

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Ngā whakahaere rauemi – natural resource management

Māori interests in natural resource management: latter half of 2020 in review

Dave Randal, Chelsea Easter, Avikesh Chandra, Manahi Moana, Honor Kelly, and Eilís Donnelly.

Overview

The Buddle Findlay team is pleased to present this review of resource management case law and related developments of relevance to practitioners advising Māori (or on issues relating to Māori interests).

This is the latest in a series of annual reviews, linked at the foot of this article. Due to lockdown-related disruption, our previous review discussed developments during 2019 and the majority of 2020. This article covers key cases from the last six months, summarises current developments in Resource Management Act 1991 (RMA) policy and legislative reform, briefly updates readers on Treaty settlement milestones, and offers thoughts on developments to watch for in the year ahead.

Resource management law and practice are constantly evolving, but this article is written at a particularly dynamic and complex point in time. To take freshwater management as an example, regional councils updating their plans to give effect to national policy direction issued in 2014 and 2017 now have to consider further fundamental changes introduced in 2020, as well as navigate a new statutory decision-making process for freshwater planning. Iwi, hapū, and other interested parties, many of whom have invested considerable time and other resources in planning processes that are not yet complete, must also work through the implications of these changes. Shortly they will probably also have to deal with the added complexity of three new pieces of legislation replacing the RMA itself.

Some of the recent decisions discussed below relate to this dynamic area of freshwater management.

(Continued at p 3)

Editors

Carwyn Jones
Craig Linkhorn

Publisher

Māori Law Review Ltd
PO Box 25433
Wellington 6146
New Zealand

T +64 4 472 2667

W maorilawreview.co.nz

Associate Editor

Toni Love

Student Editor

Hinemoana Markham-Nicklin

Consultant Editors

Tom Bennion
John Borrows
Judge Craig Coxhead
Jacinta Ruru
Māmari Stephens

© Copyright Māori Law Review Ltd 2021. No part may be reproduced by any process without prior written permission.

This issue may be cited as:
(2021) March Māori LR

ISSN 1172-8434



Use this QR code to visit
our website

Contents

(2021) Poutu te rangi Māori LR

Ngā whakahaere rauemi – natural resource management

Māori interests in natural resource management: latter half of 2020 in review – Dave Randal and colleagues 1

Te Kōti Matua – High Court

Arbitration – determining whakapapa not arbitrable and inconsistent with tikanga – *Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board* [2021] NZHC 291 – Craig Linkhorn 19

Te Kōti Pira Māori – Māori Appellate Court

Appeal – procedural error – substantive directions without jurisdiction – *Te Maari v Hamon Lot 5 Deposited Plan South Auckland 15580 (Mangakino Pouākani Marae)* [2021] Māori Appellate Court MB 10 (2021 APPEAL 10) – Hinemoana Markham-Nicklin 21

Te Kōti Whenua Māori – Māori Land Court

Trusts – injunction – removal of trustees – *Taueki v Proctor – Horowhenua 11 (Lake) Block* (2020) 415 Aotea MB 1 (415 AOT 1) – Sam Taylor 23

Trusts – breach of trust – interim trustee appointed – *Hutcheson v Clarkson – Mangamaire B No 2 Block* (2020) 86 Tākitimu MB 283 (86 TTK 283) – Hinemoana Markham-Nicklin 28

The Māori Law Review is proud to have an association with the Faculty of Law at Victoria University of Wellington and Buddle Findlay New Zealand lawyers.



VICTORIA UNIVERSITY OF
WELLINGTON
TE HERENGA WAKA

BUDDLE FINDLAY

This print edition of the Māori Law Review is published 11 times each year starting with the February issue. <http://maorilawreview.co.nz> has author profiles, free resources, regular updates, decisions for download and more information about the Māori Law Review.

Disclaimer

Any views expressed in the *Māori Law Review* are those of the author of each article and not necessarily those of the editors or publisher. The information contained in this publication is a summary only. You should seek professional advice before taking any action in relation to matters dealt with in this publication. The parties involved in this publication exclude any liability for any damage, loss or liability from use of or reliance on this publication.

Contents (continued) (2021) Poutu te rangi Māori LR

Te Kōti Whenua Māori – Māori Land Court

Injunction – co-owner rights – *MacDonald v MacDonald* 30
– *Wairau Block XII Section 6C 2C* (2021) 69 Te
Waipounamu MB 251 (69 TWP 251) – Hinemoana
Markham-Nicklin

Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal

Overlapping claims – *The Hauraki Settlement* 31
Overlapping Claims Inquiry Report (Wai 2840, 2020) –
Zoe Rose-Curnow

(Continued from p 1)

Other cases highlight: the excellent community outcomes that can arise when infrastructure projects are developed in partnership with iwi, provide guidance on difficult issues relating to mana whenua status, give a working example of planning to protect cultural landscapes, and explore the interaction between environmental legislation and co-management arrangements implemented through Treaty settlements.

Developments in relation to freshwater management

Last year's review noted the emergence of an updated National Policy Statement for Freshwater Management (NPSFM 2020) and associated national environmental standards (NES Freshwater), the context provided by the Waitangi Tribunal's ongoing Wai 2358 inquiry, and cases regarding freshwater planning (*Aratiatia Livestock Ltd*) and a water bottling proposal opposed by iwi (*Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*).

Regulating activities associated with fresh water continues to be the subject of considerable policy-making attention, in an effort to reverse the widespread degradation of the health of water bodies.

There is much information for practitioners to digest. For one, Te Mana o Te Wai provides a relatively new touchstone for substantive decision-making. The concept refers to "*the fundamental importance of water and recognises that protecting the health of freshwater protects the health and well-being of the wider environment*", and puts in place a hierarchy of obligations that prioritises the health and well-being of water bodies and freshwater ecosystems above people's health needs and other social, economic, and cultural drivers.

Moreover, a new freshwater planning regime is intended to streamline the processes by which plans will give effect to the NPSFM 2020. The process will be overseen by a Chief Freshwater Commissioner, Professor Peter Skelton, and will involve decisions being made by freshwater hearings panels, generally with five members, one of whom must have an

understanding of tikanga and mātauranga Māori and is to be nominated by tangata whenua.

The Waitangi Tribunal undertook Stage 2 of its Wai 2358 inquiry in parallel to the Crown developing freshwater management policy, and its influence can be seen in some elements of the recent reforms. Stage 3 of the inquiry is expected to start shortly, focusing on geothermal resources.

Many practitioners will be closely monitoring yet another important development, namely the claim brought by Ngāi Tahu in the High Court, yet to be heard, seeking recognition of the rangatiratanga of Ngāi Tahu over fresh water in its takiwā.

While many of these developments will play out over the coming year, a number of decisions from late in 2020 also illustrate this dynamic context.

The Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council [2020] NZEnvC 180

Bay of Plenty Regional Council developed Plan Change 9 (PC9) to its Regional Natural Resources Plan, to insert provisions giving effect to the 2014 version of the NPSFM. A draft was consulted on in August 2015, PC9 was notified in October 2016, Council-level hearings took place in early 2018, and the Council notified its decision in October 2018. Fourteen appeals against that decision were lodged with the Environment Court, and Court-assisted mediation took place during 2019.

Late in 2019, Council officers became concerned about the utility of proceeding with PC9, given that the issues remaining in dispute were significant and would require costly hearings and determination by the Court, and in light of the uncertainty created by central government signalling imminent further policy changes. Those changes ultimately emerged in August 2020 as the NPSFM 2020.

In the meantime, the Council had resolved to withdraw PC9, and that decision had been publicly notified. Clause 8D of Schedule 1 to the RMA allows a council to withdraw a plan change where there is a live appeal before the Environment Court but the Court hearing has not yet commenced.

While iwi had been critical of elements of PC9, the Council's decision to withdraw it equally attracted criticism. The Trustees of the Motiti Rohe Moana Trust sought declarations from the Environment Court that Council's decision to withdraw PC9 had breached the RMA. The applicants pointed to:

- the extensive resources dedicated by tangata whenua to participating in the PC9 process, which would be wasted by allowing its withdrawal;
- the significance of water to tangata whenua;
- the importance of RMA planning processes in fulfilling the Crown's promises in Te Tiriti o Waitangi regarding water;
- the historical failures by the Crown to adequately perform functions relating to water;

- the more directive approach regarding fresh water in recent higher-order planning documents;
- what they considered to be significant gaps within the operative regional plan provisions; and
- an alleged lack of evaluation by the Council of Treaty principles and lack of consultation with tangata whenua regarding how the withdrawal would affect Māori.

Despite those factors, this case largely turned on the breadth of the Environment Court's jurisdiction to make declarations under section 310 of the RMA. The High Court had previously held that a council's power to withdraw a plan change is a mechanical function not requiring prior notice to, submissions from, or a right of appeal by affected persons. In that context, the Court in this case considered whether it is empowered to review the exercise of that power by a council, and to make related declarations.

The Court held that its jurisdiction does not extend that far. In summary, it found that:

- the Court's power to make declarations stems only from section 310 (i.e. it has no inherent jurisdiction, unlike the High Court), and that provision – including the catch-all in section 310(h) – is not sufficiently broad to allow judicial review of an administrative action;
- nor does the Court have a general supervisory function to review administrative acts by a council;
- it is a council's function to make and change plans under the RMA; while the Court can have a role in the substantive outcome of plan processes (i.e. on appeal), its power to make declarations in respect of administrative decisions is very limited (to "stating what can be done rather than what should be done"); and
- considerations of fairness and reasonableness, while inevitably applied by the Court in the exercise of its judgment in all cases, do not give the Court a power to review an administrative decision.

The Court also considered whether clause 8D of Schedule 1 should be interpreted by reference to Part 2 of the RMA, and in particular the requirement (in section 8) to take into account the principles of Te Tiriti o Waitangi. The Court accepted that section 8 does guide interpretation, but was not persuaded that the withdrawal of PC9 had left a gap in the planning instruments that was contrary to Treaty principles. The Court observed that the Council would have to prepare another plan in order to give effect to the NPSFM 2020, and tangata whenua would have a right to participate in that process, consistent with the principles of the Treaty. Accordingly, the Court held that section 8 did not have the effect of expanding the Court's jurisdiction under section 310 to allow an administrative action of the Council to be reviewed.

