

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Indigenous children and State care

He Pāharakeke, he Rito Whakakīkinga Whāruarua

Waitangi Tribunal (Wai 2915, 2021)

Report by Zoe Rose-Curnow

Hei tīmatanga – Introduction

The Waitangi Tribunal has released its report on its urgent inquiry into Oranga Tamariki, the Ministry for Children. The Tribunal found a number of Crown breaches of the Treaty of Waitangi, the most pervasive being Crown policy in place since the 1850s to assimilate Māori. The Tribunal examined changes to Oranga Tamariki as an organisation, introduced from 2017, and found that these are not enough to make the organisation's work Treaty compliant. The Tribunal recommended that an independent Māori Transition Authority be established to "identify the changes necessary to eliminate the need for State care of tamariki Māori."

(Continued at p 3)

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Indigenous children and State care – assimilation – independent Māori authority	
Date	29 April 2021
Case	He Pāharakeke, he Rito Whakakīkinga Whāruarua (7.1 MB PDF)
Citation	Wai 2915, 2021
Tribunal	Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal
Member(s)	Judge Doogan (Presiding Officer), Professor Rawinia Higgins, Kim Ngarimu and Professor William Te Rangiuā Temara
Prior/later parts	
Overview and result	Following the controversial and highly publicised "Hastings uplift" where Crown officials seized a baby from its mother, a number of investigations into Oranga Tamaki were launched, including an urgent inquiry by the Waitangi Tribunal. The Tribunal examined the reasons for the high disparity in the proportion of Māori and non-Māori children in State care, changes introduced since 2017, and what additional changes may be required. The Crown admitted that there is disparity in the number of Māori in care, and there had been breaches of the Treaty prior to 2017. However, the Crown argued that policy and practice changes introduced since then would improve this disparity. The Tribunal acknowledged the changes that have been made since 2017, and noted that there has been some progress made. However, it considered this progress was not enough, recommending an independent Māori authority be established so State care of tamariki Māori could be eliminated.

Kōrero whānui – Background

In 2017, Oranga Tamariki replaced Child, Youth and Family as the government department charged with ensuring the care and protection of vulnerable children.

In May 2019, Oranga Tamariki attempted to uplift a newborn baby from a Māori mother at Hastings Hospital. The incident was reported on Newshub and gained national attention and outcry. Following this, a number of investigations into Oranga Tamaki were launched, including an urgent inquiry from the Waitangi Tribunal. The Tribunal received 51 claims between November 2019 and July 2020.

The overarching issue the claims raise is that policies and practices, inconsistent with te Tiriti, have caused significant and irreversible prejudice to tamariki Māori taken into State care, as well as their whānau, hapū, and iwi. This prejudice, the claimants allege, is exacerbated by the

disproportionately high number of tamariki Māori continuing to enter the State care and protection system. (At 1.)

The Crown conceded that there was a "significant disparity between the number of tamariki Māori and non-Māori being taken into the State care", and further submitted that "since Oranga Tamariki's inception this 'disparity may be reducing'." (At 4.) The Crown also conceded that "structural racism is a feature of Oranga Tamariki and its predecessors", and "historically, Māori perspectives and solutions have been ignored across the care and protection system." (At 6.)

A focus of the report was the 1988 Ministerial Advisory Committee report Puao-Te-Ata-Tu. The report resulted from the then Minister of Social Welfare having appointed a committee to "investigate and report on the operations of the department from a Māori perspective". Part of the report called for changes to legislation, and to the "operations of the courts relating to care of Māori children." (At 33.)

The Crown acknowledged that it had not fully implemented the recommendations of Puao-Te-Ata-Tu.

Issues

The issues identified by the Tribunal were: (at 4)

- (a) Why has there been such a significant and consistent disparity between the number of tamariki Māori and non-Māori children being taken into state care under the auspices of Oranga Tamariki and its predecessors?
- (b) To what extent will the legislative policy and practice changes introduced since 2017, and currently being implemented, change this disparity for the better?
- (c) What (if any) additional changes to Crown legislation, policy or practice might be required in order to secure outcomes consistent with te Tiriti / the Treaty and its principles?

Kōrerorero – Discussion

Treaty principles

In its articulation of applicable Tiriti / Treaty principles, the Tribunal paid particular attention to the text of article 2 and its guarantee of tino rangatiranga over kāinga. The Tribunal noted (at 12):

Kāinga captures a range of meaning, including a village or a home. Continuity of chiefly authority over not just land and resources, but also the people is directly guaranteed in the Māori text of te Tiriti / the Treaty. This is nothing less than a guarantee of the right to continue to organise and live as Māori. Fundamental to that is the right to care for and raise the next generation.

Causes of disparity

As discussed, the parties agreed there is disparity between the proportion of Māori compared to non-Māori children in State care. The Tribunal inquired into the reasons for this disparity.

