources that exist for the benefit of a community, without which people cannot survive and thrive. Commons may be local, regional, global, or all of these, and include common pool resources[2] and common goods[3] which we — humanity — have inherited or created, are entitled to use, and are obligated to preserve, maintain, restore and pass on to our children.[4] In the current era, driven by technology and social innovation, new and different types of commons are rapidly developing,[5] including the internet, public health care, and silence.[6]

By definition, commons are for all and cannot be privately owned or under the exclusive control of any single person.[7] They are co-owned and/or co-governed by users and/or stakeholder communities, according to their rules and norms, and are the combination of a "thing" (such as a resource or an area where a resource is found),[8] an activity, commoning as the maintenance and

2 "Common pool resources" are resources from which the exclusion of users is difficult (but not impossible), and the use of such a resource by one user decreases resource benefits for other users. Examples include fisheries, forests, irrigation systems, pastures, oceans and the atmosphere. Tanya Heikkila and David P Carter "Common Pool Resources" (25 October 2017) Oxford Bibliographies <http://www.oxfordbibliographies.com/view/document/obo-9780199363445/obo-9780199363445-0011.xml>.

3 Examples of "common goods" include social, cultural and intellectual commons such as indigenous culture and traditions, languages, intellectual property and national parks, which are replenishable resources; solar, natural and genetic commons such as solar energy, fisheries and ecosystems, which may be replenishable or depletable; and material such as minerals, hydrocarbons and the atmosphere, which are mainly depletable resources. Global Commons Trust "The Commons" GCT <http://globalcommonstrust.org/?page_id=11>.

4 "The Commons", above n 3.

5 "The Commons", above n 3.

6 Charlotte Hess "Mapping the New Commons" (presented at "Governing Shared Resources: Connecting Local Experience to Global Challenges", 12th Biennial Conference of the International Association for the Study of the Commons, University of Gloucestershire, Cheltenham, England, 14–18 July 2008) at 31.

7 Klaus Bosselmann *Earth Governance: Trusteeship of the Global Commons* (Edward Elgar, Cheltenham, 2015) at viii.

8 At 60.

co-production of that resource,[9] and a mode of governance.[10] Commons are the stuff that make up communities and societies — and ultimately "the security of the planet".[11]

The concept of the commons is not a new one, but rather the commons are a historical concept of property rights.[12] The starting position was that the commons were everywhere and owned by nobody. They were roamed through and various areas were at times controlled, protected and used by tribal and nomadic communities in order to meet their basic needs. With the advent of agriculture came permanent settlements and private property rights,[13] but despite these developments, much land (and other features including bodies of water, shorelines, wildlife and air) remained part of the commons.[14]

The Charter of the Forest is widely considered to be one of the first laws in the world to regulate the use of natural resources.[15] In the context of a monopoly

9 The term "commoning" was popularised by historian Peter Linebaugh and can be described as the social practices used by people living in close connection with the commons, in the course of managing shared resources and reclaiming the commons. Julie Ristau "What is Commoning, Anyway?" (3 March 2011) On the Commons <http://www.onthecommons.org/work/what-commoning-anyway#sthash.ax44d8yF.ef0zgCxQ.dpbs>. And also as a pooling or mutualising of a resource, and of distributing the fruits of that resource, whereby individuals exchange with the totality of an ecosystem. Michel Bauwens "The History and Evolution of the Commons" Commons Transition <http://commonstransition.org/history-evolution-commons/>.

10 Bauwens, above n 9.

11 Bosselmann, above n 7, at viii.

12 Hartmut Zückert "The Commons — A Historical Concept of Property Rights" The Wealth of the Commons: A World Beyond Market & State <http://wealthofthecommons.org/essay/commons-%E2%80%93-historical-concept-property-rights>.

13 Historians refer to the first Agricultural Revolution, which took place around 10,000 BC, as the period of transition from a hunting and gathering society to one based on stationary farming. "The Agricultural Revolution: Timeline, Causes, Inventions & Effects" Study.com <https://study.com/academy/lesson/the-agricultural-revolution-timeline-causes-inventions-effects.html>.

14 Peter Barnes "A Brief History of How We Lost the Commons, And what we must do to get it back" (9 March 2013) On the Commons <http://www.onthecommons.org/magazine/brief-history-how-we-lost-commons#sthash.22B7IVwU.dpbs>.

15 The Charter of the Forest was granted by King Henry III of England on 6 November 1217 and is also known as the Carta de Foresta. It is a companion document to the Magna Carta of 1215, and was incorporated into that document in 1369, becoming Chapter 7. Over time the Charter of the Forest has come to be regarded as a minor subset of the Great Charter, and has receded from public memory. Carolyn Harris "The Charter of the Forest" (25 June 2014) The Canadian Encyclopedia <http://www.thecanadianencyclopedia.ca/en/article/the-charter-of-the-forest/>; David Bollier "The Charter of the Forest, Now 800 Years Old!" (7 November 2017) David Bollier: news and perspectives on the commons <http://www.bollier.org/blog/charter-forest-now-800-years-old>.

developed by successive monarchs over England's forests, thus denying the customary rights of the commoners to access the forests that were so vital to their livelihoods,[16] the Charter of the Forest established a basic right to use public lands and resources — extending this right to the common man for the first time — and firmly established the concept of the commons.[17] The Charter stated that: "Every free man may henceforth without being prosecuted make in his wood or in land he has in his forest, a mill, a preserve, a pond, a marl-pit or a ditch, or arable outside the covert in arable land, on condition that it does not harm any neighbour." The Charter of the Forest, although now over 800 years old, is arguably still relevant because it set precedents for public access to Crown land, and for common stewardship and community responsibility for the management of shared resources, that continue to the present day.[18]

The Agricultural Revolution in Great Britain and Europe, during the 18th and early 19th centuries, saw an unprecedented increase in agricultural productivity due to technological improvements and a shift to new techniques and patterns of farming. New patterns of crop rotation and livestock utilisation paved the way for better crop yields, a greater diversity of wheat and vegetables, and the ability of land to support more livestock.[19]

The desire to make land more productive still, by farming larger landholdings, led to a series of Enclosure Acts being passed in Great Britain between 1750 and 1860,[20] through which open fields and "wastes" were closed to use by the peasantry,[21] removing the rights of communities to rural land that they had often used for generations. The lands seized by the Acts were then consolidated

16 Bollier, above note 15.

17 Steven Milano "Why the 800th Anniversary of the Charter of the Forest matters to Section members" (January/February 2017) 48(3) Trends (publication of the Section of Environment Energy and Resources of the American Bar Association) ABA <https://www.americanbar.org/publications/trends/2016-2017/january-february-2017/why_the_800th_anniversary_of_the_charter_of_the_forest.html>.

18 Harris, above n 15.

19 "The Agricultural Revolution: Timeline, Causes, Inventions & Effects", above n 13.

20 The enclosure of common land had been taking place since the time of the Tudors. Ellen Rosenman "On Enclosure Acts and the Commons" (December 2012) Branch Collective <http://www.branchcollective.org/?ps_articles=ellen-rosenman-on-enclosure-acts-and-the-commons>. However, The General Enclosure Act of 1801 (also called the Enclosure Consolidation Act) simplified and standardised the legal procedure for the ensuing Acts, of which there were more than 2500. Wendy McElroy "The Enclosure Acts and the Industrial Revolution" (8 March 2012) The Future of Freedom Foundation <https://www.fff.org/explore-freedom/article/enclosure-acts-industrial-revolution/>.

21 The wastes were unproductive areas, including fens, marshes, rocky land or moors, to which the peasantry had traditional and collective rights of access in order to pasture animals, harvest meadow grass, fish, collect firewood or otherwise benefit. McElroy, above n 20.

into individual farms, privately owned by wealthy and politically connected landowners — alienating the smallholders and devastating the peasant class.[22]

The Enclosure Acts had the effect of enclosing some 30 per cent of the agricultural land in England,[23] and scholars note policies and initiatives that have had similar effect elsewhere in Europe,[24] the result of which was not only redefining land use and property rights, but also the relationship of people to the land, setting the scene for the disconnection with the environment that has arguably led to the degradation and mismanagement that we see today.

This is known as "the enclosure of the commons", a phenomenon which continues to this day in the form of privatisation, commercialisation, legal restrictions, and scarcity through overconsumption,[25] through the operation of market forces,[26] corporate consolidation, cutting-edge technologies, stricter intellectual property laws and corporate–state partnerships.[27] Commons were once the norm, but as Bosselmann notes, the advent of individualism over community has now made the law of property the norm — and this includes both private property and public property.[28]

Arguably, the concept of the commons rose to prominence in modern times due to Garrett Hardin and his influential article "The Tragedy of the Commons"[29] in 1968.[30] Considering the scenario of a common grazing pasture (the shared resource), Hardin described a situation whereby everyone with rights to the pasture would act in their own self-interest and graze as many

22 McElroy, above n 20.

23 JM Neeson *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (Cambridge University Press, Cambridge, 1993) at 188–207.

24 Juan Diego Perez Cebada and Felipa Sanchez Salazar refer to the enclosure of lands in Spain in "Destroying the Commons: The Enclosure of Lands in Spain in the 'Ancien Regime'" (IASCP Europe Regional Meeting: Building the European Commons: from Open Field to Open Source, Brescia, Italy, 23–25 March 2006) Digital Library of the Commons <https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1918/Cebada-Salazar.pdf?sequence=1&isAllowed=y>. McElroy, above n 20, also notes Soviet Collectivisation, which came later.

25 Bosselmann, above n 7, at 63.

26 Klaus Bosselmann, Peter Brown and Brendan Mackey "Enabling Flourishing Earth: Challenges for the Green Economy, Opportunities for Global Governance" (2012) 21(1) Review of European Community and International Environmental Law 20.

27 Pat Mooney Executive Director of the ETC Group, quoted in David Bollier "The Future of the Commons: Notes from a Retreat Exploring the Potential of the Commons to Fight Enclosures and Build Commons-Based Alternatives" (Retreat on the Future of the Commons, Crottorf Castle, Germany, 25–27 June 2009) GLC <http://commonstrust.global-negotiations.org/resources/Bollier-Key%20Elements%20of%20the%20Crottorf%20Retreat.pdf>.