As such, the Environment Court ruled it had no jurisdiction to make the orders sought, and the application was refused.

The Trustees have since appealed the decision to the High Court, and have also brought judicial review proceedings challenging the Council's

exercise of its function under clause 8D. The hearing is expected to take place later this year.

Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council [2020] NZEnvC 213

Technical questions also arose in respect of Bay of Plenty Regional Council's next proposed change to its Regional Natural Resources Plan. Plan Change 10 (PC10) relates to nutrient management in Lake Rotorua, and seeks to limit the amount of nitrogen entering Lake Rotorua to a cap specified in the Council's Regional Policy Statement (RPS).

This decision of the Environment Court finalised the provisions of PC10. An earlier interim decision, issued in 2019, had considered the most appropriate method to allocate nitrogen to different land uses.

The Court now considered the issues of:

- what provision should be made (in terms of a nitrogen allocation) to enable development of Treaty settlement land (such as converting forestry or bush-clad land to land used for papakāinga, marae, and associated housing and other facilities) – all parties agreed that there should be such an allocation, but disagreed as to the amount; and
- the extent to which PC10 must give effect to the new NPSFM 2020 and NES Freshwater.

As to the first issue, the Court restated some relevant conclusions from its earlier interim decision. Amongst these were that:

- PC10 should recognise potential uses of Treaty settlement land in an appropriate way and make nitrogen allocations for such uses.
- An allocation for Treaty settlement land would require a further reduction in the allocation for the dairy and dry stock sectors (because the catchment is over-allocated and the nitrogen cap exceeded), but that it would not be large given that the potential uses of settlement land identified generally had low associated discharges of nitrogen.

The Court also emphasised the unique circumstances of the Lake Rotorua groundwater catchment, and cautioned against applying its reasoning uncritically to issues elsewhere in Aotearoa.

The Court began by examining the extent to which the nitrogen amounts allocated for use of settlement land should be consistent with the amounts already allocated (by an Independent Hearings Panel (IHP)) for land held under Te Ture Whenua Māori Act 1993 (TTWMA). The Court observed that the RPS focuses on the latter and does not provide specifically for Treaty settlement land, so concluded that the allocation for TTWMA land should not be used as a starting point.

In determining an appropriate allocation, the Court noted the purposes for which the settlement land was envisaged to be used and took into account various key considerations, including:

- what allocation would be sufficient to enable 'credible land use' within the time horizon of PC10; and

- the need to provide an equitable balance between the interests of owners of settlement land and those of owners of dairy and dry-stock land who would have their allocation reduced.

The Court undertook a detailed analysis of the evidence and fixed a reallocation with respect to settlement land that it considered gives effect to the RPS and sections 6(e), 7(a), and 8 of the RMA. A common percentage reduction was applied to dairy and dry stock land in the catchment. This reallocation will come into effect in 2032, unless there is an earlier surrender of nitrogen discharge allowance relating to other existing uses (i.e. if existing farms convert to uses that have lower associated nitrogen discharges).

The 2032 date stems from the RPS, but was also relevant to the way in which the Court addressed the new NPSFM 2020 (and NES Freshwater), which is noteworthy given other ongoing planning processes around Aotearoa.

As a starting point, given that the NPSFM 2020 and NES Freshwater are much broader in scope than the nitrogen load on Lake Rotorua, and given how far PC10 was through the planning process, the Court acknowledged the limited extent to which it could implement the new documents through its decision (beyond some minor practical tweaks to PC10, which it duly made). The Court noted that the Council would have to change the plan further to give effect to the balance of the documents.

The Court did find, however, that policy 11 of the NPSFM 2020, requiring fresh water to be "allocated and used efficiently, all existing over-allocation (...) phased out, and future over-allocation (...) avoided" underscored that no new allocation of nitrogen for uses of Treaty settlement land could be made until existing over-allocation had been phased out, which in the case of this catchment will be 2032 (unless some nitrogen discharge allowance is surrendered beforehand).

Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council [2020] NZHC 3388

In last year's review we discussed the Environment Court's interim decision in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, in which the Court (in a majority decision) dismissed appeals against consents allowing the expansion of an existing water bottling operation near Ōtakiri.

Te Rūnanga o Ngāti Awa (TRONA) appealed that interim decision to the High Court, and were supported by further appeals from Ngāti Pīkiao Environmental Society (NPES) and Te Rūnanga o Ngāi Te Rangi Iwi Trust (TRONIT). Sustainable Otakiri Incorporated (SOI), a society formed by neighbours to the plant, also appealed.

The High Court, in determining whether the Environment Court had erred, analysed the relevance of 'end use' effects on the environment of a proposed activity – that is, consequential effects stemming from, rather than arising directly from, the consented activity – in resource consent processes under the RMA. At issue in this case were 'end use' effects of taking groundwater, said to arise from:

- the export of bottled water, in terms of negative effects on te mauri o te wai and the ability of mana whenua to be kaitiaki of the exported water; and
- the use of plastic bottles.

The High Court dismissed the appeals. In doing so, the Court worked through various issues, but the key ones arising from the iwi appeals relating to the regional consents were whether the Environment Court majority erred:

- in excluding consideration of the end use of the water take; and
- in concluding that the regional plans addressed issues relating to the taking of water from aquifers comprehensively, and consequently that recourse to Part 2 of the RMA was not required.

End use

The relevance of end use was at issue before the High Court because the Environment Court majority had concluded that the end uses of putting the water in plastic bottles and exporting it from Aotearoa were matters outside the scope of consideration of the resource consent to take water from the aquifer under section 104(1)(a) of the RMA.

Gault J began by traversing the relevant legal principles. His Honour noted (as the Environment Court had) that while the courts sometimes considered the consequential environmental effects of an activity when deciding whether to grant consent, this is subject to limits of nexus ('connection') and remoteness. The complexity, his Honour noted, "lies in the application of these concepts".

Gault J considered separately the end uses of exporting bottled water and inappropriate disposal of plastic bottles.

With regard to the end use effects of exporting bottled water, the High Court held that the Environment Court's conclusion that such effects were beyond the scope of section 104(1)(a) "went too far". His Honour considered there to be a nexus between the water take and the export of water in plastic bottles. Unlike in *Buller Coal*, where the effects of burning coal overseas were said to be independent from the activity of forming an access road to a coal mine, any effects on the environment of exporting water are not independent from their extraction.

However, although the Environment Court had determined these effects to be outside its scope, it had nonetheless gone on to consider the (competing) evidence before it regarding cultural effects of exporting the bottled water drawn from the aquifer. His Honour held:

Given the nature of the effects – metaphysical cultural effects on the iwi appellants – the majority was necessarily considering the effects in New Zealand. Further, the majority's factual finding – that there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatūānuku irrespective of where it is used – applies not only to exports but also to removal of water from the local area to other parts of New Zealand.

As a result of these factual findings, the High Court found there to have been no error of law as the majority's legal conclusion that the effects of export were beyond scope was not material to its decision.

TRONIT argued that the Environment Court's findings as to cultural effects were wrong because the Court had erred in accepting the evidence of the witness called by the consent applicant, a Ngāti Awa kaumātua and tikanga expert, over that of another Ngāti Awa kaumātua and tikanga expert called by TRONA. The Court did not accept that argument, which it considered to be founded in a question of fact rather than a question of law and so not amenable to a general appeal.

When considering the application of the nexus and remoteness principles to the effects of plastic bottles, Gault J found the Environment Court did not err.

The effects of exported plastic bottles discarded overseas were too remote because it is "implausible to apply sustainable management principles to overseas jurisdictions."

The effects of discarding plastic bottles in New Zealand required more detailed consideration, and Gault J noted a number of factors, including that it is reasonably foreseeable (if not inevitable) that some plastic bottles will be discarded and that such effects on the environment are not necessarily intangible. However, littering of plastic bottles is ultimately an activity prohibited by the Litter Act 1979. Weighing up the various factors, his Honour held that, "as a matter of fact and degree" in this case, the adverse effects on the environment of consumers discarding plastic bottles were too indirect or remote to require further consideration in the context of this application for consent to take groundwater.

Recourse to Part 2

Gault J also found that the applicable regional plans provided adequate coverage of sections 6(e), 7(a) and 8 of the RMA, in that they recognise and provide for the relationship Māori have with water and contain comprehensive provisions regarding kaitiakitanga. Further, in relation to section 8 of the RMA, the planning documents themselves require consideration of the principles of Te Tiriti o Waitangi / Treaty of Waitangi.

Consequently, the High Court held that the Environment Court majority had correctly concluded that assessing the consent application directly against the provisions in Part 2 of the RMA would not add anything to its evaluation. The Court observed that, due to the recent emergence of the NPSFM 2020, the plans are 'incomplete' in the sense that they do not yet give effect to that document. But the fact that planning documents are incomplete does not require resort to Part 2 in and of itself when considering a consent application; in that process, regard must also be had to the NPSFM 2020 directly.

The three iwi involved in the litigation have sought leave to bring further appeals to the Court of Appeal.

Waikato Regional Council transfer of water monitoring role to iwi

Another notable development in late 2020 was a decision by Waikato Regional Council formally to transfer certain water quality monitoring functions within the Lake Taupō catchment to the Tūwharetoa Māori Trust Board. The Trust Board is the legal owner of the bed of the Lake and parts of the associated rivers in the catchment (as well as the associated water column and airspace).

This is understood to be the first time that a council has invoked section 33 of the RMA – which allows council functions to be transferred “to another public authority” – to transfer functions to an iwi authority. In doing so, the Council acknowledged the ancestral relationship of the iwi with Lake Taupō and the local knowledge and the technical skill and expertise held within the Trust Board.

Mana whenua status

Director-General of Conservation v Taranaki Regional Council [2020] NZHC 3159

Last year's review highlighted the Environment Court's interim decision in *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203, which related to a proposed roading project in Taranaki, Te Ara o Te Ata: Mount Messenger Bypass.