Although the total number of children entering State care has decreased since 2000, the proportion of tamariki Māori has increased. "between 2000 and 2018, the incidence of tamariki Māori aged 16 and under in State care rose from one in every 125 Māori children, to one in every 64." Tamariki Māori are 25 percent of the total population of children, but they "accounted for over 60 per cent of the entries into care from 2015 to 2019". (At 94.)

Colonisation

The claimants submitted that colonisation and structural racism is the reason why care and protection systems have been unable to address this disparity. The injustices following colonisation included the loss of land, resources, traditional relationships, te reo Māori and tikanga.

The Crown accepted that colonisation and structural racism "have been significant contributing factors to the disparate number of Māori and non-Māori tamariki being taken into care." (At 55.) The Crown recognised that the disparity is unacceptable.

The Tribunal commented that all parties rightly considered the statistics on the disparity are unacceptable, and acknowledged the significant role that colonisation plays in the disparity. However, the Tribunal found that the disparity is also due to Oranga Tamariki's policies, procedures, and practices, and "the Crown's failure to honour the Māori right to cultural continuity embodied in the article 2 guarantee of tino rangatiratanga over their kāinga." The Crown breached this Treaty guarantee – starting in the nineteenth century, and continuing to the present day.

Crown control

The claimants submitted that a 'fundamental power imbalance' results from Oranga Tamariki being controlled by the Crown, which "perpetuates a structurally racist system and is a significant cause of disparity." (At 56.) Māori are denied the opportunity to be involved in the care and protection of tamariki Māori.

The Crown's approach has been based on a Pākehā framework which views a child's wellbeing and best interests "as the first and paramount consideration' and regard the child as distinct, and able to be disconnected from the whānau" (at 61). This supersedes "tamariki ancestral roles, responsibilities, and accountability to whānau, hapu and iwi". (At 61.)

The Crown conceded that Māori perspectives and solutions have been ignored in the past, and that "Oranga Tamariki needs to continue to partner and engage with Māori to deliver better outcomes for tamariki Māori." (At 59.) However, the Crown submitted that it "has an ongoing responsibility to provide a care and protection system." (At 58.)

The Crown unilaterally "developed and implemented policy and legislation from the late nineteenth and early twentieth centuries onwards", and there is little evidence of Treaty partnership in this. (At 98.) The Tribunal found that the Crown breached the partnership principle "in the design and implementation of the current legislation and policy concerning the care and protection of tamariki Māori". (At 99.)

The Tribunal found that the Crown breached the principle of active protection by failing to "direct reliable and proportionate resources towards laying a durable foundation for whānau Māori to thrive as Māori." (At 99.)

Notify-investigate model

Under the notify-investigate model Oranga Tamariki receives reports of concern from professionals and members of public. The claimants supported evidence that this model "reproduces social inequities and compounds societal racism and exposure bias at every decision point." (At 65.) Visible minorities are more likely to be noticed, and poorer communities are more likely to be exposed to people and agencies who would report them.

The Crown acknowledged that structural racism means more tamariki Māori are reported to it than non-Māori children, and that it "should have identified the need to tackle structural racism head-on when it established Oranga Tamariki." (At 65.)

The Tribunal found that the model causes significant prejudice to Māori, but noted that in the short term there was "no easily identifiable alternative." (At 102.) Even a preventative model (rather than reactive model), as argued for by the claimants, may still need a notify-investigate mechanism.

Cultural competency

The claimants pointed to a lack of cultural competency and understanding of tikanga Māori within Oranga Tamariki. This contributes to poor practice and the disparity in the number of Māori being taken into care.

The Crown acknowledged cultural competency was previously lacking, but submitted that it has been working to improve this by "increasing workforce training and recruiting more culturally competent staff." (At 67.)

The Tribunal found that the Crown failed to ensure Oranga Tamariki's workforce is adequately trained, and breached its Treaty obligations prior to 2017. However, the Tribunal acknowledged that "new frameworks and training have been implemented since 2017 to ensure cultural competency." (At 104.)

Variable practice

Claimants said that variable practice between Oranga Tamariki sites leads to "inconsistent and prejudicial results for tamariki Māori". One social worker may interpret a situation differently from another and be more likely to uplift tamariki Māori. There were some witnesses who spoke to the benefits of cultural variability and the partnerships that district offices have with local Māori organisations.

High caseloads were another factor that claimants made submissions about. This hindered the social worker's ability to form relationships with whānau and to make fully informed decisions on each case. The wide discretion afforded to social workers also had the potential for bias and variable decision-making

The Crown accepted that there were differences in practice across Oranga Tamariki, and large and complex case loads make it more difficult for social workers. It also conceded that "there is institutional bias within Oranga Tamariki and that the culture of the organisation needs improvement." (At 74.)

The Tribunal noted that the data showed that Māori are "perceived to be more at risk than their Pākehā counterparts at each stage." It found that, "prior to 2017, Oranga Tamariki did not exhibit best practice" (at 105), and that: (at 104)

[T]here is sufficient evidence to conclude the presence of concerning site variability encompassing culture, site size, social worker workloads, discretion, power, and decision-making.