28 Bosselmann, above n 7, at 63.

29 Garrett Hardin "The Tragedy of the Commons" (1968) 162 Science 1243.

30 Zückert, above n 12.

animals as possible; the consequence being that the shared resource would become over-used and eventually depleted. Harden called this "the tragedy of the commons" and advocated for the enclosure (privatisation) and public regulation of these areas and resources in order to avoid further "tragedies".[31] Arguably, though, these solutions are themselves tragedies of a different kind with regard to humanity's encroachment on the commons.[32]

In the context of decolonisation and hostile international relations between developed and developing (and capitalist and communist) states, Hardin arguably aimed to address topical concerns about population and resource distribution.[33] However, commentators suggest that "The Tragedy of the Commons" and his subsequent writings conveyed a discriminatory and prejudiced stance under the seal of ecological thinking.[34] Ranganathan suggests that Hardin saw impoverished communities in developed states and the people of the Third World as the responsible parties, and that he offered no criticism of the ecologically unsustainable lifestyles of the rich in developed states, perhaps assuming that they would be careful stewards for their own future generations. Hardin, she says, "slid over the contributions of affluence and technology, targeting population as the culprit".[35]

Nevertheless, the concept is central to and widely discussed in commons rhetoric and there are numerous anecdotal examples of such "tragedies", including the devastation of tropical rainforests, the depletion of local and regional fish stocks,[36] the accumulation of plastics and other rubbish in the centre of ocean gyres,[37] climate change and the degradation of the Earth's atmosphere.

Bosselmann observes that "tragedy is linked with the efficacy of governance of the commons",[38] yet not all "tragedies" are created equal. He notes that in the case of governed commons (common-pool resources with regimes), tragedies can occur because of breach or violation of existing rules, or because the rules of access and use are insufficiently defined, creating situations where vagueness or ambiguity leads to the temptation or incentives for over-use. In

31 Surabhi Ranganathan "Global Commons" (2016) 27(3) The European Journal of International Law 693 at 694.
32 Bosselmann, above n 7, at 63.
33 Ranganathan, above n 31, at 694.
34 At 701.
35 At 699.
36 Heikkila and Carter, above n 2.
37 For example, the Great Pacific Garbage Patch located between Hawaii and California: more than 1.8 trillion pieces of plastic weighing an estimated 80,000 tonnes, making it the largest accumulation of ocean plastic in the world. The Ocean Cleanup "The Great Pacific Garbage Patch" TOC <https://www.theoceancleanup.com/great-pacific-garbage-patch/>.
38 Bosselmann, above n 7, at 61.

the case of ungoverned commons (open-access areas), tragedies can occur as Hardin described (albeit using a much-criticised example),[39] because no rules or standards of behaviour exist to prevent over-use.[40] Arguably, then, open-access resources belonging to no one, or to everyone, are the most vulnerable to "the tragedy of the commons",[41] and the global commons are often described as the best illustration of Hardin's tragedy thesis.[42]

The "global commons" are resource domains to which all states have legal access,[43] beyond the realm of state sovereignty. They require global cooperation for their sustainable use and provision,[44] and include the oceans, fisheries and seabed beyond state jurisdiction, Antarctica, outer space including celestial bodies, the geostationary orbit and electromagnetic spectrum, and the atmosphere.[45] There is no overarching global commons regime, but rather, over the course of the last century, numerous attempts (arguably driven as much by political rivalry and competition as they were by concerns about ever-increasing over-use and enclosure) to create regimes for global commons resources and areas. As a result, an array of largely voluntary regimes exists to govern the specific resource domains such as Antarctica, outer space and the oceans. Within these regimes are sub-regimes for specific resource units in the area, such as the ozone layer, and the conservation of marine living resources in Antarctic waters. These regimes operate in different ways and with varying (though usually minimal) success,[46] and Shackelford notes that in the modern era they are all under increasing pressure from capital-exporting nations to permit greater private economic activity.[47]

The global commons are generally still open-access, as enclosing them has historically been physically impossible or economically impracticable.[48] Indeed, the development of many of the existing commons regimes (such as the Law of

39 Some scholars have criticised Hardin's work, on the basis that historical commons could not be described as common-pool resources that were open to all, but rather that there was a clearly defined group of people with rights to the commons who agreed with one another on rules in order to avoid degrading the resource. Zückert, above n 12. Bosselmann, above n 7, at 61 describes Hardin's scenario as "something more likely to be a common property regime".

40 Bosselmann, above n 7, at 61.

41 Elinor Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge, 1990).

42 E Araral "Ostrom, Hardin and the Commons: A Critical Appreciation and A Revisionist View" (2014) 36 Environmental Science and Policy 11 at 21.

43 Bosselmann, above n 7, at 71.

44 Soltau, above n 1, at 203.

45 Bosselmann, above n 7, at 72.

46 At 72–73.

47 Scott J Shackelford "The Tragedy of the Common Heritage of Mankind" (2008) 27 Stanford Environmental Law Journal 101 at 112–113.

48 Bosselmann, above n 7, at 73.

the Sea, the Outer Space Treaty and Antarctica) saw states agree to international management of these commons areas because their economic exploitation was not yet feasible due to a lack of appropriate technology.[49] But "as technology has progressed … so too have claims of sovereignty over these unclaimed regions",[50] and most are now experiencing some degree of enclosure, or the threat of enclosure, through the opportunities for private enterprise allowed by ever-improving technologies.[51] Science and technology, and the rapid and relentless pursuit of knowledge and progress, represent a significant challenge for the global commons,[52] placing them at an even greater risk of exploitation, degradation, depletion, private appropriation and enclosure.

Today, "humankind's dependence on the life-sustaining commons of the planet … has become more obvious than ever before".[53] It is estimated that at present humanity is overshooting the regenerative capacity of our global commons by about 70 per cent — in other words, we are using 1.7 Earths.[54] The Stockholm Resilience Centre has mapped nine so-called "planetary boundaries" required to maintain the integrity of healthy, productive ecosystems, and estimates that three of these — climate change, biodiversity loss and the biogeochemical flow boundary — may already have been crossed by humanity.[55] As a result, the global commons are now under unprecedented pressure.[56] Reasonable access to and use of the commons are critically important for human quality of life, and indeed survival, and their sustainable management is essential to solving almost every looming environmental crisis.[57] However, states are arguably poorly positioned at this point in time to deal with them, both due to the nature of state sovereignty, and challenges posed by globalisation and neoliberalism.

The concept of the nation-state finds its origins in the Westphalian settlement of 1648, and the principle of the sovereignty of nation-states is set out in the UN Charter.[58] The Charter provides that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are

49 Shackelford, above n 47, at 112–113.
50 At 112–113.
51 Bosselmann, above n 7, at 73.
52 Mooney, above n 27.
53 Soltau, above n 1, at 203.
54 Mathis Wackernagel "Humanity uses 70% more of the global commons than the Earth can regenerate" *The Guardian* (online ed, London, 14 November 2017) <https://www.theguardian.com/the-gef-partner-zone/2017/nov/14/humanity-global-commons-earth-regenerate-sustainable-development-goals>.
55 Johan Rockstrom and others "Planetary Boundaries: Exploring the Safe Operating Space for Humanity" (2009) 14(2) Ecology and Society 32.
56 Soltau, above n 1, at 203.
57 Milano, above n 17.
58 Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

essentially within the domestic jurisdiction of any state",[59] and there is a strict observance by states of the obligation not to intervene in the affairs of any other state, to ensure that nations are able to live together in peace with one another.[60] The concept of State sovereignty, therefore, is one of the cornerstones of international law, and with it, international diplomacy has followed the liberal perception of trade and exchange as the first means for bridging cultural gaps, promoting prosperity and achieving peace.[61] However, Bollier notes that "[o]ver the past generation, neoliberalism has steadily expanded to become the default worldview governing economics, public policy and human aspiration more generally",[62] and with it has come privatisation, deregulation, free trade and the liberalisation of markets. While held to be the key to nation-state independence through increased prosperity, in reality these serve to usurp power from governments in that policy-making that may have a negative impact on the market becomes all but impossible.[63] Consequently, other concerns, including environmental impacts and degradation, are marginalised.[64] This may be one reason why the trampling of planetary boundaries and the well-documented ecological decline we see around us and understand to be a result of our actions and inactions seems to continue unchecked. As Bosselmann notes, "it is becoming clear that neoliberal economics is increasingly out of sync with the interests of the majority of the world's citizens".[65]

Environmental matters are generally seen as domestic affairs, thereby preventing interference by other states,[66] but in our increasingly connected and interdependent world it is becoming clear that notions of territoriality, independence and non-intervention have lost some of their meaning. In certain areas, sovereignty must be exercised collectively, particularly in relation to management and protection of the global commons,[67] which is arguably now one of humanity's most pressing concerns.[68]

Over the course of the latter half of the 20th century the international community has developed a dense network of institutions, international agreements, treaties and governance frameworks addressing regional and international

59 Article 2, para 7.
60 United Nations General Assembly Resolution 2625 (XXV) (1970).
61 Bosselmann, above n 7, at 16.
62 Bollier, above n 27.
63 Bosselmann, above n 7, at 9.
64 At 10.
65 At 12.
66 At 17.
67 Commission on Global Governance *Our Global Neighbourhood* (Oxford University Press, Oxford, 1995).
68 Soltau, above n 1, at 203.

environmental concerns,[69] but arguably none of them is up to the task at hand. The same can be said of nation-states, most of whom are in crisis-management mode.[70] Thirty years on from the publication of the Brundtland Report it could be argued that still "the integrated and independent nature of the new challenges and issues contrasts sharply with the nature of the institutions that exist today".[71] Disappointingly, and potentially devastatingly for our environment and the global commons particularly, we are still missing the kind of governance that will halt degradation.[72]

The situation we are confronted with today is unprecedented and uncontemplated by international law as it has developed to date.[73] The integrity of the Earth's ecological systems now depends on a shift from state-centric governance to Earth-centric governance in order to safeguard the environment from exploitation, ensure that the marginalised have access to resources, and to distribute profits from common-pool resources equitably and justly.[74] Scholars suggest that only an ethic of stewardship and trusteeship will create institutions, policies and laws powerful enough to reclaim and protect the global commons,[75] and that states, which already owe such moral obligations to their citizens and in many cases legal obligations as well, need to step up and give effect to them.