That interim decision was appealed to the High Court, which issued its judgment in late 2020. The High Court's judgment deals again with the issue of mana whenua status in the Mangapepeke Valley, where the project is to be located. In short, the High Court held that the Environment Court had not erred in finding that the appellants, Poutama Kaitiaki Charitable Trust (Poutama) and Mr and Mrs Pascoe (who are affected landowners), have no cultural connection to the proposed affected project land that is relevant under the RMA.

The project involves replacement of a 7.4-kilometre stretch of road, which will require acquisition of 11.2 hectares of land belonging to Mr and Mrs Pascoe and temporary use of 13.5 hectares of their land. The Pascoes have lived on the property for over 30 years, and Mr Pascoe's family acquired the farm 65 years ago. They asserted that their interests in the land require recognition under Part 2 of the RMA, as they are stewards of the land and as Mrs Pascoe has a whakapapa connection to Ngāti Rahiri (a hapū unassociated with Ngāti Tama, which holds mana whenua over the area and supports the project).

Poutama joined the Pascoes in the proceedings. Poutama is a Māori grouping claiming tangata whenua and other cultural connections to the project area.

The Environment Court interim decision, discussed in the previous edition of this article, found neither Mrs Pascoe nor Poutama had established the required cultural connection as relevant under sections 6(e), 7(a), and 8 of the RMA, as there was no evidence to validate their claims.

On appeal, the High Court found there to have been no error of law. Noting that the Court must be vigilant against factual findings made by the Environment Court being relitigated, Grice J held there had been "ample evidence" upon which the Environment Court based its findings. Further, the Environment Court had been correct not to take at face value (or as determinative) Poutama's own assertions of mana whenua and kaitiaki status.

In this context, her Honour considered the decision in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whai Maia Ltd (Ngāti Maru)*, discussed in last year's review. In *Ngāti Maru*, the High Court held that where iwi or hapū claim that a particular outcome is required to meet the directions in sections 6(e), 7(a), and 8 of the RMA in accordance with tikanga Māori, RMA decision-makers must meaningfully respond to that claim. Therefore, the Environment Court may make evidential findings about tikanga-based rights, powers and/or authority insofar as that is relevant to discharge the obligations to Māori under the RMA.

Poutama and the Pascoes argued that *Ngāti Maru* supported their case that the Environment Court had erred in taking into account external evidence in ascertaining Poutama's customary interests, as opposed to focusing solely on evidence of Poutama tikanga. Grice J noted that *Ngāti Maru* was concerned with an issue which did not arise in the current case: divergent claims between tribal groupings based on recognised tangata whenua interests. The High Court in *Ngāti Maru* did refer to the methodology (the 'rule of reason' approach) adopted by the Environment Court in concluding Poutama and/or the Pascoes had not established any recognisable cultural connection. Thus, insofar as *Ngāti Maru* was relevant to affirming the jurisdiction of the Environment Court to determine the relative strengths of hapū/iwi status in an area affected by a proposal and the correct methodologies in doing so, Grice J considered it supported the findings of the Environment Court.

Grice J also emphasised the distinction between kaitiakitanga and stewardship under the RMA. Section 6(e) of the RMA refers to an "ancestral relationship" with the land. To extend the application of section 6(e) to Māori (or other) claimants who had not established such an ancestral connection would "diminish the value and importance of those rights".

Since the High Court's judgment was issued, the appellants have applied unsuccessfully for the judgment to be recalled, and are seeking to take further steps in the higher courts. The Environment Court has also recently issued a second interim decision confirming the grant of consents (and a modification to the relevant designation) for the project, which has also been appealed.

Partnership with iwi

Waka Kotahi NZ Transport Agency v Manawatū-Whanganui Regional Council [2020] NZEnvC 192

Two other recent decisions in respect of Waka Kotahi projects illustrate the myriad benefits of projects being developed in partnership with local iwi.

One relates to Te Ahu a Turanga: Manawatū Tararua Highway, a project to replace the section of State Highway 3 through the Manawatū Gorge (which was closed by slips and ongoing land instability in 2017) with a new road across the Ruahine Range, between Ashhurst and Woodville.

Since an early stage of the project, Waka Kotahi has worked in partnership with four iwi groupings who identify interests in the project area. Those partnerships, and the information provided by iwi as to how the project should best traverse a highly valued cultural landscape, were instrumental in designations being obtained for the project in 2019 and regional resource consents being granted by the Environment Court (on direct referral) following a one-day hearing in late 2020.

In its decision, the Court noted how the participatory and comprehensive nature of these partnerships has ensured that the interests and values of the four iwi groupings – Rangitāne o Manawatū, Rangitāne o Tamaki Nui-ā-Rua, Ngāti Kahungunu ki Tamaki Nui-a-Rua, and Ngāti Raukawa ki Te Tonga / Ngāti Kauwhata – will continue to be met through their ongoing involvement in the project. The Court noted (among other measures) that the four iwi groupings have formal roles in the alliance that has designed and is now building the new road, are represented on the Project Governance Board, have appointed Kaimahi to deal with day-to-day demands of the Project, and have established an Iwi Working Group to provide management-level direction to the Kaimahi and wider alliance design team.

Consequently, while all parties accepted that the project will adversely affect intrinsic cultural values in a deeply significant landscape, the Court noted the iwi partners' support of the project, including evidence given for Rangitāne o Manawatū that it was looking forward to continuing to work with the Alliance to "realise the Treaty articles of partnership and protection in the development of the project" and for Ngāti Raukawa that the partnership provides a "model for future infrastructure projects".

Ngā Ūranga ki Pito-one Shared Path – Decision under the COVID-19 Recovery (Fast-track Consenting) Act 2020

Waka Kotahi has also entered into successful partnerships with iwi in relation to the Ngā Ūranga ki Pito-one Shared Path project in Wellington. This project runs along the coast of Te Whanganui-a-Tara, an environment highly significant to Taranaki Whānui ki te Upoko o Te Ika and Ngāti Toa Rangatira.

These partnerships culminated in the creation of a Mana Whenua Steering Group (MWSG) to guide the development of the project and represent the interests of mana whenua throughout the conceptual, consenting, detailed design, and construction phases. The 'Te Ara Tupua Kaitiaki Principles' were developed to ensure that mātauranga Māori has been, and will continue to be, central in the project's design, and various consent conditions enshrine ongoing guidance by the MWSG throughout the remaining phases of the project.

The project was consented using the new fast-track process, discussed further below. In its decision the expert consenting panel described the

engagement by Waka Kotahi with mana whenua as "exemplary" and a "resounding success".

As with Te Ahu a Turanga, the partnerships between Waka Kotahi and iwi in relation to the Ngā Ūranga ki Pito-one Shared Path have led to development of a culturally appropriate infrastructure project that will provide significant flow-on benefits for iwi.

Part 2 of the RMA

Self Family Trust v Auckland Council [2020] NZEnvC 214

This case is the latest in a series of decisions dealing with the potential urbanisation of the Pūkaki Peninsula, following a request by the applicant for the Auckland Unitary Plan's (AUP) Rural Urban Boundary (RUB) to be extended to include the peninsula, with a Future Urban Zone (FUZ) applied to that land.

The Council and mana whenua, represented by Te Ākitai Waiohū, opposed this outcome. The independent hearing panel deciding on the AUP had recommended the zone should extend to the peninsula, but the Council had declined to accept this recommendation; a series of appeals and remissions to the Environment Court ensued, which are important context to this latest decision.

The High Court had directed the Environment Court to:

- revisit evidence and its conclusion on certain issues, adopting the High Court's interpretation of the relevant policies in the RPS;
- consider whether to allow additional evidence in relation to the RPS policies; and
- reconsider its overall findings taking into account the evidence called before it in 2018, any new evidence permitted to be called, the relevant statutory considerations, and the High Court's interpretation of the RPS policies.

A core consideration for the Environment Court was how the AUP approached future development of land. The development capacity of the land in question was not disputed, but at issue was whether that capacity was great enough to justify categorisation of the area for greenfields development.

In short, the Court arrived at the same overall outcome as it had previously, namely to exclude the Pūkaki Peninsula from the RUB on the basis of the significant cultural heritage and landscape values held by mana whenua over the area (only some of which were expressly recognised in the AUP). The Court urged greater consideration to be given to expressly protecting other values expressed by Te Ākitai Waiohū.

Interpretation of Treaty settlement and conservation legislation

Norman v Tūpuna Maunga o Tāmaki Makaurau Authority [2020] NZHC 3425

As practitioners will be well aware, the relatively recent implementation of co-governance, co-management, or co-ownership arrangements through Treaty settlements is an interesting area with important implications for processes under the RMA and other environmental statutes.

Such arrangements have been an increasingly common feature of both iwi-specific settlements – with well-known examples including the establishment of the Waikato River Authority, the Te Urewera Board, and arrangements in respect of the Whanganui River – and collective redress, with one such example being the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014 (Collective Redress Act).

Under the Collective Redress Act, the fee simple estate in land associated with 14 Tūpuna Maunga was vested in the 13 iwi and hāpu of Ngā Mana Whenua o Tāmaki Makaurau (Ngā Mana Whenua), with the Tūpuna Maunga o Tāmaki Makaurau Authority (Maunga Authority) established as the statutory co-governance authority for the Tūpuna maunga.

How these arrangements interact with other environmental management legislation was recently considered by the High Court in *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority*.^[1] The Court reviewed a decision by the Maunga Authority to remove 345 exotic trees from Ōwairaka/Te Ahi-kā-a-Rakataura/Mt Albert (Ōwairaka) and to replant 13,000 native plants. The appellants, a group of local residents, argued that the Maunga Authority had acted unlawfully as the decision did not comply with sections 17 and 42 of the Reserves Act 1977. They alleged the decision to have been contrary to the "protection and pleasantness" of the existing natural environment, and that the decision was not "necessary" for the "proper management or maintenance of the reserve".^[2] The applicants asserted that the Collective Redress Act was of limited relevance, insofar as it confirmed Ōwairaka was subject to the Reserves Act regime.

The High Court rejected this interpretation, and found that the Reserves Act must be read in the context of the Collective Redress Act, which establishes a "clear regime for the Maunga Authority to govern the Tūpuna Maunga, including the exercise of mana whenua and kaitiakitanga by Ngā Mana Whenua".^[3] Gwyn J considered the applicants' position to risk giving only "lip service" to the Collective Redress Act, which would thwart the purpose of the settlement.^[4]

The Collective Redress Act contains an acknowledgement by Parliament "that the Maunga are taonga and that iwi and hāpu have a unique relationship with the Maunga".^[5] Under section 109(2), the Maunga Authority must have regard to the spiritual, ancestral, cultural, customary, and historical significance of the maunga to Ngā Mana Whenua. Positioning this provision as the starting point for the Court's decision, her Honour concluded the decision taken by the Maunga Authority was "plainly open" to it.^[6]

One argument put forward for the Maunga Authority was that section 4 of the Conservation Act 1987, requiring decision-makers to give effect to the principles of Te Tiriti o Waitangi, applies to the Reserves Act 1977. Gwyn J did not find it necessary to determine this issue, as her Honour considered the position arrived at by an analysis of the Reserves Act, read in the context of the Collective Redress Act, would be no different than the outcome arrived at by application of section 4 of the Conservation Act to the Reserves Act. The Collective Redress Act reflects the Treaty principles of redress and active protection, and the co-governance structure reflects partnership.^[7] Her Honour noted that section 4 of the Conservation Act "could have greater relevance to a future case".^[8]

This decision has been appealed to the Court of Appeal with a hearing set down for later this year.

Minister of Land Information v Dromgool [2021] NZCA 44

This is the latest in a series of cases considering the role and obligations of the Minister for Land Information (the Minister) under section 186(1) of the RMA, in particular the interaction between the Public Works Act 1981 (PWA) and the RMA.

Section 186(1) provides for a network utility operator to apply to the Minister to have land required for a project acquired or taken under the PWA as if it were a government work. Here, Top Energy Ltd (TEL) sought to acquire easements under section 186(1) to enable construction of an electricity transmission line between Kaikohe and Kaitaia. The initial evaluation identified a route passing over land owned by the Office of Treaty Settlements (OTS; now Te Arawhiti – the Office for Māori Crown Relations) and land-banked for potential use as redress in settling historical Treaty claims. The land block is part of the tūrangawaewae of Te Whiu, a hapū of Ngāpuhi. As the sole remnant land available of the original ancestral lands of Te Whiu, it is important for the purposes of future cultural redress.

As OTS refused to grant easements over this land, TEL decided on an alternate route over privately held land.

The Minister gave her agreement, which the affected landowners objected to in the Environment Court. The Environment Court, which is required to write a report under section 24(7) of the PWA if there are any objections, considered the Minister's powers under section 186(1) to be "fully discretionary" and confirmed the Minister's decision.

The objectors appealed the report to the High Court. Courtney J allowed the appeal, finding that the section 186 discretion is not unfettered. Her Honour observed that a statutory power is subject to limits, even if conferred in unqualified terms, and Parliament must be taken to have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the legislation. Her Honour placed significance on the finding that section 186 of the RMA is not the source of the Minister's power to take or acquire land; that power is in section 16 of the PWA, and section 186 of the RMA merely allows a network utility operator to request the exercise of the power. Therefore, the High Court

found, the Minister ought to be taking into account the policy and objects of the PWA.

The Court of Appeal overturned the decision of the High Court, finding that under section 186(1) the Minister needs to be satisfied that the project would be capable of achieving a favourable report from the Environment Court under section 24(7) of the PWA. However, the Minister need not personally assess the merits of the potential outcomes.

The Court made some interesting comments about the interaction between the PWA and Part 2 of the RMA in this context. In particular, the Court rejected the finding made by the High Court that the Minister's power arose from section 16 of the PWA. The Court of Appeal clarified that it is the RMA which creates this power, and emphasised that part 2 of the RMA is thus a relevant consideration for the Minister in the decision, as opposed to only those considerations which arise under the PWA.

This requires the Minister to take into account the principles of the Treaty when making the decision to acquire land under section 186. The Court said:^[9]

For example, a proposal that otherwise appeared meritorious might be considered inappropriate because of its implications for land of particular cultural or spiritual value to Māori. Similarly, the facts of the present case included consideration of a potential route (the apparently less costly OTS route) over land which was land-banked for the provision of potential redress in the settlement of claims under the Treaty of Waitangi. We consider a decision made in good faith not to consent to the acquisition of such land under s 186(1) would be appropriate even if the project might otherwise be considered suitable to meet the objectives of a network utility operator.

The Court of Appeal also emphasised the importance for the Environment Court, when making its report under section 24(7) of the PWA, to consider the relevance of the Treaty. While the section does "not expressly require the Environment Court to have recourse to the Treaty of Waitangi or its principles, where the acquisition of land of significance to Māori is at issue the Treaty is clearly relevant to the Environment Court's inquiry."^[10] The statutes need to operate "in a complementary manner".^[11]

The Court of Appeal, by emphasising the relevance of Part 2 of the RMA to the PWA where the two Acts intersect, reminds decision-makers of the commanding reach of Part 2.

Treaty settlement milestones

In the latter half of 2020 and early 2021 there have been significant steps forward in a number of Treaty settlements. Deeds of settlement were signed or initialled between the Crown and Ngāti Rangitahi, Waikato-Tainui (remaining claims), Ngāti Maniapoto, Te Ākitai Waiohau, and Ngāti Maru (Taranaki).

The Moriori Claims Settlement Bill also passed its first reading.

Other reforms and developments

Proposed RMA reform

Last year's article noted the July 2020 release of the 'Randerson report', which has since been endorsed by the Government as the basis of its upcoming replacement of the RMA. That report also highlights the need for greater Māori participation in RMA processes and recommends, among other things, that:

- the Mana Whakahono a Rohe process in the RMA be redesigned to provide greater opportunities for local authorities and mana whenua to work in partnership;
- the transfer of powers and joint management agreement provisions in the RMA be improved by removing barriers to using these mechanisms; and
- a National Māori Advisory Board be established to monitor Treaty performance of central and local government from a Māori perspective.

Other details of how Māori involvement may be enhanced are not yet known.

The Government has signalled its intention that the legislation to replace the RMA (a 'Natural and Built Environments Act', and a 'Strategic Planning Act') will be formally introduced to the House by the end of 2021, and passed next year.

COVID-19 Recovery (Fast-track Consenting) Act 2020

The COVID-19 Recovery (Fast-Track Consenting) Act 2020 came into effect on 9 July 2020. The Act introduces a short-term consenting process designed to support economic recovery and generate employment opportunities in response to COVID-19. For both listed and referred projects, the Act provides significant protections for Māori interests, and section 6 of the Act requires persons acting under the Act to do so in a manner that is consistent with both the principles of the Treaty of Waitangi and Treaty settlements.

The Act has been a popular avenue for those seeking consents for eligible projects. It offers three pathways for fast-tracked consent, namely projects being listed in the Act, projects being confirmed through Orders in Council, and permitted works relating to existing infrastructure to be undertaken without requiring a resource consent.

At the time of writing, two projects (both listed in the legislation) have been successfully consented, the Ngā Ūranga ki Pito-one Shared Path (discussed above) and the Matawii Water Storage Reservoir.

The Te Tai Tokerau Water Trust lodged an application for the latter project on 10 August 2020, and resource consents were granted by the Expert Consenting Panel on 23 October 2020. The reservoir is intended to provide drinking water for Kaikohe, and to support the development of Northland's agriculture and horticulture sector (by allowing a combined 7,000ha of land to be converted to high-value horticulture). The reservoir will store 750,000

cubic metres of water, pumped from nearby streams in period of high-water flow.

The Te Tai Tokerau Water Trust hopes that Matawii water storage reservoir will be operational by next summer.

(Note: since the time of writing, two further listed projects have been approved, namely a Papakāinga development in Rāpaki and an arterial road in Queenstown.)

Marine and Coastal Area (Takutai Moana) Act 2011

The Crown has received 387 applications for direct engagement under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA), and two hundred applications under MACA have been made to the High Court. Many of these applications overlap, with 175 of the applications made to the Crown also being made to the High Court.

To date only one decision, *Re Tipene* [2016] NZHC 3199, has been released under MACA, with the applicant in that successfully being granted customary marine title. The applicant, Mr Dennis Tipene, sought an order for customary marine title on behalf of all Rakiura Māori with customary interests in the islands of Pohowaitai and Tamaitemioka, which form part of the Tītī Islands. The islands are geographically isolated and are only inhabited for the gathering of Tītī (Muttonbird) on a seasonal basis. Only those who whakapapa to the islands can go to them, unless expressly permitted by a committee. The High Court found that an order recognising customary marine title over an area adjacent to the landing zone for the islands should be made for Rakiura Māori with customary interests in the islands.

The High Court is now hearing priority applications. Both the Edwards (CIV-2011-485-817 (Te Whakatōhea)) and Clarkson (CIV-2011-485-789) cases were heard in 2020, but decisions have not yet been released. The Reeder case (CIV-2011-485-793 (Ngā Potiki)) has been set down for April 2021. Since *Re Tipene*, there have been few substantial developments in MACA jurisprudence, and the release of the Edwards and Clarkson decisions is much-anticipated.

Developments to watch for in 2021

As discussed above, significant legislative change and further developments in RMA case law and practice are expected in the year ahead, including the expected release of a National Policy Statement for Indigenous Biodiversity. Another process to monitor is stage 3 of the Waitangi Tribunal's inquiry into the National Freshwater and Geothermal Resources Claims (Wai 2358), which will focus on geothermal resources.

Ngā kupu āpiti – Notes

[1] [2020] NZHC 3425.

[2] See [40], [42]-[44].

[3] At [68].

- [\[4\]](#) At [67].
- [\[5\]](#) At [75].
- [\[6\]](#) At [75] and [90]-[94].
- [\[7\]](#) At [102].
- [\[8\]](#) At [103].
- [\[9\]](#) At [74].
- [\[10\]](#) At [121].
- [\[11\]](#) At [120].

Follow the links below for the previous reviews of Māori interests in natural resource management ([2013](#) March Māori LR 9-13; [2014](#) March Māori LR; [2015](#) March Māori LR; [2016](#) April Māori LR; [2017](#) April Māori LR; [2018](#) March Māori LR; [2019](#) April Māori LR; and [2020](#) October Māori LR).