2. ENVIRONMENTAL TRUSTEESHIP

Trusteeship is a concept that exists in both domestic and international law,[76] and also in civil society,[77] as a means of taking responsibility for the benefit

69 James Gustave Speth *Red Sky at Morning: America and the Crisis of the Global Environment* (Yale University Press, New Haven CT, 2005).
70 Bosselmann, above n 7, at 1.
71 World Commission on Environment and Development *Our Common Future* [Brundtland Report] (Oxford University Press, Oxford, 1987).
72 Bosselmann, above n 7, at 114.
73 At 17.
74 Silke Helfrich and Jorg Haas "The Commons: A New Narrative for Our Time" in Silke Heinrich (ed) *Genes, Bytes and Emissions: To Whom Does the World Belong?* (Heinroch Böll Stiftung, Berlin, 2008) Boell.org <https://us.boell.org/2010/10/06/genes-bytes-and-emissions-whom-does-world-belong-economic-governance>.
75 Bosselmann, above n 7, at xi.
76 Although the two operate differently. Bantekas suggests that "the trust concept in international law enjoys very few of the legal commonalities with its domestic law counterpart, apart from perhaps its perceived function". Ilias Bantekas *Trust Funds under International Law: Trustee Obligations of the United Nations and International Development Banks* (TMC Asser Press, The Hague, 2009) at 192.
77 For example, the parent–child relationship is perhaps the most obvious and arguably the most important.

of others. It is one which has already been used by the United Nations as a means of attempting to promote certain outcomes and to ensure the well-being of states and their citizens, albeit in a different context. The United Nations trusteeship system was established under the UN Charter,[78] and its main goals were to promote the political, economic, social and educational advancement of the inhabitants of trust territories (including territories detached from enemy states during World War II, territories voluntarily placed under UN jurisdiction by enemy states, and failing states or those in states of post-conflict disarray including East Timor, Cambodia and Kosovo)[79] and their progressive development towards self-government or independence.[80] The Trusteeship Council, established under the UN Charter as one of the main organs of the United Nations, was assigned the task of supervising the administration of trust territories placed under the trusteeship system.[81]

Now that the aims of the trusteeship system have been fulfilled, to the extent that all trust territories placed under it have attained self-government or independence, the Trusteeship Council has suspended its operations.[82] In recent times, there have been a number of proposals to revamp the Trusteeship Council into an environmental body,[83] and there are a number of other examples which indicate that the concept of trusteeship is still alive and well within the UN system, including the Human Rights Council, the Department of Economic and Social Affairs, the World Health Organization,[84] the United Nations Convention on the Law of the Sea (UNCLOS) and the UNESCO World Heritage treaty regime.[85]

78 The UN trusteeship system was established by Chapter XII of the UN Charter (arts 75–85), above n 58.

79 Bosselmann, above n 7, at 146.

80 Charter of the United Nations, above n 58, art 76(b).

81 United Nations "Trusteeship Council" UN <http://www.un.org/en/sections/about-un/trusteeship-council/>.

82 Operations were suspended on 1 November 1994, one month after the independence of the last remaining UN Trust territory, Palau. "Trusteeship Council", above n 81.

83 Hannah Stoddart (ed) *A Pocket Guide to Sustainable Development Governance* (Stakeholder Forum and Commonwealth Secretariat, London, 2011) at 37. The proposal advanced by then Secretary-General Kofi Annan in 1997 suggested that it could be "the forum through which Member States exercise their collective trusteeship for the integrity of the global environment and common areas such as the oceans, atmosphere and outer space". Peter Sand "The Rise of Public Trusteeship in International Environmental Law" (2014) 44(1/2) Environmental Policy and Law 210.

84 Klaus Bosselmann "The Next Step: Earth trusteeship" (speech to the Seventh Interactive Dialogue of the General Assembly on Harmony with Nature, UN Headquarters, New York, 21 April 2017) at 4.

85 Sand, above n 83.

Although trusteeship has a somewhat controversial history — it has been criticised as "a thinly veiled tool of racism" in situations where it was suggested that certain peoples lacked the ability to govern themselves[86] — commentators suggest that its shortcomings to date are less about the concept itself and more directly related to how it is applied.[87] Proponents of the concept of trusteeship point to its enduring nature, which can be expressed in flexible, adaptive and idiosyncratic legal arrangements,[88] as the reason why it is the logical form of governance for the environment, and the global commons specifically.

Environmental trusteeship, analogous with the concepts of stewardship and guardianship, can be described as an emerging legal concept,[89] and "a system of governance imbued with an ethic fundamental to the human–nature relationship".[90] Although not (yet) well supported by states, the Earth Charter, launched in June 2000 and formally endorsed by organisations representing millions of people worldwide,[91] describes the concept beautifully — declaring the protection of the Earth's vitality, diversity and beauty as "a sacred trust" and asserting that "we, the peoples of Earth, declare our responsibility to one another, to the greater community of life, and to future generations".[92] Environmental trusteeship therefore enables, and requires, actors to speak and act for and on behalf of those members of the greater community of life who do not have a voice, including future generations, those who may be disadvantaged, all living beings regardless of their worth to humanity, and indeed the environment itself.

An increasing number of commentators and scholars firmly believe that the environmental governance of the planet should be facilitated by states operating as trustees for the Earth;[93] that states have both a moral and a fiduciary duty to protect and restore the integrity of the Earth's ecological systems, and that this duty has been expressed in no less than 25 key international environmental agreements.[94] Further, the public trust doctrine, which finds its origins in Roman law, provides numerous examples of the fiduciary obligations conferred on states to protect the commons so as to ensure public access for the benefit of

86 Bosselmann, above n 7, at 147.
87 At 147.
88 At 145.
89 Bosselmann, above n 84, at 3.
90 Bosselmann, above n 7, at 116.
91 Earth Charter Initiative <http://earthcharter.org>.
92 Earth Charter, Preamble.
93 Klaus Bosselmann (speech to the Fifth Interactive Dialogue of the General Assembly on Harmony with Nature, UN Headquarters, New York, 27 April 2015).
94 Agreements range from the World Charter for Nature (1982) right through to the Paris Climate Agreement (2015). Bosselmann, above n 84, at 2.

"the people", and also to act as trustees with a duty to protect those natural resources.[95]

Locke wrote that "[g]overnment is not legitimate unless it is carried on with the consent of the governed".[96] In democratic states the power remains with the people,[97] who are able to elect representatives who will act in their interests and in such a way as to ensure that their needs are met. Returning to the concept of the state, legal research into the theory and legitimacy of the modern nation-state indicates that the latter rests on its ability to care for its citizens. To this end, the state acts, and has fiduciary obligations to do so, as a trustee for its citizens and their cultural and natural commons.[98] In the absence of a healthy environment capable of sustaining life, the state would not be able to meet any of the needs of citizens now or in the future, and so the obligation to act as a trustee for the natural environment is extended to these future generations as a further class of beneficiary.

Many countries around the world have made constitutional amendments and legislative change in order to include environmental rights and duties, signalling what Bosselmann describes as "a general trend towards Earth trusteeship".[99] The following part will look more closely at the rights of nature and how these have been recognised internationally, and the concept of legal personality and its extension to include natural features, and consider environmental trusteeship concepts in the case of New Zealand specifically.

3. INTERNATIONAL RECOGNITION OF THE RIGHTS OF NATURE

The theory of giving rights to nature was first proposed in the 1970s by Christopher D Stone as a strategic environmental defence strategy — the problem in most environmental litigation being that nature's de facto representatives lacked the legal standing to be able to defend its interests in court.[100] In his book *Should Trees Have Standing* Stone argued that our forests,

95 Peter H Sand, above n 83, discusses the work of Joseph L Sax in this area and provides examples of the doctrine operating in England, the USA, India, South Africa, Uganda, and similar concepts in Germany, France and elsewhere in Europe.

96 R Ashcraft (ed) *John Locke: Critical Assessments* (Routledge, London, 1991) at 524.

97 Bosselmann, above n 7, at 26.

98 Bosselmann, above n 84, at 2.

99 At 2.

100 Mihnea Tanasescu "When a River is a Person: From Ecuador to New Zealand, Nature gets its day in court" (19 June 2017) The Conversation <https://theconversation.com/when-a-river-is-a-person-from-ecuador-to-new-zealand-nature-gets-its-day-in-court-79278>.

our oceans, our environment should have the ability to stand before the courts and have someone speak for and on behalf of nature,[101] and that giving rights to the environment itself would thereby enable it to bring suit on its own behalf.[102]

It took decades for Stone's idea to become a reality, but in 2006 Tamaqua Borough in Pennsylvania became the first community in the United States to recognise the rights of nature within a municipal territory,[103] banning the dumping of toxic sewage sludge as a violation of the rights of nature.[104] Since then the right has been recognised across other communities, and the concept has gained some traction internationally.

Ecuador is famous for its outstanding natural environment. It is considered one of the most biodiverse countries in the world in terms of the number of species of both flora and fauna per hectare, but such biodiversity has in recent years come under significant threat from the expansion of human activity and infrastructure in the country.[105] Within the wider context of progressivism in what has become known as "the Citizens' Revolution",[106] it is perhaps unsurprising that Ecuador was the first country to formally recognise the rights of nature. In 2008, as part of a major restructure of the nation's legal framework, Ecuador broke new ground by granting essential rights to nature in its new constitution.[107] Article 71 of the Constitution provides that "[n]ature or Pachamama, where life is reproduced and exists, has the right to exist, persist,

101 Simon Day "If the hills could sue: Jacinta Ruru on legal personality and a Māori worldview" (27 November 2017) The Spinoff <https://thespinoff.co.nz/atea/atea-otago/27-11-2017/if-the-hills-could-sue-jacinta-ruru-on-legal-personality-and-a-maori-worldview/>.

102 Tanasescu, above n 100.

103 Tanasescu, above n 100.

104 Community Environmental Legal Defense Fund "Advancing Legal Rights of Nature: Timeline" CELDF <https://celdf.org/rights/rights-of-nature/rights-nature-timeline/>.

105 Of particular note were the construction of new roads giving access to oil and mineral reserves located in the heart of the country's Amazon, Yasuni National Park and Biosphere Reserve and other protected areas. Melissa Arias "Conversation with Natalia Greene about the Rights of Nature in Ecuador" (9 March 2015) Yale Center for Environmental Law and Policy <http://environment.yale.edu/envirocenter/post/conversation-with-natalia-greene-about-the-rights-of-nature-in-ecuador/>.

106 The Citizens' Revolution, led by President Rafael Correa, saw the rejection of neoliberal policies and an emphasis on "a style of life that enables happiness … cultural and environmental diversity … equality, equity and solidarity". Denis Fernando "Ecuador Citizens Revolution" (26 April 2014) Critical Thinking <http://www.freecriticalthinking.org/daily-pickings/929-ecuador-s-citizens-revolution>.

107 The 2008 Constitution was the country's 20th, and was passed by referendum on 28 September 2008, becoming the first Constitution worldwide to grant such rights. Arias, above n 105.

maintain and regenerate its vital cycles, structure, function and its processes in evolution".[108] One of those rights, as set out in art 72, is the right to be restored.[109] Ecuador's natural environment, including its tropical forests, islands and rivers, has therefore been granted positive constitutional rights to something specific — restoration, regeneration, respect[110] — rights which are equal to those of humans.

The Ecuadorian Constitution further resolves the issue of legal standing that Stone sought to address, by granting it to everyone.[111] Article 71 also provides that "[e]very person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms".[112] In other words, any person in Ecuador — regardless of their relationship to a particular piece of land or other natural feature — can go to court to protect it.[113] This article has been tested and upheld in the *Vilcabamba River Case* in 2011,[114] where the Court determined that the actions of the Provincial Government in respect of the Vilcabamba River had resulted in a violation of nature's rights.

Commentators observe, however, that in both Ecuador and Bolivia, which followed suit by passing a "Law of the Rights of Mother Earth" in 2010,[115] the implementation of the rights of nature appears to have yielded mixed results to date.[116] At this point in time, both countries are reliant on industrial growth and the development of extractive industries to fuel their economies, which in turn leads to an increase in the environmentally damaging activities that their law-makers sought to target by recognising the rights of nature.[117] Unfortunately for Pachamama, through the granting of rights the legal system has the potential to hear her cries, but for the most part the system is still looking the other way, focusing on other priorities.

108 Republic of Ecuador Constitution of 2008, art 71, Political Database of the Americas <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

109 Tanasescu, above n 100.

110 Tanasescu, above n 100.

111 Tanasescu, above n 100.

112 Republic of Ecuador Constitution of 2008, art 71, above n 108.

113 Tanasescu, above n 100.

114 *Richard Frederick Wheeler y Eleanor Geer Huddle c/ Gobierno Provincial de Loja* Juicio 11121-2011-0010 (30 March 2011). Richard Frederick Wheeler and Eleanor Geer Huddle were an American couple with riverfront property who sued the Provincial Government of Loja, arguing that a planned road project would deposit large quantities of rock and excavation material into the river.

115 Law of the Rights of Mother Earth, Law 071, 21 December 2010, English translation at WFF <http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html>.

116 Tanasescu, above n 100.

117 Tanasescu, above n 100; David Hill "Is Bolivia going to frack 'Mother Earth'?" *The Guardian* (online ed, London, 24 February 2015) <https://www.theguardian.com/environment/andes-to-the-amazon/2015/feb/23/bolivia-frack-mother-earth>.

Recognising rights for nature is arguably an anthropocentric approach, bestowing the rights akin to humans rather than recognising the intrinsic value of nature itself, but rights are a concept that nation-states understand in other contexts, notably human rights and property rights. Although the recognition of rights for nature forces nature to compete against other rights holders, humans, with humans having a distinct advantage in the legal arena,[118] Boyd has noted that "overall inclusion of an environmental right improves environmental outcomes".[119] It is clear, then, that rights-based approaches are not a silver bullet, but they are a good first step. As Bosselmann suggests, more ambitious solutions can grow out of the establishment of the first basic right,[120] and recognition in the first place indicates that states are seeking to give effect to their trusteeship obligations.

4. LEGAL PERSONALITY

A legal person is an entity that has the same rights and responsibilities as a natural person,[121] but to be a legal person one does not have to be human.[122] Legal personality typically confers three primary rights: the right to legal standing, the right to enter contracts, and the right to hold property.[123] The status of legal personhood has expanded throughout history to include newly created or recognised categories of persons and institutions which the law regards as being capable of bearing rights and duties.

Stone suggests that who is considered a legal person is determined by the influential and the powerful, in accordance with society's values at any given time.[124] For example, with the abolition of slavery, slaves were no longer

118 Bosselmann, above n 7, at 120.

119 DR Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, Vancouver, 2012) at 47.

120 Bosselmann, above n 7, at 120.

121 New Zealand Parliament "Innovative bill protects Whanganui River with legal personhood" (28 March 2017) NZHR <https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/>.

122 Erin O'Donnell and Julia Talbot-Jones "Will Giving the Himalayas the same rights as people protect their future?" (20 April 2017) Pursuit <https://pursuit.unimelb.edu.au/articles/will-giving-the-himalayas-the-same-rights-as-people-protect-their-future>.

123 O'Donnell and Talbot-Jones, above n 122.

124 Christopher D Stone "Response to Commentators" (2012) 3 Journal of Human Rights and the Environment 100.

regarded as property but instead as legal persons,[125] and under New Zealand law, a number of entities have gained legal personhood including companies, trusts and societies.[126] Naffine argues that the recognition of corporate entities as having legal personhood status, and the fact that in most legal systems the environment is not recognised in any capacity, is indicative of the fact that contemporary Western societies see the natural world as being for profit and the natural world as property to be used and controlled.[127]

The concept of legal personality is arguably one that has been viewed through an anthropocentric lens for far too long. Dominant discourse suggests that legal personhood flows directly from human personhood,[128] but while human centrality in the world is maintained, nature is not recognised as being the holder of rights.[129] Scholars argue, however, that as legal personhood is an "invention of law", there is no reason that it cannot be extended to animals and the environment, because the human element is no requirement for applying the legal fiction of legal personality to an entity.[130] Early work by Stone,[131] and D'Amato and Chopra,[132] showed that international law was starting to provide promise for the recognition of rights of non-human forms of life, and recent developments in the law in New Zealand (and elsewhere) provide evidence of a further extension of the concept of legal personality to natural features.

5. THE NEW ZEALAND EXPERIENCE

New Zealand, with its beautiful natural environment and unique flora and fauna, was once highly regarded as a leader in the field of environmental protection and environmental law. The 1980s were a period of radical reform with respect

125 Ngaire Naffine *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, Oxford, 2009) at 13.

126 "Innovative bill protects Whanganui River with legal personhood", above n 121.

127 Ngaire Naffine "Legal Personality and the Natural World: On the Persistence of the Human Measure of Value" (2012) 3 Journal of Human Rights and the Environment 68 at 83.

128 Abigail Hutchison "The Whanganui River as a Legal Person" (2014) 39(3) Alternative Law Journal 179 at 180.

129 Naffine, above n 127, at 78.

130 Naffine, above n 125, at 12.

131 Stone argued that human centrality in the world should be displaced and that legal personhood should be extended to "nature objects" such as lakes and forests. Christopher D Stone *Should Trees Have Standing? Law, Morals and the Environment* (3rd ed, Oxford University Press, Oxford, 2010) at 2.

132 These authors have shown that whales are in the process of being attributed an entitlement to life, which has hitherto only been recognised for the human species. Anthony D'Amato and Sudir K Chopra "Whales: their Emerging Right to Life" (1991) 85 AJIL 21.

to New Zealand's law and institutions of environmental governance, and saw a shift from traditional environmental protection and resource management to "sustainable management". With the enactment of the Resource Management Act 1991 (RMA), New Zealand became the first country to apply the principle of sustainability in law. The intention was that the concept of sustainability should be applied generally in law in the same way as liberty, equality and justice, but its integration as a fundamental principle has been a challenge for jurisprudence and law.[133] New Zealand also has an independent Parliamentary Commissioner for the Environment, appointed under the Environment Act 1986; and in another world first, the Environment Court was established in 1995 to provide the necessary expertise for the adjudication of environmental cases under the RMA.[134]

Section 5 of the RMA states that its purpose is to "promote the sustainable management of natural and physical resources".[135] In this context, "sustainable management" means "managing the use, development, and protection of natural and physical resources" so that "people and communities are able to provide for their social, economic, and cultural well-being and for their health and safety"[136] while sustaining these resources "to meet the reasonably foreseeable needs of future generations", "safeguarding the life-supporting capacity of air, water, soil, and ecosystems", and "avoiding, remedying, or mitigating adverse effects … on the environment".[137] This definition and its application has been the source of much debate in the Environment Court and beyond.

The RMA requires all economic activities to meet non-negotiable "environmental bottom lines", an approach which was initially affirmed by the Environment Court in the *Foxley Engineering Limited*[138] and *Campbell*[139] cases. However, over the following two decades the Court resorted to a more traditional idea of trade-offs between environmental and economic interests[140] — the so-called overall broad judgement approach — before it was rejected by the Supreme Court in 2014 as not in line with the purpose of the Act.[141]

133 Klaus Bosselmann *The Principle of Sustainability: Transforming Law and Governance* (2nd ed, Routledge, London, 2017) at 73.
134 At 74.
135 Resource Management Act 1991, s 5(1).
136 Section 5(2).
137 Section 5(2)(a)–(c).
138 *Foxley Engineering Limited v Wellington City Council* Decision W12/94. The Court in this case considered that the provisions of s 5(2)(a)–(c) were cumulative safeguards, which must be met for the Act's purpose to be fulfilled.
139 *Campbell v Southland District Council* Decision W114/94.
140 Bosselmann, above n 84, at 4.
141 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

The *King Salmon* decision represents something of a move back towards the ideal of sustainable management and making economic development conditional upon the preservation of the integrity of ecological systems,[142] and it opens the door for further findings of "ecological bottom lines" in other policy documents in the RMA framework going forward.[143] However, it is clear that the scope of s 5 is ambiguous, and the interpretation of the principle of sustainability by the courts confused. It is unsurprising, then, that decision-making in this area has been criticised by scholars, politicians and the Parliamentary Commissioner for the Environment alike.[144]

The RMA represents an attempt by the New Zealand Government to give effect to its trusteeship responsibilities. Section 7 of the Act states that, amongst other things, kaitiakitanga (indigenous guardianship), the ethic of stewardship, and the maintenance and enhancement of the quality of the environment should be taken into account. Arguably, though, it still falls well short of what its framers intended, not least because the very notion of sustainability was limited in s 5 to "sustainable management" — meaning that sustainability in New Zealand needs to be integrated with the concept of economic development. As Bosselmann notes, "this has been an acceptable concept for the neoliberal climate of a small open economy which has pursued ongoing economic growth",[145] and it remains to be seen whether the "promise of the RMA" — economic growth within sustainable biophysical limits — will ever be delivered upon,[146] or whether the focus will ever shift to sustainability and the well-being of the Earth, our home, first and foremost.