This article was prepared by Dave Randal, Chelsea Easter, Avikesh Chandra, Manahi Moana, Honor Kelly, and Eilís Donnelly in Buddle Findlay's resource management and Māori law team, based in Wellington. Buddle Findlay acts for clients directly involved in five cases discussed in this article, namely *Waka Kotahi NZ Transport Agency v Manawatu-Whanganui Regional Council* [2020] NZEnvC 192, *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, *Director-General of Conservation v Taranaki Regional Council* [2020] NZHC 3159, *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425, and the Ngā Ūranga ki Pito-one Shared Path.

Te Kōti Matua – High Court

Arbitration – determining whakapapa not arbitrable and inconsistent with tikanga

Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board

[2021] NZHC 291
26 February 2021

Report by Craig Linkhorn

Whakataunga – Overview and result

Successful application to set aside the referral of whakapapa issues to arbitration. The Court found that it would not be consistent with tikanga Ngāti Rehua-Ngātiwai ki Aotea for an external arbitrator to determine whakapapa. Rather, it was for the kaumātua of Ngāti Rehua-Ngātiwai ki Aotea to decide.

Arbitration – stay of arbitral proceeding – abuse of process – arbitration of a person's whakapapa inconsistent with tikanga – matter of tikanga to be determined within the group exercising rangatiratanga

Date	26 February 2021
Case	Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board (537 KB PDF)
Citation	[2021] NZHC 291
Court	Te Kōti Matua – High Court
Judge(s)	Palmer J
Earlier/later decisions	<i>Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board</i> [2018] NZHC 3398; <i>Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board</i> [2017] NZHC 1155.
Legislation cited	Te Ture Whenua Māori Act 1993, ss 29, 32, 32A, 114A; Oranga Tamariki Act 1989, s 2; Resource Management Act 1991, s 2; Taumata Arowai – The Water Services Regulator Act 2020, s 5.
Cases cited	<i>Hildred v Strong</i> [2007] NZCA 475, [2008] 2 NZLR 629; <i>Carter Holt Harvey v Genesis Power Ltd</i> [2006] 3 NZLR 794 (HC); Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733; <i>Attorney-General v Ngāti Apa</i> [2003] 3 NZLR 643 (CA); Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2020] NZCA 86, [2020] NZRMA 248; Ngāti Whātua Ōrākei v Attorney-General No 1 [2020] NZHC 3120; <i>Schmidt v Rosewood Trust Ltd</i> [2003] 2 AC 709.
Overview and result	The defendants sought to have the whakapapa of two people referred to arbitration, which the plaintiffs opposed on the basis that it is contrary to tikanga Ngāti Rehua-Ngātiwai ki Aotea. The parties are two groups of beneficiaries of the Ngāti Rehua-Ngātiwai ki Aotea Trust, who are disputing a number of issues relating to the Trust. A substantive trial has been set down for five days in March 2021. A dispute arose in March 2020 about "the process for registering new applicants and reviewing the voting database" (at [10]), which was largely resolved by mediation. However, the issue of the whakapapa of two people (Person A and B) was not resolved. The mediation agreement said that a committee of 10 kaumātua would address whakapapa issues. The agreement also said that any unresolved issues will be referred to independent arbitration to make a ruling. After mediation, three kaumātua committee hui touched on the issue of the whakapapa of Person A and B. No resolution was reached, however it was unclear how much direct discussion was had on the matter. In October 2020 the defendants referred the matter to arbitration. A Tauranga barrister was appointed by the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) upon request of the defendants. The plaintiffs applied for orders setting aside the agreed process arising out of the mediation, and for the kaumātua committee validation process to continue.

	Parties can agree to arbitration of any part of a dispute during any time in the proceeding under r 7.80 of the High Court Rules 2016 and cl 8 of the Arbitration Act 1996. However, the Arbitration Act does not disturb the inherent jurisdiction of the Court, which retains its ability to stay arbitral proceedings. There is a general principle of non-interference, and a stay should only be granted where "continuance of the arbitration would be oppressive or vexatious or would otherwise constitute an abuse of the process of the Court" (at [39], quoting Randerson J in <i>Carter Holt Harvey Ltd v Genesis Power Ltd</i>). Palmer J stated that "Tikanga Māori was the first law in Aotearoa" (at [2]), and it is recognised by Acts of Parliament and the common law of New Zealand. In <i>Ngāti Whātua Ōrākei</i>, Palmer J "accepted that tikanga is law proved as fact", although a court should be cautious about "finding" tikanga as fact, because tikanga can change over time and "[a]ny recognition by a court can only be a snapshot at a certain point." (At [58].) The plaintiffs' tikanga evidence, which argued that an external barrister deciding the whakapapa of Ngāti Rehua-Ngātiwai ki Aotea was inconsistent with their tikanga, was accepted by the Court. Held, determining whakapapa in the circumstances of the case is not arbitrable, and is inconsistent with tikanga Ngāti Rehua-Ngātiwai ki Aotea. Tikanga has legal effect, in that the parties cannot legally "arbitrate about the whakapapa of Ngāti Rehua-Ngātiwai ki Aotea contrary to tikanga Ngāti Rehua-Ngātiwai ki Aotea." (At [66].)
--	--

Te Kōti Pīra Māori – Māori Appellate Court

Appeal – procedural error – substantive directions without jurisdiction

Te Maari v Hamon Lot 5 Deposited Plan South Auckland 15580 (Mangakino Pouākani Marae)

[2021] Māori Appellate Court MB 10 (2021 APPEAL 10)
23 February 2021

Report by Hinemoana Markham-Nicklin

Whakataunga – Overview and result

The lower Court had declined to inquire into the administration of the Pouākani Marae yet issued substantive directions. Appeal allowed.

Appeal – procedural error – no jurisdiction to issue substantive directions once inquiry application dismissed – appeal allowed – leave to bring appeal out of time granted	
Date	23 February 2021
Case	Te Maari v Hamon (272 KB PDF)
Citation	[2021] Māori Appellate Court MB 10 (2021 APPEAL 10)
Court	Te Kōti Pīra Māori – Māori Appellate Court
Judge(s)	Deputy Chief Judge Fox, Judges Savage and Reeves
Earlier/later decisions	Hamon v Te Maari – Lot 5 Deposited Plan South Auckland 15580 (Mangakino Pouākani Marae) (2020) 233 Waiariki MB 296 (233 WAR MB 296).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 37, 58, 237-245; Māori Land Court Rules 2011, r 8.14; Māori Reservation Regulations 1994, reg 21.
Cases cited	<i>Robertson v Gilbert</i> [2010] NZCA 429; <i>Koroniadis v Bank of New Zealand</i> [2014] NZCA 197; <i>My Noodle Ltd v Queenstown-Lakes District Council</i> [2009] NZCA 224; <i>Almond v Read</i> [2017] NZSC 80, [2017] 1 NZLR 801; Ngakoti v Department of Conservation – Ngaiotonga A3 [2019] Māori Appellate Court MB 213 (2019 APPEAL 213); Tairua v Aati – Estate of Mere Hare Kerepeti [2020] Māori Appellate Court MB 224 (2020 APPEAL 224); <i>Hamilton – Tuahu 3X (Erepeti Marae)</i> (2009) 34 Gisborne Appellate MB 230 (34 APGS 230); <i>R v Moke</i> [1966] 1 NZLR 263; Mikaere Toto – Te Reti B and C Residue Trust (2014) Māori Appellate Court MB 249 (2014 APPEAL 249); <i>Marino-Repongaere 4G (Part)</i> (2004) Gisborne Appellate MB 98 (34 APGS 98); <i>Short-Pukeroa Oruawhata Trust</i> (1997) 1 Waiariki Appellate MB 86 (1 WAR APP 86); <i>Maxwell v Parata – Maruata 2B2</i> (1994) 4 Taitokerau Appellate MB 18 (4 APWH 18)
Overview and result	The lower Court declined an application to inquire into the administration of Pouākani Marae ("Marae") yet invoked s 237 of the Act to issue substantive directions, including orders to hold an AGM and an election to fill vacant trustee positions, and to undertake a review of trust. The appellants claimed the lower Court failed to adhere to the two-step process required by reg 21 of the Māori Reservations Regulations 1994. The Court should have addressed whether to conduct the inquiry first, and then proceed in the manner appropriate, which in this case required the lower Court to conduct an inquiry and then issue directions under s 237. The appellants also expressed concern that the Judge failed to consider whether further hearings were required to receive information from affected parties. Held, appeal allowed due to procedural error and case remitted to the lower Court for rehearing.

	The lower Court's decision to dismiss the inquiry application removed the jurisdiction to issue orders or determinations under s 237. The Court disagreed with the respondent's submission that the lower Court was empowered with inherent jurisdiction to issue orders. The lower Court could only have invoked the inherent jurisdiction under s 237 through s 37(3) or through conducting an inquiry into the administration of the Marae. However, the Court agreed that it was not necessary or appropriate to invoke the lower Court's jurisdiction in the circumstances and, if it were to do so, it should give adequate notice to the parties (as required by s 37(3)). The Court had granted leave to bring the appeal out of time as this was due to an unintentional administrative error and the Court considered the interests of justice favoured granting leave to the appellants.
--	---

Te Kōti Whenua Māori – Māori Land Court

Trusts – injunction – removal of trustees – barring further proceedings

Taueki v Proctor – Horowhenua 11 (Lake) Block

(2020) 415 Aotea MB 1 (415 AOT 1)
11 May 2020

Report by Sam Taylor

Whakataunga – Overview and result

A judgment regarding applications for an interim injunction, the removal of trustees from the Horowhenua 11 Part Reservation Trust, and the prevention of further legal proceedings against the applicants under s 98C of Te Ture Whenua Māori Act 1993. The Court dismissed the injunction application, declined to reappoint Mr Sword and Mr Warrington as responsible trustees, and dismissed the application under s 98C to prevent further proceedings.