Progress in this regard, it seems, is unlikely to come in the form of resource management legislation in the foreseeable future. The Resource Legislation Amendment Act 2017 (RLAA), representing the Government's most comprehensive package of reforms to the RMA since its inception 26 years ago, obtained Royal Assent on 18 April 2017.[147] According to the Ministry for the Environment, "these changes aim to deliver substantive improvements to the resource management system to support more effective environmental management and drive capacity for development and economic growth".[148] The RLAA, however, does nothing to strengthen the principle of sustainability, or to clarify the scope of s 5, and hence is unlikely to strengthen the case for,

142 Bosselmann, above n 84, at 4.
143 Bosselmann, above n 133, at 78.
144 At 76.
145 At 82.
146 Hon Amy Adams "RMA Discussion Document Launched" (press release, 26 April 2013), referred to in Bosselmann, above n 133, at 82.
147 Ministry for the Environment "About the Resource Legislation Amendment Act 2017" MfE <http://www.mfe.govt.nz/rma/reforms-and-amendments/about-resource-legislation-amendment-act-2017>.
148 "About the Resource Legislation Amendment Act 2017", above n 147.

and the meaningful exercise of, the Government's trusteeship function any time soon. With this in mind, it is pertinent to consider other factors at play in New Zealand, namely the Māori worldview and the decision-making of the Waitangi Tribunal, which are arguably having more of an impact.

Indigenous cultures worldwide provide us with examples of stewardship ethics, practices and management systems that have been effective for thousands of years and yet in many cases became obsolete in just a few decades as a result of colonialism, in what commentators describe as "the real tragedy of the commons".[149] Bosselmann further notes that the incursion on indigenous peoples by colonisers is perhaps another apt example of "enclosure" to the extent that culture, tradition and stores of ecological knowledge have, in turn, been denied, appropriated and commodified.[150] The law has time and time again been used as a tool by colonialists with a clear line of sight to the establishment of nation-states.[151]

Unfortunately, the New Zealand experience is no exception. With the European arrival in Aotearoa, two conflicting perspectives of the environment came together, and like the vast majority of colonial experiences, the indigenous one was usurped.[152] However, as this part of the article aims to show, recent developments in New Zealand law and resource management appear to signal a willingness to consider, and adopt, trusteeship-based models and solutions for particular natural resources, and that there is a place within these for indigenous perspectives.

Unique to Aotearoa/New Zealand are the beliefs, customs and values held by Māori, which are derived from a combination of cosmogony, cosmology, mythology, religion and anthropology.[153] Central to this complex belief system are the stories of the origins of the universe and of the Māori people, the interconnectedness of Māori with the environment, and the concept of kaitiakitanga — stewardship or guardianship over the environment for future generations.

For Māori, the origins of the universe can be traced back to the beginning through whakapapa[154] — from the darkness, the nothingness, the void, to the

149 DW Bromley *Environment and Economy: Property Rights and Public Policy* (Blackwell, Oxford, 1991) at 104.

150 Bosselmann, above n 7, at 64.

151 Day, above n 101.

152 Day, above n 101.

153 Garth R Harmsworth and Shaun Awatere "Indigenous Māori Knowledge and Perspectives of Ecosystems" in JR Dymond (ed) *Ecosystem Services in New Zealand — Conditions and Trends* (Manaaki Whenua Press, Lincoln, 2013) 274 at 274.

154 "Whakapapa" can be described as a connection, lineage or genealogy between humans and ecosystems and all flora and fauna. Harmsworth and Awatere, above n 153, at 275.

emergence of light and the creation of a tangible world, two primeval parents — Ranginui and Papatūānuku, and eventually the creation of mankind. Ranginui and Papatūānuku, once inseparable, had many children — among them the wind, the forest and plants, the rivers, the oceans, the animals — each with supernatural powers. In a plan carried out by the children to create light, so that they might thrive, the parents were prised apart. Papatūānuku became the land — the Earth Mother — providing sustained nourishment for all her children, and her husband Ranginui became the Sky Father, who sheds tears in the form of rain as he weeps for his separated wife.[155] As part of this ancestry, responsibilities were conferred on the Māori people to care for their ancestors, and to sustain and maintain the well-being of people, communities and natural resources.[156]

Indigenous Māori have an intricate, holistic and interconnected relationship with the natural world and its resources, with a rich knowledge base developed over thousands of years.[157] This knowledge, or wisdom, is known as mātauranga Māori. It includes philosophy, beliefs, language, ways of knowing and doing, and provides the basis for the Māori worldview.[158] This worldview acknowledges a natural order, balance or equilibrium, with all living things related to each other through whakapapa, and also dependent on each other. Māori acknowledge the interconnectedness of ecosystems, which they see themselves as part of rather than separate from, and recognise the links between healthy ecosystems and the cultural and spiritual well-being of the people. Their perspective can be described as holistic and integrated — when the mauri, or life-force, of part of this system shifts, the mauri of immediately related components shifts, and eventually the entire system is thrown out of balance.[159]

Kaitiakitanga is a concept of environmental management based on the Māori worldview. It means stewardship or guardianship. Kaitiakitanga is closely linked to the concepts of Te Ao Turoa[160] and taonga tuku iho,[161] which together articulate a desired intergenerational equity with respect to the environment. The practice of kaitiakitanga restores the balance between the well-being of people and the use of resources for their benefit, and the well-

155 At 274–275.
156 At 275.
157 At 274.
158 At 275.
159 At 274–276.
160 Te Ao Turoa refers to intergenerational concepts of resource sustainability. Harmsworth and Awatere, above n 153, at 276.
161 Taonga tuku iho refers to the intergenerational protection of highly valued taonga or treasures, passed on from one generation to the next in a caring and respectful manner. Harmsworth and Awatere, above n 153, at 276.

being of the environment[162] — keeping it in, or returning it to, a good condition, maintaining its mauri and its mana, or spiritual power, and passing it on to future generations so that it may provide for their needs also.

The Māori worldview, including kaitiakitanga, provides a uniquely New Zealand example of the concept of stewardship or environmental trusteeship in action. There can be no doubt that for Māori all members of the community of life have rights and are deserving of care and careful management, and that the moral obligation to future generations is front of mind. However, the concept arguably goes even further than Western notions of stewardship or trusteeship, in that an obligation is also owed to previous generations, ancestors, through whakapapa. This may explain why the legal acknowledgement of rights for nature through the extension of legal personality to natural resources seems completely logical to Māori, as evidenced by recent decisions of the Waitangi Tribunal.

In 2014 the Waitangi Tribunal, on behalf of the Government of New Zealand (the Crown), reached two landmark Treaty settlements — the Whanganui River settlement and Te Urewera settlement. The Whanganui River settlement came first, with the signing of a preliminary agreement in August 2012, bringing to a close 148 years of disagreement and negotiation between the Crown and Whanganui iwi (tribal federation) over the ownership and management of the river — the longest-running legal case in New Zealand history.[163] It was closely followed by Te Urewera settlement, which signalled the beginning of a new phase of cooperation between Tūhoe iwi and the Crown, whose history can be described as contentious at best.

Te Urewera Act was legislated first of the two[164] — making Te Urewera the first non-human or corporate entity to become a legal person in New Zealand[165] — followed by Te Awa Tupua (Whanganui River Claims Settlement) Act 2017[166] which confirmed the same status for the Whanganui River under New Zealand law. However, as the Whanganui River Treaty settlement was the first instance of a Western nation acknowledging legally

162 Stephanie Warren "Whanganui River and Te Urewera Treaty Settlements: Innovative developments for the practice of rangatiratanga in resource management" (Victoria University of Wellington Research Archive, 2016) VUW <http://researcharchive.vuw.ac.nz/handle/10063/6198> at 18.

163 "Te Awa Tupua" (January 2016) 33 Kōkiri 30 <https://www.tpk.govt.nz/en/mo-te-puni-kokiri/kokiri-magazine/kokiri-33-2016/te-awa-tupua>. Whanganui iwi first petitioned the New Zealand Parliament in the 1870s, continuing for decades to seek compensation and justice through several courts and the Waitangi Tribunal. "Innovative bill protects Whanganui River with legal personhood", above n 121.

164 Te Urewera Act 2014.

165 Warren, above n 162, at 58.

166 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

enforceable trusteeship over a natural object,[167] this article will consider it primarily.

At the time of the signing of the Treaty of Waitangi, between the Crown and various Māori chiefs throughout Aotearoa/New Zealand in 1840, a substantial Māori population existed and was dispersed along the Whanganui River and its tributaries. The iwi and hapū (sub-tribes) of Whanganui possessed, and exercised, rights and responsibilities in relation to the river in accordance with their tikanga, or customary norms.[168] They not only relied on it for their well-being and survival, but held with it a unique ancestral relationship and a deep spiritual connection.[169] This is best summarised by the Whanganui iwi whakataukī (proverb): "Ko au te awa, ko te awa ko au" — I am the river, the river is me.

Over time, various government actions, omissions and legislation substantially affected the ability of the Whanganui iwi to be involved in the management of the river and to exercise other rights with respect to it.[170] Notably, Crown works including gravel and mineral extraction, establishing a steamboat service, and the diversion of water by the Tongariro Power Scheme, as well as the introduction of foreign marine species, the destruction of eel weirs and fisheries, and the removal of rapids, with little or no iwi consultation, had the effect of downgrading the river's ecological quality and degrading its cultural and spiritual value.[171]

The Crown assumed ownership of the river, without the agreement of Whanganui iwi, through the enactment of the Coal-mines Amendment Act 1903,[172] and the same Act has been used by the Crown to justify further acquisitions of parts of the river, such as riparian land, ever since.[173] Further, when customarily held Māori land along the Whanganui River was sold into private ownership, the *ad medium filum* rule was applied, meaning that the new

167 Bosselmann, above n 93.

168 Library of Congress "New Zealand: Bill Establishing River as Having Own Legal Personality Passed" (22 March 2017) LOC Global Legal Monitor <http://www.loc.gov/law/foreign-news/article/new-zealand-bill-establishing-river-as-having-own-legal-personality-passed/>.

169 "Innovative bill protects Whanganui River with legal personhood", above n 121.

170 "New Zealand: Bill Establishing River as Having Own Legal Personality Passed", above n 168.

171 "Innovative bill protects Whanganui River with legal personhood", above n 121; Warren, above n 162, at 2.

172 Coal-mines Amendment Act 1903 (3 EDW VII 1903 No 80). Section 14 of the Act stated that the beds of navigable rivers "shall remain and shall be deemed to have always been vested in the Crown".