Trusts – application for interim injunction – removal of trustees – application to prevent further proceedings – breaches of trust order – acting as trustees-elect – not validly reappointed earlier – declined to reappoint	
Date	11 May 2020
Case	Taueki v Proctor – Horowhenua 11 (Lake) Block (856 KB PDF)
Citation	(2020) 415 Aotea MB 1 (414 AOT 1)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Harvey
Earlier/later decisions	Taueki v Horowhenua 11 Part Reservation Trust – Horowhenua 11 (Lake) Block (2016) 347 Aotea MB

	269-295 (347 AOT 269-295); Taueki – Horowhenua 11 (Lake) (2018) 386 Aotea MB 142 (386 AOT 142); Rudd – Horowhenua 11 Part Reservation Trust (2018) 390 Aotea MB 31 (390 AOT 31); Rudd v The Former Trustees – Horowhenua 11 Part Reservation Trust and Horowhenua 11 (Lake) (2018) 392 Aotea MB 179 (392 AOT 179).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 19, 31, 98C, 98D, 227A, 222, 223, 238, 240, 244; Māori Land Court Rules 2011, r 7.5.
Cases cited	Taueki – Horowhenua 11 Part Reservation Trust [2018] Māori Appellate Court MB 512 (2018 APPEAL 512); Te Whata v Paku – Akura Lands Trust [2011] Māori Appellate Court MB 55 (2011 APPEAL 55); <i>Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd</i> [1985] 2 NZLR 129 (CA); <i>Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd</i> [1976] VR 309; Lomax v Apatu – Awarua o Hinemanu Trust (2013) 22 Tākitimu MB 282 (22 TKT 282); <i>Roseneath Holdings Ltd v Grieve</i> [2004] 2 NZLR 168 (CA); <i>Chambers v Minchin</i> (1802) 7 Ves 186; <i>Scott v National Trust for Places of Historic Interest or Natural Beauty</i> [1998] 2 All ER 705; <i>Pitt v Holt</i> [2013] UKSC 26; <i>Aberdeen Railway Co v Blake Brothers</i> [1843-60] All ER Rep 249; <i>Boardman v Phipps</i> [1967] 2 AC 46 (HL); <i>New v Jones</i> (1833) 1 Mac & G 668n; <i>Bray v Ford</i> [1896] AC 44; <i>Re Thompson's Settlement</i> [1986] Ch 99; <i>Robinson v Pitt</i> (1734) 3P Was 249; <i>Barrett v Hartley</i> (1866) LR 2 Eq 789; <i>Rochefoucauld v Boustead</i> [1898] CH 550 (CA); <i>Willis v Barron</i> [1902] AC 271 (HL); <i>Re Macadam</i> [1945] 2 All ER 664; <i>Breakspear v Auckland</i> [2009] Ch 32; Naera v Fenwick [2013] NZCA 353; <i>Fenwick v Naera</i> [2016] 1 NZLR 354; Pook v Matchitt – Matangareka 3B [2019] Māori Appellate Court MB 167 (2019 APPEAL 167); Rātima v Sullivan – Tātaraakina C (2019) 79 Tākitimu MB 103 (79 TKT 103); <i>Marks v Orbell – Rowallan Block XIII Secs 1 and 5 Trusts</i> (2015) 28 Te Waipounamu MB 37 (28 TWP 37); <i>Wong v Burt</i> [2005] 1 NZLR 91 (CA); Rātima v Sullivan – Tātaraakina C Trust (2015) 41 Tākitimu MB 102 (41 TKT 102); Rātima v Sullivan – Tātaraakina C Trust (2017) 64 Tākitimu MB 121 (64 TKT 121); Tupe Snr v Everton – Manunui No 1 4th Residue Ahu Whenua Trust (2015) 334 Aotea MB 227 (334 AOT 227); <i>Schmidt v Rosewood Trust Limited</i> 2 AC 709 [2003] UKPC 26; <i>Erceg v Erceg</i> [2017] NZSC 28; <i>Addleman v Lambie Trustee Limited</i> [2019] NZCA 480; Adlam v Savage [2016] NZCA 454; Paki v Māori Land Court [2015] NZHC 2535; Clarke v Karaitiana [2011] NZCA 154; Rameka v Hall [2013] NZCA 203; <i>Apatu v Trustees of Owahaoko C Trust – Owahaoko C1 and C2</i> (2010) Māori Appellate Court MB 34 (2010 AP 34); <i>Perenara v Pryor – Matata 930</i> (2004) 10 Waiariki Appellate MB 233 (10 AP 233); Karena v Steedman – Te Koau A (2019) 76 Tākitimu MB 183 (76 TKT 183); Taueki v

	<i>McMillan – Horowhenua 11 (Lake)</i> (2014) 324 Aotea MB 144 (324 AOT 144).
Overview and result	A judgment considering an application for an injunction to stop the trustees of the Horowhenua 11 Part Reservation Trust (the Trust) from undertaking further earthworks around Lake Horowhenua, as well as proceedings for the removal of those trustees. During the hearing, the respondents applied for an order to restrict the applicants from bringing further proceedings against them. Held, the application for injunction was dismissed. The Court found that Mr Sword and Mr Warrington would have been removed as responsible trustees for breaching their duties, but noted that the trustees were not validly reappointed after the Māori Appellate Court quashed the earlier orders reappointing them. The Court declined to reappoint them. The application for orders barring the applicants from bringing proceedings was also dismissed.

Kōrerorero – Discussion

The history of the Lake Horowhenua litigation is extensive, but this judgment should conclude a long chapter of legal proceedings between the applicants and the respondents. The primary issues for determination by the Court were whether an injunction should be granted, whether the trustees' actions warranted their removal, and whether the applicants should be barred from bringing further proceedings.

Injunction

In relation to the injunction application, Mr Taueki had sought to prevent the trustees from further carrying out work that he believed to be causing injury to the land. He argued that the works being done caused damage and distress to land that was culturally, archaeologically and environmentally significant to the iwi. In response, the trustees submitted that the work carried out was necessary to provide critical services. They argued that there was no injunction application to be heard as all the work had already been completed and all the equipment had been removed.

The Court agreed with the trustees, noting that any injunction would have already served its purpose to maintain the status quo and the works had been completed. The Court saw no reason to grant an interim injunction. There was also a question around a permanent injunction to stop further works, but the Court saw fit to let the sole responsible trustee, Mr Hemana, deal with the issue if it arose again.

Trustee removal

Next, in determining whether or not to remove the trustees, the Court looked at the alleged breaches of the trust order in relation to the inappropriate manner in which trustee duties were delegated, the failure to manage conflicts of interests appropriately, and the failure to convene annual general meetings (AGMs).

Counsel for Mr Rudd submitted that the Trust received money from the Ministry for the Environment's Te Mana o Te Wai fund, which was then mismanaged and inappropriately delegated to a governance group. This, it was submitted, was in breach of both duties and of the trust order. The governance group was contracting with the trustees and paying them large amounts of money from funds that belonged to the Trust. However, there seemed to be no resolutions of the Trust authorising these contracts. The trustees argued that all of their conduct was consistent with the terms of reference and there had been no purposeful attempt to avoid the disclosure of the operations of the governance group.

The Court repeated well settled law, saying that the trustees could not delegate their decision-making functions to the governance group, as had been done. At most, the governance group could only ever make recommendations to the Trust, with them having to approve or decline those recommendations. Additionally, the governance group could not make decisions on the expenditure of funds that belonged to the Trust. Therefore, the Court concluded that the trustees had improperly delegated their responsibilities and in doing so, acted in breach of their duties, for which they must be held accountable.

The applicants jointly believed that some trustees who held dual roles on both the Trust and the Lake Domain Board had conflicting duties regarding negotiations around the disposal of the Rowing and Sailing Club buildings. Counsel for Mr Rudd also submitted that the situation regarding the financial arrangements where the trustees would pay themselves from funds dedicated to the health of the lake was a significant conflict of interest, exacerbated by the improper delegations to the governance group. Counsel for the trustees argued that all conflicts between the trustees who held dual roles were declared and managed appropriately, as well as perceived conflicts regarding contracts with trustees.

The Court laid out the essential principles relating to the management of conflicts of interests and noted in relation to those who held dual membership that there was not any evidence to support a substantial claim of conflict. It stated that it does not always follow that the interests of the Trust and the Domain Board will at all times be contrary. Those who hold dual roles will need to examine each set of circumstances that arises and assess the risk of conflict.

The Court then looked at whether or not the process of appointing trustees as contractors was consistent with the trust order. The Court found that it was not. Clause 12.1 of the trust order provided that trustees cannot participate in any discussions concerning a contract they may be interested in. It was not within the mandate of Mr Sword, the chairperson of the governance group as well as project manager, or the governance group itself to appoint colleagues to paid contractor roles as this was expressly contrary to the trust order. Only a meeting of trustees acting in accordance with the trust order could do such a thing. All it would have taken, said the Court, was for the interested trustees to be absent from the discussions and for those remaining trustees to approve such a course of action. Overall, the Court held that the trustees acted contrarily to the trust order and to general trust law principles.

The applicants alleged the trustees failed to comply with the trust order in failing to hold, and when needed, to reconvene AGMs. They provided some specific examples of such actions, saying there had been no valid AGMs since 2016. Counsel for the respondents submitted the breaches had been technical in nature, rather than substantive and that these failings did not damage the interests of the trust nor were they egregious in nature. However, the Court noted that there were sufficient provisions within the trust order that detailed the correct process for the running of AGMs and if they were inquired, it was clear what needed to be done. These provisions were not optional and could not be ignored. It was always open to the trustees to vary and further refine the trust order as required to suit the trust and its beneficiaries. No such variation was progressed by the trustees. In failing to organise these AGMs, the trustees denied the beneficiaries the chance to scrutinise their performance. Therefore, the trustees breached the trust order by failing to convene AGMs in strict accordance with the express provisions contained within it.

Having made these findings, the Court turned to whether or not the trustees had breached their duties sufficiently to warrant their removal. Importantly, the Court identified those acting in the capacity as trustees were actually acting as trustees-elect. The decision of the Māori Appellate Court (2018 APPEAL 512) quashed the orders appointing them as trustees and directed a rehearing. As the Court noted, the effect of that decision was to render them once again trustees-elect and any adverse findings made against them during their time as trustees-elect meant they could not be removed as they were simply trustees-elect.

The Court went on to reiterate the various breaches of trust found, and concluded that in its assessment, the most serious were the breaches of the non-delegation, non-conflict, and non-profit duties.