173 Elaine Hsiao "Whanganui River Agreement, Indigenous Rights and Rights of Nature" (2012) 42(6) Environmental Policy and Law 371 at 372.

owners also owned the riverbed up to the centre line, thus extinguishing any rights of Whanganui iwi to the riverbed.[174]

The Whanganui River Treaty settlement sought to compensate the Whanganui iwi for their grievances, but was also brought about by concern for the river's health and the desire to preserve the resources for future generations of Whanganui iwi and the New Zealand community in general.[175] It contained an acknowledgement by the Crown of wrongdoing by past governments in terms of their disregard of iwi opinions in matters concerning the river,[176] and established a new legal framework for the Whanganui River, Te Awa Tupua, which, in line with the iwi–river relationship, recognises the river as an indivisible and living whole from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements.[177] At the heart of the settlement was the legal recognition of the Whanganui River as a person, a separate being with its own legal personality and rights,[178] an entity in its own right. In what was at the time the first, and today remains one of only a handful of instances in the world where a natural resource has been recognised as having its own legal personality and rights, the Whanganui River owns itself.

The Te Awa Tupua (Whanganui River Claims Settlement) Act transferred ownership of the riverbed from the Crown to Te Awa Tupua, and assigned a guardian the responsibility of representing Te Awa Tupua's interests,[179] and performing certain functions on behalf of the river.[180] The guardian consists of two people, one each appointed by the Whanganui river tribes and the New Zealand Government, who together make up the co-management board or "human face"[181] — Te Pou Tupua. Substantial funds were set aside by the Crown in order to assist the guardian to restore the health of the river, and to

174 Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 220–230.

175 *Whanganui Iwi and the Crown, Record of Understanding in relation to Whanganui River Settlement* (13 October 2011) Ngā Tāngata Tiaki o Whanganui <http://www.ngatangatatiaki.co.nz/wp-content/uploads/2015/04/DocumentLibrary_WhanganuiRiverROU.pdf>.

176 "Te Awa Tupua", above n 163.

177 New Zealand Law Society "Whanganui River settlement passed" (16 March 2017) NZLS <https://www.lawsociety.org.nz/news-and-communications/latest-news/news/whanganui-river-settlement-passed>.

178 "Te Awa Tupua", above n 163.

179 Erin O'Donnell and Julia Talbot-Jones "Three rivers are now legally people — but that's just the start of looking after them" (24 March 2017) The Conversation <https://theconversation.com/three-rivers-are-now-legally-people-but-thats-just-the-start-of-looking-after-them-74983>.

180 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 19 sets out the functions of Te Pou Tupua.

181 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 19(1)(a).

establish the new legal framework for the river.[182] Although not expressly stated in the legislation,[183] it is widely accepted that the trusteeship function performed by the guardian has its origins in kaitiakitanga.[184]

At the time of the settlement the Minister for Treaty of Waitangi Negotiations, Christopher Finlayson, noted that the legislation "recognises the deep spiritual connection between the Whanganui Iwi and its ancestral river and creates a strong platform for the future of Whanganui River".[185] This is evident in s 19(2) of the Act, which provides that the actions of the guardian must be guided by Tupua te Kawa — "the intrinsic values that represent the essence of Te Awa Tupua" which include the river's life-supporting capacity, the fact that it is an indivisible, living and metaphysical whole, and the inalienable connection of the Whanganui River iwi and hapū to Te Awa Tupua.[186] This represents the first recognition by the Crown of these values with respect to the Whanganui River,[187] and arguably paves the way for iwi and government together to begin to look at ways to provide better environmental outcomes for the waterway.[188]

Like the Whanganui iwi, the Tūhoe people consider Te Urewera — the subject of the second significant Treaty settlement — to be their ancestor. Te Urewera is Te Manawa o te Ika a Māui, the heart of the great fish of Māui, pulled from the sea in defiance of his brothers to become the North Island. Te Urewera is remote and isolated, and the forest's rugged hills rise from the mists of the central North Island — a source of shelter, protection, food and identity for Tūhoe.[189] Unlike the Whanganui iwi, Tūhoe did not sign the Treaty of Waitangi as it was not taken into Te Urewera in 1840. They had little sustained contact with the Crown until the New Zealand land wars of the 1860s, after which, part of their lands was confiscated under the New Zealand Settlements Act 1863, thus beginning the resistance and conflict that has characterised the Crown–Tūhoe relationship ever since. The Crown came to

182 The settlement provided $30 million to restore the health of the river, $80 million in financial redress to its tribes, and $1 million towards establishing the new legal framework. "Whanganui River settlement passed", above n 177.

183 The only mentions of the word "kaitiaki" (spiritual guardian) can be found in the statement on the importance of Ngā Ripo (the rapids of the Whanganui River) to Whanganui iwi, set out in Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, sch 8.

184 Bosselmann, above n 93.

185 Christopher Finlayson, Minister for Treaty of Waitangi Negotiations, "Whanganui River settlement passed", above n 177.

186 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 13.

187 Whanganui River Maori Trust Board <http://www.wrmtb.co.nz/>.

188 Taken from comments made by the lead negotiator for Whanganui iwi, Gerard Albert. "Te Awa Tupua", above n 163.

189 Day, above n 101.

possess much of Te Urewera through a series of Acts,[190] for the purposes of forest preservation and hydro-electricity, eventually owning it in its entirety.[191] Many Tūhoe nevertheless remained in Te Urewera — some as an act of defiance, and many because they lacked the means to go elsewhere — living in poverty as a result of Crown alienation of land and resources.[192]

The Te Urewera Treaty settlement addressed 29 years of Tūhoe claims lodged with the Waitangi Tribunal, in which Tūhoe sought to both own and manage Te Urewera National Park. However, amid widespread concern around public access to the park, the idea of Tūhoe ownership was not well supported by Cabinet and it was removed from the first Deed of Settlement prepared (but never signed) by the Waitangi Tribunal in 2009.[193] A second Deed of Settlement was signed in 2013 under which Te Urewera was, following the example of the Whanganui River, also granted legal personhood. Section 11 of the Te Urewera Act provides that "Te Urewera is a legal entity and has all the rights, powers, duties, and liabilities of a legal person" and the Act also acknowledges Te Urewera as "a place of spiritual value, with its own mana and mauri"[194] — Māori concepts that are allowed to stand on their own, without an English translation.[195]

Te Urewera is no longer a national park, but Te Urewera as a legal person still meets the criteria of a Category II Protected Area (the same level as a national park) of the International Union for Conservation of Nature,[196] alongside the maintenance of public access by the Crown and increased decision-making power for Tūhoe.[197] Although they did not gain ownership of Te Urewera, Warren suggests that the application of a legal personality may have been considered to be a good compromise for Tūhoe, as it had the effect of removing it from Crown ownership.[198]

The Te Urewera Act also provides for the Te Urewera Board — a co-management board of eight people, half appointed by the Crown and half by iwi, with a plan to increase membership from eight to nine members in 2018.[199] The ninth member of the board would be appointed by Tūhoe, providing an

190 Including the Urewera District Native Reserve Act 1896 (and its amendments in 1900, 1909 and 1910) and the Urewera Lands Act 1922.
191 Warren, above n 162, at 61–64.
192 At 66.
193 At 65–66.
194 Te Urewera Act 2014, s 3(2).
195 Day, above n 101.
196 Department of Conservation "Board appointed for new era for Te Urewera" (24 July 2014) DOC <https://www.doc.govt.nz/news/media-releases/2014/board-appointed-for-new-era-for-te-urewera/>.
197 Warren, above n 162, at 67.
198 At 66.
199 Te Urewera Act 2014, s 21.

iwi majority — the first example of such in a co-management regime set up via the Treaty settlement process, and the farthest the Crown has ever gone in providing for iwi autonomy in this area.[200] This will be a further opportunity for Tūhoe to ensure that their ancestor Te Urewera is managed in accordance with their values and knowledge, and is a strong indication from the Crown that a trusteeship model based on kaitiakitanga is one that it has confidence in.

It appears that in both the Whanganui River and Te Urewera Treaty settlements, the Crown has taken the opportunity to listen closely to iwi stories about the land, the river and other natural resources, and to understand the existential significance of these to the respective iwi. Through the process of bestowing legal personality on the Whanganui River and Te Urewera, and recognising and formalising the role of iwi as kaitiaki in respect of these entities through co-management structures with intrinsic Māori values front and centre, the Crown appears to be acknowledging that it sees a Māori worldview as one with a valuable contribution to make to New Zealand's legal system.[201] This acknowledgement provides us with another example of the state seeking to give effect to its trusteeship responsibilities. Recognising the importance of the Māori worldview and kaitiakitanga to many of its citizens and acting to formalise this in the management of natural resources is a step in the right direction.

When considering the concepts of property and personhood in 1982, Margaret Radin wrote: "Property … refers to something in the outside world, separate from oneself … the idea of property … requires the notion of a thing, and the notion of a thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed from the system."[202] The idea articulated here is directly at odds with the Māori worldview and their relationships with the rivers, maunga (mountains) and other natural features that embody their ancestors. Considering the case of the Whanganui River, iwi consider the river to be part of the people, as the people are part of the river ("Ko au te awa, ko te awa ko au"), and therefore that the people have obligations and responsibilities towards the river.[203] The river is seen as an indivisible whole with intrinsic value of its own, a living entity; a treasure that contributes to their survival which they as kaitiaki

200 Warren, above n 162, at 68–69.

201 Day, above n 101.

202 Margaret Radin "Property and Personhood" (1982) Stanford Law Review 957 at 966.

203 "Totohu Whakatupua explained Questions and Answers" *Whanganui Chronicle* (online ed, Whanganui, 3 September 2012) <https://www.nzherald.co.nz/wanganui-chronicle/news/article.cfm?c_id=1503426&objectid=11073833>.

have the right to use in a certain way,[204] but not something that they, or anyone else, has the right to own.[205] It is unsurprising then that Māori have never seen property and the notion of ownership, inherently Western concepts, as the appropriate tools for environmental management, protection and stewardship.

It is clear from the Treaty settlements that the Māori worldview and the relationships of iwi to the Whanganui River and Te Urewera have contributed to the new status of these features as a legal person, helping to shift the view that they exist for the use and enjoyment of humans to an understanding that they are legal persons in their own right.[206] Like women and slaves before them, the transformation of the Whanganui River and Te Urewera from property to entities with legal personality has reconceptualised the legal person and pushed the boundaries of what is property and what is not.[207] Hutchison notes that a river granted legal personhood is no longer owned in its entirety, and that New Zealand's decision to grant legal personhood is indicative of changing societal values around entities that are able to enjoy such status.[208] Stone goes even further, saying that "granting the river legal status demonstrates that New Zealand values the river enough to make room for it in their legal system".[209]

The New Zealand examples provide "a disruptive union" of the very Western concepts of property and legal personality, and the Māori worldview that sees the environment as a living entity, which has resulted in a world first in terms of legal recognition of the environment.[210] The Whanganui River and Te Urewera now have the rights, powers, duties, and liabilities of a legal person,[211] and therefore will be able to enforce their own legal rights against other legal persons through various enforcement procedures in New Zealand law,[212] in the same way that companies, trusts and societies have been able to do for years.