Overall, the Court held that Mr Sword and Mr Warrington would have been removed for breach of their trust duties if they had been validly reappointed as responsible trustees in 2016, so instead declined to reappoint them. The application to reappoint the others was adjourned until the disposal of any application for relief and the application to appoint the new trustees was granted.

Preventing further litigation

Turning to the last point regarding the respondents' application to bar the applicants from bringing further proceedings against them, the Court concluded that the applicants' conduct fell short of what was contemplated under ss 98C and 98D of the Act to justify such orders.

Trusts – removal of trustees – breach of trust – interim trustee appointed

Hutcheson v Clarkson – Mangamaire B No 2 Block

(2020) 86 Tākitimu MB 283 (86 TTK 283)
24 December 2020

Report by Hinemoana Markham-Nicklin

Whakataunga – Overview and result

Application for removal of trustees due to numerous breaches of trust. Trustees resigned. Court held that trustees would have been removed if they had not resigned. Court appointed an independent trustee to reconstruct the trust's records and ensure that accounts are properly prepared.

Trusts – removal of trustees – breach of trust – failure to provide sufficient financial records and convene trust meetings – interim trustee appointed	
Date	24 December 2020
Case	Hutcheson v Clarkson – Mangamaire B No 2 Block (379 KB PDF)
Citation	(2020) 86 Tākitimu MB 283 (86 TTK 283)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Harvey
Earlier/later decisions	Hutcheson v Clarkson – Mangamaire B2 Trust [2019] 81 Takitimu MB 52 (81 TKT 52).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 40, 43, 90, 238, 240; Trustee Act 1956, s 73.
Cases cited	Henare v Māori Trustee – Parengarenga 3G [2012] Māori Appellate Court MB 1 (2012 APPEAL 1); White v Potroz – Mohakatino Parininihi No 1C West 3A2 [2016] Māori Appellate Court MB 143 (2016 APPEAL 143); Ecreg v Ecreg [2017] NZSC 28; Rameka v Hall [2013] NZCA 203; Apatu v Puna – Owhaoko C Trust [2010] Māori Appellate Court MB 34 (2010 APPEAL 34); Clarke v Karaitiana [2011] NZCA 154; Bramley v Hiruharama Ponui Incorporation (2006) 11 Waiariki Appellate MB 144 (11 AP 144); Perenara v Pryor – Matata 930 (2004) 10 Waiariki Appellate MB 233 (10 AP 233); The Hawke's Bay Lawyers Committee of the New Zealand Law Society v Clarkson [2014] NZLCDT 29; Broadman – Waimarama 3A4B Sec 5 (2018) 66 Takitimu MB 207 (66 TKT 207); Tatare v Te Aute Trust Board – Mangatainoka No 1BC No 2C [2013] Māori Appellate Court MB 105 (2013 APPEAL 105); Pinker v Westworth – Whakarewarewa Lot 39 (2009) 349 Rotorua MB 216 (349 ROT 216); Mansfield v Pomana – Matahiwi 1A and 2 other blocks (2013) 22 Takitimu MB 123 (22 TKT 123); Hall v Opepe Farm Trust (2010) 19 Waiariki MB 258 (19 WAR 258); Rātima v Sullivan – Tataraakina C (2012) 18 Takitimu MB 75 (18 TKT 75); Taueki v McMillan –

	<i>Horowhenua 11 (Lake) Māori Reservation</i> (2004) 148 Aotea MB 27 (148 AOT 27); <i>Te Whata v Paku – Akura Lands Trust</i> [2011] Māori Appellate Court MB 55 (2011 APPEAL 55); <i>Rātima v Sullivan – Tatarakina C</i> (2019) 79 Takitimu MB 103 (79 TKT 103).
Overview and result	Application for removal of trustees due to numerous breaches of trust. The applicant claimed the trustees of Mangamaire B2 Trust (the Trust) had breached the trust order and general trustee duties and therefore sought the trustees' removal. The applicant contended that an interim trustee be appointed to investigate the management of the Trust. The Trustees agreed to resign. The Court considered three issues: (1) should a rehearing be granted concerning the decision of 24 December 2019? (2) would the trustees have been removed if they had not resigned? (3) should an interim trustee be appointed? Held, if the trustees had not resigned, they would have been removed for breach of trustee duties. While the Court emphasised that removal of trustees is a decision that requires cautious consideration of the circumstances, in this case the trustees had clearly breached their duties. The trustees had failed to provide reports on financial performance, failed to file the accounts with the Registrar, failed to engage in an independent audit and failed to convene general meetings. These breaches were sufficiently serious to warrant removal, even if the trustees had not resigned. In relation to the first issue the Court concluded that the application for rehearing be dismissed as there was no justification for the delay in responding. In relation to the third issue the Court considered that as the trustees had resigned, it could not leave the Trust without trustees so the Court appointed an independent trustee. The Court confirmed that the former trustees are appointed as advisory trustees and must cooperate with the independent trustee and undertake the orders to complete the Trust's accounts. The independent trustee must attempt to reconstruct the Trust's records and file a report within three months setting out the required actions of the Trust in order to comply with the law of trusts.

Injunction – co-owner rights

MacDonald v MacDonald – Wairau Block XII Section 6C 2C

(2021) 69 Te Waipounamu MB 251 (69 TWP 251)
17 March 2021

Report by Hinemoana Markham-Nicklin

Whakataunga – Overview and result

Application seeking an injunction to prevent a co-owner from occupying the northern third of the block and an order allowing the applicant to occupy that area. The core issue for the Court was whether an order under s 18(1)(a) of the Act for exclusive possession of part of the block in favour of one owner, can be made to the exclusion of the other co-owner. Application dismissed as the order sought was beyond the jurisdiction conferred by s 18(1)(a).

Injunction – co-owner rights – s 18(1)(a) injunction application dismissed	
Date	17 March 2021
Case	MacDonald v MacDonald – Wairau Block XII Section 6C 2C (256 KB PDF)
Citation	(2021) 69 Te Waipounamu MB 251 (69 TWP 251)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Reeves
Earlier/later decisions	MacDonald v MacDonald – Wairau Block XII Section 6C 2C [2016] Māori Appellate Court MB 259 (2016 APPEAL 259); MacDonald v MacDonald – Wairau Block XII Section 6C 2C [2016] Māori Appellate Court MB 370 (2016 APPEAL 370); MacDonald v MacDonald – Wairau Block XII Section 6C 2C (2014) 27 Te Waipounamu MB 68 (27 TWP 68).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 18, 19(1)(b).
Cases cited	<i>Mangu v Mangu – Motatau 1B3B2</i> (2000) 91 Whangarei MB 1 (91 WH 1); <i>Hiroki v Hiroki – Tikitiki B13C1A</i> (2011) 17 Tairāwhiti MB 54 (17 TRW 54).
Overview and result	The issue was whether an order under s 18(1)(a) of the Act for exclusive possession of part of the block in favour of one owner, can be made to the exclusion of a co-owner. Phillip MacDonald (Phillip) sought an interim injunction preventing Brigham MacDonald (Brigham) from occupying the northern third of the Wairau Block XII Section 6C 2C (the block) and an order allowing him to occupy that area. Brigham resides in the other two thirds of the block. Phillip asserted that Brigham intended to occupy the whole block and that this is seriously inequitable given they are co-owners. Brigham occupies a majority of the block and Phillip is seeking a smaller portion to exclusively occupy. Brigham opposes this application and insists that his occupation of the land should be confirmed.

	Held , application dismissed. The Court declined to make the order sought as to declare that one party is entitled to occupy the land to the exclusion of the other is beyond the jurisdiction conferred by s 18(1)(a). The Court recommended that the parties return to arbitration to devise a solution.
--	---

Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal

The Hauraki Settlement Overlapping Claims Inquiry Report

Waitangi Tribunal (Wai 2840, 2020)
16 December 2019

Report by Zoe Rose-Curnow

Whakataunga – Overview and result

The Waitangi Tribunal reported on its inquiry into the Hauraki Settlement overlapping claims. The Tribunal found that the Crown breached the Treaty of Waitangi in a number of ways relating to its handling of overlapping claims with consequent damage to relationships.

Ngā whakataunga tiriti – Treaty of Waitangi settlement process – overlapping claims – Pare Hauraki settlement – impact upon overlapped groups – failure to consult and act transparently – creation of fresh grievances – impact on relationships	
Date	16 December 2019
Case	The Hauraki Settlement Overlapping Claims Inquiry Report (2.8 MB PDF)
Citation	Wai 2840, 2020
Tribunal	Te Rōpū Whakamana i Te Tiriti o Waitangi - Waitangi Tribunal
Member(s)	Judge Armstrong, David Cochrane, Dr Rawinia Higgins and Dr Ruakere Hond
Prior/later parts	Decision on applications for an urgent hearing – Hauraki Collective Deed of Settlement (Wai 2616, #2.5.16; Wai 2653, #2.5.12; Wai 2666, #2.5.10; Wai 2678, #2.5.11; Wai 2735, #2.5.11; Wai 2754).
Overview and result	A number of tangata whenua groups whose traditional rohe were overlapped by the settlement area of the Pare Hauraki Collective deed of settlement sought an urgent Tribunal inquiry. The claimants argued that the Crown breached the Treaty of Waitangi through its conduct regarding the proposed redress which overlapped with the claimants' rohe. The Tribunal found that the Crown breached the Treaty by (among other things) failing to properly consult and be transparent with the claimants about

	the redress being offered to Hauraki iwi that overlapped with their own rohe. The Crown's actions created fresh grievances, and harmed relationships between iwi as well as between iwi and the Crown.
--	--

Kōrero whānui – Background

In 2018 the Pare Hauraki Collective and the Crown signed a deed of settlement. Several tangata whenua groups objected to the redress being offered to the Hauraki groups, claiming that it was within their own rohe. An urgent inquiry was sought from the Waitangi Tribunal into "the Crown's policies, processes, and conduct with respect to overlapping redress items included in the Pare Hauraki negotiations and deeds of settlement." (At 1.) The subsequent Tribunal report addresses the claims of four groups – two Tauranga Moana iwi, Ngātiwai and Ngāti Porou ki Hauraki.

The claimants alleged that the Crown "has breached the principles of the Treaty of Waitangi through its policies and processes, and as a result has incorrectly allocated redress to iwi of Hauraki", and "that the contested redress would undermine either existing or potential settlements, and significantly affect the mana whenua and mana moana rights of the claimants." (At 1.)

Of particular concern to the claimants was the inclusion of Hauraki iwi in the Tauranga Moana Framework, which was "developed between 2010 and 2012 as a co-governance mechanism for managing and protecting" the Tauranga Harbour (at 37). There were originally four seats on the framework's governance group, but later Hauraki iwi expressed a desire for representation as well. The Crown agreed to include Hauraki iwi on the governance group. However, it was agreed that a clause adding Hauraki as the fifth seat would be removed from the proposed Hauraki Collective deed of settlement as there were still contentions between iwi as to any Hauraki iwi place on the group. In fact, the Hauraki position on the governance group was, unbeknown to the claimants until accidentally revealed shortly before the Hauraki deed was signed, kept in the deed in a "preservation clause."

The Crown did not concede there had been a Treaty breach and argued that "it made reasonably informed decisions against its own criteria, and that its decisions and actions complied with its duties" (at 5).

At the centre of the dispute were aspects of the Crown's published guide to Treaty settlement negotiations, the so-called "Red Book" - entitled "Ka Tika a Muri, Ka Tika a Mua / Healing the Past, Building a Future". The Red Book was characterised as the only publicly available Crown policy on Treaty settlements.

The claimants alleged that statements in the book on the Crown's policy regarding overlapping interests falls short of compliance with Te Tiriti o Waitangi - the Treaty of Waitangi. The Crown submitted that the book supplies "general commentary" only and cannot be seen as "a fulsome exposition of what the Crown does in order to determine redress in

overlapping contexts." (At 27.) The Crown submitted that "[w]hat matters is not the existence or content of any 'policy' but what the Crown does." (At 31.)

Kōrerorero – Discussion

Consulting on redress proposals

The claimants submitted that they were not consulted on the Tauranga Moana Framework preservation clause. The Crown considered that it only needed to consult on overlapping issues with other groups about "truly major issues". The timing of the consultation was also an issue for Tauranga Iwi as they had repeatedly asked for information on the redress proposed to Hauraki, only to be sent some information just days before the initialling.

The Tribunal considered that "[l]ate disclosure with hurried timeframes to respond, especially against the background of settlement deeds that are about to be initialled, is not a fulsome, robust consultation process." (At 75.) The Crown was attempting to progress the Hauraki settlement and avoid any delay, but the Tribunal found that this should have been outweighed by avoiding creating fresh grievances.

The Crown breached its partnership obligation and its duty to consult.

Transparency: disclosing and sharing information

The claimants said that despite repeated requests, there was a lack of information and transparency about Pare Hauraki's interests in Tauranga Moana. In particular, on the "preservation clause allowing Hauraki representation on the Tauranga Moana Framework governance group." (At 76.) The Crown said it is usual practice not to release draft settlement documents to third parties, and if the negotiating group requested confidentiality, the Crown would honour this.

The Tribunal found that the Crown's practice of not sharing information on overlapping interests means groups cannot understand the basis on which redress is offered. In the Tribunal's view this is flawed practice, and "it is not good enough for the Crown to say Hauraki did not wish the information to be shared" (at 79).

By failing to communicate openly and share information with the claimants the Crown breached: (at 80)

- the principles of partnership and active protection;
- its duty to act honourably and in good faith to all iwi and not just the settling group; and
- its obligation to protect or preserve amicable tribal relationships.

The Crown's understanding of customary interests

The claimants submitted that the Crown failed to understand Hauraki iwi customary interests within their rohe, which "affected who the Crown negotiated with, inter- and intra-iwi relationships, and the nature of the redress the Crown proposed." (At 81.)

The Tribunal considered that (at 82):

[T]he Crown's failure lay not so much in its efforts to establish Hauraki's customary interests, but the inadequate process it followed to test out its understanding of those interests with Tauranga iwi and Ngātiwai when developing redress proposals.

The effects of offering groups redress items in the rohe of other iwi

The claimants submitted that the contested redress being offered to Hauraki iwi gives them "direct engagement and decision-making ability on matters relating to Tauranga Moana" and diminishes the claimants' own mana whenua and rangatiratanga (at 83). The Crown said that that "settlement redress is not intended as a reflection of mana whenua." (At 84.) However, the Tribunal said that this is "often precisely how redress is perceived: as an expression of a group's mana whenua status within the rohe in which the redress lies." (At 84.) Therefore, the Tribunal found, "it is necessary for the Crown to engage in robust consultation and facilitate full information-sharing among parties before offering redress" (at 85).

The use of tikanga-based processes to resolve conflict over redress

The claimants submitted that the Crown did not encourage using tikanga-based processes and, where tikanga was followed and agreements reached between iwi, the Crown ignored these. The Crown said that a compulsory tikanga-based process would "put the Crown in breach of article 2 of the Treaty by undermining the rangatiratanga of iwi, and would also adversely affect Māori-Crown relations." (At 86.) If settled groups were required to agree to redress for iwi who are yet to settle, this would vest in the settled group "a de facto power of veto".

The Tribunal found that the Crown "failed to properly encourage, support, and facilitate" tikanga-based processes (at 86), and "prioritised a speedy settlement over preventing further grievances" (at 89). This breached the Crown's duty to avoid creating fresh grievances, and "[a]s a result, it has prejudicially affected iwi with overlapping interests and breached the principles of partnership, good faith, and active protection." (At 92.)

Protecting all parties and maintaining relationships

The claimant groups described relationship breakdowns between them and the Crown, and between the affected iwi due to the Crown's redress decisions. The Crown submitted that upholding a duty to one iwi may have an impact on another.

The Tribunal found that "the Crown has a duty to protect all parties, whether settled or not, and to promote and maintain relationships with all tangata whenua groups." It agreed that this was a challenging task but said that "it does not exempt the Crown from criticism when it acts in a way inconsistent with maintaining positive relationships." (At 93.)

The Crown's actions, which have been detrimental to relationships across the board, breached the Treaty principles of partnership and active protection.

Providing additional redress after reaching initial agreements

The claimants argued that the Crown offered Hauraki iwi redress over and above what was originally agreed to, which the Crown refuted. The Tribunal agreed that the Crown's offers did go further than was agreed. In particular, the preservation clause was inserted without proper consultation. This was a breach of the principle of active protection and of the duty to avoid creating fresh grievances.

Contested redress: reconsidering or proposing alternative redress

The claimants said that when they expressed concerns about proposed redress items, the Crown failed to consider offering alternatives. For example, other properties instead of contentious overlapping ones. The Crown said that it "could not 'disregard the rangatiratanga of Hauraki iwi by retracting their redress just because that was what other iwi sought.'" (At 100.) It further submitted that the Crown "had in fact reconsidered or amended certain redress items that it had originally proposed." (At 100.)

The Tribunal accepted that the Crown was willing to revise redress offers or develop alternatives on occasion. However, it said the Crown "must balance the interests of multiple parties and be fair to them all, not just the one it happens to be negotiating with at the time." (At 101.)

Summary of findings

The Tribunal found (at 117-118):

- *Ka Tika a Muri, ka Tika a Mua* (the Red Book) is vague, unhelpful, inadequate, and inaccurate as a statement of Crown policy and practice to inform Māori. The Tribunal noted particular concern that it had not been amended in light of the very clear recommendations set out in *The Tāmaki Makaurau Settlement Process Report* more than 12 years ago.
- In failing to carry out a proper consultation process, the Crown breached its partnership obligation, and its duty to consult.
- In failing to share information with and between all groups, the Crown breached:
 - the principles of partnership and active protection;
 - its duty to act honourably and in good faith to all iwi and not just the settling group; and
 - its obligation to protect or preserve amicable tribal relationships.
- The Crown's conduct has also created fresh grievances, fractured relationships, and caused further delays to the settlement process.

- By failing to properly promote, allow for, and facilitate tikanga-based processes, the Crown breached its duty to avoid creating fresh grievances. The resulting prejudice to iwi with overlapping interests breached the principles of partnership, good faith, and active protection.
- The Crown did not act in a way that protected all parties and maintained relationships between iwi and with the Crown. This breached the Treaty principles of partnership and active protection, and caused fresh grievances.

Recommendations

The Tribunal recommended (at 118):

- that the legislation giving effect to the Pare Hauraki Collective settlement deed, and the individual Hauraki iwi settlement deeds, does not proceed until the contested redress items have been through a proper overlapping claims process as set out in this report;
- that the Crown, when undertaking overlapping engagement processes during settlement negotiations, fully commits to and facilitates consultation, information-sharing, and the use of tikanga-based resolution processes that reflect the principles identified in chapters 3 and 5 of this report; and
- that the Crown amends the Red Book to record current policies, processes, and practices, and in particular to:
 - explicitly acknowledge the Crown's commitment to consultation, information-sharing, and tikanga-based resolution processes at the appropriate times; and
 - include the principles on which those processes should be based, taking into account the findings in this report, and other Waitangi Tribunal reports, concerning overlapping interest claims.

Poutu te rangi 2021 – additional content online

Te Kōti Whenua Māori – Māori Land Court

[Chief Judge's powers](#) – succession – whāngai – ōhākī – Rata – *Paretuaoroa Paretekora and Haki Rata* (2021) Chief Judge's MB 106 (2021 CJ MB 106) – Hinemoana Markham-Nicklin

[Procedure](#) – transfer proceedings to the High Court – *Huata v Gotty* – *Lot 2 Deposited Plan 1996* (formerly Mangaroa 26N2 Block) (2021) 87 Tākitimu MB 251 (87 TKT 251-257) – Hinemoana Markham-Nicklin

[Partition](#) – granted – house building purpose – *Couch - Rāpaki Māori Reservation 875 Section 8B1* (2021) 69 Te Waipounamu MB 235 (69 TWP 235) – Hinemoana Markham-Nicklin

[Māori Incorporations](#) – conflict of interest – maintenance of records – *Kani v MacDonald* – *Waimārama 3A6B6B* (2021) 88 Tākitimu MB 148 (88 TKT 148) – Hinemoana Markham-Nicklin