These settlements are not a perfect solution. The Crown was careful to retain ownership of minerals (and the right to mine them) in both cases, and there are questions around water rights in the case of the Whanganui

204 Such use was always conditional on satisfying obligations to ancestral values and future generations. Brendan Kennedy "I am the River and the River is Me: The Implications of a River Receiving Personhood Status" (December 2012) Cultural Survival Quarterly <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/i-am-river-and-river-me-implications-river-receiving>.

205 Office of Treaty Settlements *Ruruku Whakatupua — Te Mana o Te Awa Tupua* (5 August 2014).

206 Hutchison, above n 128, at 181.

207 At 179.

208 At 180.

209 Stone, above n 124, at 100.

210 Day, above n 101.

211 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14(1).

212 Hutchison, above n 128, at 179.

River,[213] indicating that the state still has one eye on economic prosperity and development, even here. Further, the granting of legal personality in these cases could be viewed as nothing more than a clever attempt by the Crown to skirt the issue of ownership. Following the settlements, they quickly moved to limit the expansion of legal personhood, with Attorney-General Christopher Finlayson making it clear that "the legal personality concept ought not to travel the country, and should not be replicated across other environmental areas of New Zealand".[214] There is clearly a tension here. As recently as June 2018, iwi concerns around the challenges of managing rivers, where the Māori worldview and the Western one in which rivers are seen as resources that can support a community's economic livelihood are pitted against each other, were playing out in the national media.[215] It remains to be seen whether the doctrine of legal personality will be put to use again in selected cases going forward, or even more broadly once the practicalities are better understood and success is able to be gauged.

In a further display of leadership in this field, New Zealand invited diplomats from other countries to witness the signing and settlement of the Whanganui River claims.[216] Five days after the Te Awa Tupua (Whanganui River Claims Settlement) Bill passed in the House, the Indian courts cited the Whanganui example in their decision to accord legal personality to two rivers considered sacred,[217] perhaps illustrating just how influential and innovative New Zealand's approach was.[218] The Indian approach differed slightly from the New Zealand one, however, in that the Ganga River — which is considered to be the holiest river in India and is worshipped as a goddess[219] — and the Yamuna River were to be treated as minors under the law.[220] Like the New Zealand entities, they were to be represented by a guardian, the Ganga Management Board, which would consist of three people acting as their legal parents.[221] Although still a

213 O'Donnell and Talbot-Jones, above n 179.

214 Day, above n 101.

215 Charlie Mitchell "'I am ashamed': A Canterbury river's pollution starts a cultural debate" (2 June 2018) Stuff.co.nz <https://www.stuff.co.nz/environment/104351892/i-am-ashamed-a-rivers-pollution-starts-a-cultural-debate>.

216 "Te Awa Tupua", above n 163.

217 Michael Safi "Ganges and Yamuna rivers granted same legal rights as human beings" *The Guardian* (online ed, London, 21 March 2017) <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>.

218 "Innovative bill protects Whanganui River with legal personhood", above n 121.

219 "After New Zealand, India's Ganges gains legal status of a person" *Dhaka Tribune* (online ed, Dhaka, 20 March 2017) <https://www.dhakatribune.com/world/south-asia/2017/03/20/new-zeland-indias-ganga-gains-legal-status-person/>.

220 O'Donnell and Talbot-Jones, above n 179.

221 Monalisa Das "Ganga and Yamuna are now legal entities: What does this mean and is it a good move?" *The News Minute* (online ed, Bangalore, 21 March 2017)

huge step forward in the conservation and preservation of these rivers, India's move arguably limited or qualified the status of these rivers in the same way that the law limits the rights and responsibilities of children and minors under the law.

Ten days after the Uttarakhand High Court granted legal personality to the Ganga and the Yamuna, it did so again, to the Yumanotri and Gangotri glaciers in the Himalayas. In what appears to be a further expansion of the concept of legal personality, the Court went further than it had in its previous decision, by declaring that the "rights of these legal entities shall be equivalent to the rights of human beings and the injury/harm caused to these bodies shall be treated as harm/injury caused to human beings", seemingly bestowing upon the glaciers all the same rights as Indian citizens.[222]

These court rulings were considered a significant shift in the legal landscape in India, broadening the basis for expanding environmental protection,[223] but unfortunately for the Ganga and Yamuna their status as legal persons, living human entities, was short-lived. In July 2017 the Indian Supreme Court stayed the Uttarakhand High Court order according the status, on the basis that it raised several legal questions and administrative issues, particularly around the fact that the rivers flow through several states.[224] The Ganga, for example, flows through Uttarakhand, Uttar Pradesh, Bihar, Jharkhand and West Bengal, but all states have different rules and regulations in relation to maintaining the river and clearly some reluctance at handing management over to a central guardianship body.[225] This is surely an issue that would be encountered if the concept of legal personality were to be applied to the global commons.

It is clear that legal personality is now a tool that governments internationally are increasingly willing to use in order to protect and give rights to the environment. Questions remain about whether these types of legal rights are relevant or appropriate for nature, on the basis that they do not mean much if they cannot be enforced, and it takes both time and money to set up the legal and organisational frameworks that will ensure these rights are worth more than the paper they are printed on.[226] In many cases, the roles and responsibilities of the guardians are yet to be fully understood or given effect to, and there is uncertainty around how they will decide which rights to enforce and when,

<https://www.thenewsminute.com/article/ganga-and-yamuna-are-now-legal-entities-what-does-mean-and-it-good-move-58999>.

222 O'Donnell and Talbot-Jones, above n 122.

223 O'Donnell and Talbot-Jones, above n 122.

224 "SC stays Uttarakhand HC order on Ganga, Yamuna living entity status" *The Indian Express* (online ed, Noida, 8 July 2017) <http://indianexpress.com/article/india/sc-stays-uttarakhand-hc-order-on-ganga-yamuna-living-entity-status-4740884/>.

225 Das, above n 221.

226 O'Donnell and Talbot-Jones, above n 179.

particularly where the rights of the natural resources go head to head with human or property rights, who can hold them to account for these decisions and who has oversight.[227] Only time will tell.

These examples signal a general trend towards Earth trusteeship, and the extension of the concept of legal personality to nature provides states with a tool to help them give legal effect to their moral trusteeship duties. It is clear, though, that conferring legal rights on nature is not enough on its own. It remains to be seen whether the doctrine of legal personality could transcend national borders and be extended to the global commons. This would require considerable cooperation at international level, a loud voice to remind states of the trusteeship duties that they have agreed on in international agreements,[228] and a groundswell of states willing to follow the lead set by New Zealand and others by first recognising the concept in their own jurisdictions. As one of the key states taking the lead in this area, New Zealand has an important role to play in showing the rest of the world how resource management arrangements based on legal personality and trusteeship can work in practice.

Previous Treaty settlements between iwi and the Crown have been influential in moving the Crown towards greater engagement with iwi values, particularly kaitiakitanga and rangatiratanga (the right to self-determination).[229] The Ngāi Tahu Claims Settlement Act 1998 and Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 are regarded as particularly bold and innovative examples, which arguably set the scene for the steps the Crown took in the Whanganui River and Te Urewera settlements. The former included the explicit recognition of the iwi's engagement with their environment and their storytelling, and created a new platform for rights and responsibilities between Ngāi Tahu and the Department of Conservation,[230] and the latter achieved an important step forward for Treaty settlements generally with the inclusion of Waikato-Tainui's understanding of the river and the development of a new co-management structure.[231]

Like the Resource Management Act, co-management arrangements do not address underlying issues of sovereignty and ownership but deal only with the ongoing management of a resource.[232] However, these types of arrangements have been championed over the past decade because they provide a strategy to reconcile Māori interests in a resource with Crown reluctance towards iwi

227 O'Donnell and Talbot-Jones, above n 179.
228 Bosselmann, above n 84, at 2.
229 Tredegar Rangiātea Delamere Hall "Restoring the flow: Challenging the existing management frameworks to integrate Mātauranga Māori" (Master of Social Sciences Thesis, University of Waikato, 2012) at 125.
230 Day, above n 101.
231 Warren, above n 162, at 27.
232 At 28.

ownership.[233] The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act, for example, is a "negotiated compromise" whereby Waikato-Tainui were granted the opportunity to restore the Waikato River, and the Crown maintained for the public the right to continued access and enjoyment of it.[234]

The Waikato River Authority is a statutory body formed under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, and He Mahere Taiao — the Maniapoto Iwi Environmental Management Plan.[235] It is a co-management structure, with government and iwi co-chairs and 10 board members who are appointed by the river iwi and Ministers of the Crown. The purpose of the Waikato River Authority is to set the vision and strategy to achieve the restoration and protection of the health and well-being of the Waikato River for future generations; to promote an integrated, holistic and coordinated approach to the implementation of the vision and strategy and the management of the Waikato River; and to fund rehabilitation initiatives.[236] The Authority is the sole trustee of the Waikato River Clean-up Trust, whose role is to fund projects which meet the purpose of the Authority.[237] To date it has supported nearly 250 clean-up projects with funding of $38 million,[238] and provides an excellent illustration of a co-management agreement operating effectively.

Evidence of the New Zealand Government's commitment to their trusteeship responsibilities can also be found in the work of the country's Crown Research Institutes (CRIs) and Ministries. CRIs function as independent companies but are owned by and are accountable to the New Zealand Government. The Kaitiaki Environmental Impact Assessment and Reporting (KEIA-R) framework — a collaboration between Landcare Research (a CRI) and Māori organisations under the umbrella of Waahi Whaanui Trust — is designed to help Māori engage effectively in resource management processes, particularly environmental impact assessments (EIAs). The KEIA-R framework helps a Māori community to identify its aspirations, values, needs and expected outcomes, particularly with regard to articulating, monitoring and reporting on impacts to specific tangible and spiritual values that support kaitiaki and kaitiakitanga, and to respond to day-to-day cultural–environmental issues.[239]

233 Linda Te Aho "Ngā whakataunga waimāori: Freshwater Settlements" in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 102 at 110.
234 Warren, above n 162, at 28.
235 Waikato River Authority <https://www.waikatoriver.org.nz/>.
236 Waikato River Authority, above n 235.
237 Waikato River Authority, above n 235.
238 Waikato River Authority, above n 235.
239 Manaaki Whenua — Landcare Research "Kaitiaki Environmental Impact

Further examples include NIWA's (another CRI) Kaitiaki Tools initiative,[240] and the Ministry for the Environment's Cultural Health Index.[241] All these examples represent attempts by the state to not only ensure that the indigenous voice is heard, but that their worldview and values are reflected in resource management in New Zealand.

In practical terms, New Zealand is able to point to a number of examples of trusteeship. As one of the planet's largest maritime nations, with a marine environment of more than 4 million square kilometres, New Zealand has put in place a system of marine protected areas totalling 17,430 square kilometres, six designated marine mammal sanctuaries, and benthic protected areas and seamount closures covering almost one-third of our exclusive economic zone (EEZ).[242] New Zealand was also instrumental in the creation of the Ross Sea Marine Protected Area, the world's largest marine protected area at 1.12 million square kilometres, within the 25-member Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) group[243] (as part of New Zealand's wider contribution under the Antarctic Treaty System).

These initiatives represent an excellent foundation of trusteeship in respect of the marine environment on which to build, but challenges around the creation of the Kermadec Ocean Sanctuary, which was set to be New Zealand's (and one of the world's) largest at 620,000 square kilometres,[244] highlight the difficulty that the Government is faced with, trying to balance economic (primarily fisheries and the potential of mineral exploitation), iwi and environmental interests in this area. Similarly, recent moves by the Government to address climate change and create a green and sustainable future for New Zealand by ending the issuance of offshore oil and gas exploration permits appear to

Assessment and Reporting (KEIA-R)" LCR <https://www.landcareresearch.co.nz/science/living/indigenous-knowledge/keia-r>.

240 National Institute of Water and Atmospheric Research "What is Kaitiaki Tools?" NIWA <https://www.niwa.co.nz/our-science/freshwater/tools/kaitiaki_tools/what-is-kaitiaki-tools>.

241 Ministry for the Environment "Why a Cultural Health Index?" MfE <http://www.mfe.govt.nz/publications/fresh-water/using-cultural-health-index-how-assess-health-streams-and-waterways/why-0>.

242 Statistics New Zealand "Protection in the Marine Environment — New Zealand's Environmental Reporting Series" Stats NZ <http://archive.stats.govt.nz/browse_for_stats/environment/environmental-reporting-series/environmental-indicators/Home/Marine/marine-protected-ares.aspx>.

243 Ministry of Foreign Affairs and Trade "Ross Sea Marine Protected Area" MFAT <https://www.mfat.govt.nz/en/environment/antarctica/ross-sea-region-marine-protected-area/>.

244 Simon Maude and Jonathan Milne "Kermadec Ocean Sanctuary put on ice by NZ First, catching Greens unaware" (22 October 2017) Stuff.co.nz <https://www.stuff.co.nz/environment/98122008/kermadec-ocean-sanctuary-put-on-ice-by-nz-first-catching-greens-unaware>.

be a further step in the right direction. However, the protection of existing exploration and mining rights and permits, of which 22 are offshore covering an area nearly the size of the North Island and able to run out another 40 years from 2030, indicates that the protection of jobs and economic interests is still front and centre.[245]

It is clear that New Zealand, which prides itself on its incredible natural beauty and clean, green image, is more than capable of taking the lead when it comes to environmental trusteeship. New Zealand has shown this time and time again, with the passing of ground-breaking legislation, decision-making that results in world firsts for nature, recognition of the Māori worldview and related concepts for resource management, new frameworks for cooperation, and examples of this leadership in action in the context of the global commons. New Zealand is already setting an example for other nations as to how environmental trusteeship can operate both domestically and internationally, but there is little doubt that further action and commitment is required, as well as further engagement and cooperation on the international stage, in order to safeguard the future of the environment.

6. CONCLUSION

Thomas Berry said that "the destiny of humans cannot be separated from the destiny of the Earth",[246] and unlike any other species today or throughout history, humans are uniquely placed to be able to have an impact on the environmental degradation and devastation we see around us. We alone have the ability to change the future by what we do today.[247] The global commons, which are open to all, owned by none, and yet being depleted by humanity at an alarming rate, require our attention most urgently.

A commons does not always have to be a tragedy, but unfortunately to date the actors on the world stage — predominantly nation-states — appear to be unequipped, unable or unwilling to deal with the challenges faced, and have so far failed to effect ecologically sustainable governance.[248] This does not mean that they cannot learn to do so or that a coordinated response is not possible. In fact, at this point in time a coordinated response is essential if we wish to ensure the survival of humans, and other species, on Earth — our home.

245 Dane Ambler "Government ends offshore oil and gas exploration" *National Business Review* (New Zealand, 12 April 2018) <https://www.nbr.co.nz/article/government-ends-offshore-oil-and-gas-exploration-da-214608>.

246 Bosselmann, above n 7, at 23.

247 David Suzuki *David Suzuki: The Autobiography* (Greystone Books, Vancouver, 2007) at 398.

248 Bosselmann, above n 7, at 9.

Neoliberalism is arguably the root cause of many of the issues facing our environment today, and also of nation-states' ability to address such issues. With the focus on progress, development, economic prosperity, privatisation, deregulation and free trade over the past century, environmental concerns have taken a back seat and generally only been addressed to the extent that doing so did not impact on the neoliberal agenda. Through the related concept of globalisation the world has become a smaller place, with states, corporations and people more connected than ever before, and the doctrine of sovereign states is arguably less relevant today as a result of these interdependencies, and the pooling of sovereignty in bodies like the European Union.

Herein lies an opportunity for change, from state-centric governance to Earth-centric governance. The environment has always been an interconnected system, and any boundaries imposed on it by nation-states exist only on maps. Global environmental interests therefore, such as those relating to the global commons, are in fact national interests for every state, occurring both within and beyond state boundaries simultaneously. Reconceptualising the way that states view their environmental obligations is critical. At present there exists a mismatch between states' legal accountability to their own constituencies and their moral obligation towards all constituencies.[249] The gap can only be closed if states are able to think globally when they act locally (in their own territories) in the first instance, with a view to global environmental cooperation towards common goals in the longer term.

This is not an easy ask for states, as it undermines their very foundation, sovereignty, and they are quite simply unequipped to deal with areas that are owned by everyone or no one. However, they can no longer act (or not) in isolation. Nor can they continue to ignore the trusteeship obligations for the environment, humanity and future generations that they have agreed to under a multitude of international agreements to date. But more is required, and arguably the extension of the concept of trusteeship to the global commons makes sense — for each commons is different, and will require different management and levels of cooperation amongst states — and the flexible, adaptive, idiosyncratic nature of trusteeship would allow for the development of solutions for all. A strong international voice, or a bold move from the United Nations, is required to bring all states to the table — but attempts to do so have fallen by the wayside to date.

This article argues that in lieu of a more structured, formalised trusteeship system that may still be years or decades away, if it ever eventuates at all, it is up to nation-states to take the lead — to listen to their citizens, and to nature, and to look for ways to give effect to their trusteeship obligations within their national jurisdictions and legal frameworks. Nation-states cognisant of their

249 Bosselmann, above n 7, at x.

trusteeship responsibilities and acting on them provide an example for other states, and a groundswell in this area could see an increase in willingness to engage in environmental governance and trusteeship at a global level in the future. From origins in controversy and mistrust, a move to a new form of trusteeship may no longer seem like such a great leap. It is our opinion that New Zealand has a role to play as a leader in this area.

Having once been highly regarded as a leader in the field of environmental protection, New Zealand has arguably fallen short in the decades since the RMA was enacted, as the nation pursued development and economic growth goals. However, recent progress appears to indicate a subtle elevation in New Zealand of the importance of preservation of ecological systems. This is evidenced by decisions in the Environment Court and the work of the Waitangi Tribunal, and reflected in co-management arrangements incorporating the Māori worldview. The extension of legal personality in New Zealand, to the Whanganui River and Te Urewera, was ground-breaking, and is already being emulated elsewhere.

The recognition of the rights of nature and extending the concept of legal personality — for so long reserved for humans or primarily corporate entities flowing from human personhood — to the environment are the tools that states are able to use, and are using, to give effect to trusteeship responsibilities. There is still some debate about whether the rights approach is in fact the right one, and some uncertainty about how it will all work in practice. However, in our opinion these approaches are a valuable tool to give nature a seat at the table and a voice to demand her rights. Her voice is not yet as strong as those of the economy and development at this point, but recognition of rights is a start from which more can follow.

New Zealand is also leading the world with co-management systems and structures for resources that not only enable Māori voices to be heard and the Māori worldview and kaitiakitanga particularly to be guiding principles, but also enable iwi guardians to manage with the Crown as equals (and in the case of Te Urewera later in 2018, as the majority). These systems have enabled Māori not only to reconnect with their rivers or maunga, who are their ancestors through whakapapa, but also to fulfil their obligations to both the past and the future by reclaiming their right to act as stewards or kaitiaki. With a clear line of sight back to the Charter of the Forest, whereby responsibility for the stewardship of common resources on forest land shifted from the monarch to the community,[250] Māori are taking the opportunity to protect, restore and ensure good outcomes for these resources, and their people, going forward.

This type of model could be applied in other countries with indigenous populations, and/or in countries with strong civil society groups or NGOs who could step into the co-management role. It may also work for the global

250 Harris, above n 15.

commons. It is likely that in many cases these co-managers would be more connected to the environment than the state party/parties, and without the impediments of sovereignty, property and neoliberalism to restrain them they may be more willing or able to act as trustees, or at least to add another layer of checks and balances to the international system and help ensure that voices beyond the state are heard.[251]

Throughout history there has been a disconnect between the perceived rights of humans to use our environment and the corresponding responsibility to care for it, protect it and pass it on to future generations in good condition. It is perhaps unsurprising, then, that at the dawn of a new ecological epoch — the Anthropocene — humanity is still struggling to translate these obligations into a system of international agreement, cooperation and action. States are increasingly realising their trusteeship obligations, and attempting to give effect to them, but only to the extent that they do not conflict with other frequently economic or development-related goals or agendas, and not quickly enough. In the absence of a more formalised trusteeship or treaty system protecting the global commons, it is up to states to take the lead in their own jurisdictions and hope that others will follow. New Zealand has started down this track and nature arguably has a stronger voice here than she does elsewhere. But even in Aotearoa there is still much room for improvement, and improve we must, because in the words of the late New Zealand explorer and environmentalist Sir Peter Blake: "It's too important not to."[252]

251 Bosselmann, above n 7, at 47.

252 Samantha Hayes "Revealed: The documentary footage filmed on Sir Peter Blake's final voyage" (30 June 2017) Newshub <https://www.newshub.co.nz/home/new-zealand/2017/06/revealed-the-documentary-footage-shot-on-sir-peter-blake-s-final-voyage.html>.