Family group conferences

In family group conferences (FGC), whānau, hapū, and iwi meet with social workers and other professionals to discuss a plan for a child. Claimants submitted that FGC "processes perpetuate structural racism, lack tikanga, and do not assess Māori according to their own worldview." (At 75.) Whānau are not properly informed of the FGC processes, and social workers often come to a FGC with pre-determined plans. The Crown acknowledged that FGC's can be problematic and that several initiatives have been introduced since 2017 to improve the efficacy and outcomes of the FGC.

The Tribunal concluded that due to the deficiencies in the FGC process prior to 2017 (at 105):

...whānau, hapū, and iwi were not able to participate meaningfully in decision-making regarding their tamariki. In this respect, the Crown did not fulfill its obligations to protect rangatiratanga over kāinga.

Uplift practices

Custody orders allow Oranga Tamariki to uplift children without prior notice. The claimants noted that these are supposed to be used in limited circumstances but they "appear to be default practice when removing children." (At 78.) "Without notice" uplifts were described by the claimants as being a particular reason that they fear and mistrust Oranga Tamariki. The Crown argued that uplift orders have decreased significantly since 2017, and that uplift practices have also changed since the publicised Hastings uplift in 2019.

The Tribunal noted that over the past five years, over 90 per cent of Māori uplifts were executed 'without notice'. It found that, prior to 2017, the Crown "failed to meet its Tiriti / Treaty duties to protect Māori tino rangatiratanga." (At 106.)

Summary of findings on disparity

The Tribunal found that before 2017 the Crown breached its te Tiriti "obligation to honour the right of Māori to exercise tino rangatiratanga over their kāinga and taonga" by: (at 109)

- failing to implement the recommendations of Puao-Te-Ata-Tu to address systemic racism in the State care and protection system, and subsequently failing to support and enable Māori attempts to arrest and reverse the flow of tamariki Māori into State care;
- maintaining a care and protection system characterised by asymmetrical control and leadership;
- maintaining a care and protection system which in operation continues to reflect and prioritise Eurocentric thinking, values, and practices;
- failing to ensure that Oranga Tamariki's workforce is adequately trained to have a requisite level of cultural competency;
- failing to monitor and regulate substantive and prejudicial differences in site culture and practice, and social worker practice, discretion, power, and decision-making;
- failing to address persistent problems inhibiting the decision-making ability of whānau in family group conferences;
- using section 78 uplift powers in ways that perpetuate and compound issues of structural racism, and contribute to the disparate rates of Māori and non-Māori tamariki being taken into care; and
- failing to oversee and consistently apply mechanisms for the monitoring and accountability of social work practice.

Changes to policy, practice and legislation since 2017

After examining the causes of the disparity, the Tribunal looked at whether the situation for Māori has improved, or is likely to improve, since the legislation and policy changes introduced in 2017.

Section 7AA

Section 7AA of the Oranga Tamariki Act 1989 (the Act) sets out duties for the chief executive to recognise the Treaty and "reduc[e] disparities by setting measurable outcomes for Māori children and young persons who come to the attention of the department". The claimants argued that s 7AA is not enough – it "might help to reduce disparities but Māori want equity." (At 113.) References to the Treaty which only require a "practical commitment" are merely tokenistic.

The Crown recognised that "section 7AA is not a complete answer to addressing the disparity", but it was a "significant step" and it is driving changes for improvements in outcomes for tamariki Māori.

The Tribunal considered that Treaty-related provisions in the legislation conflict with other provisions, such as the best interests of the child being the paramount consideration (the deciders of the child's best interests not typically being Māori). It agreed with claimants that the Treaty provisions are "not strong enough to require that the Crown comply with its Tiriti / Treaty obligations." (At 154.)

The Tribunal concluded (at 155):

any attempts to broadly reform the philosophy and operations of Oranga Tamariki – within existing parameters – will not succeed. While ameliorative measures may succeed in reducing disparity in

certain areas for periods of time, we consider that unless the core precepts of the care and protection system are realigned, with power and responsibility returned to Māori, disparity will be a persistent feature of the system

Planned partial repeal of the 'subsequent child' provisions

Subsequent child provisions require a parent that has previously had a child removed (or been convicted of murder, manslaughter, or infanticide) to prove that they can provide a safe environment for subsequent children.

The claimants said that these provisions disproportionately prejudice Māori. The Children's Commissioner also opposed the provisions, stating that these shift the onus of proof onto parents, rather than Oranga Tamariki having to prove that the parents couldn't safely look after the child(ren).

The Crown submitted to the Tribunal that it plans to partially repeal the provisions in 2022, and afterwards they will only apply where a parent has been convicted of murder, manslaughter or infanticide.

The Tribunal noted that it was troubled by the apparent delay in repealing these provisions, and said that until the planned repeal occurs there will be a "continuing breach of the duty to act in good faith central to the partnership principle and to actively protect Māori rangatiratanga over their kāinga." (At 156.)

Partnerships

Section 7AA states that "Oranga Tamariki must seek to develop strategic partnerships with iwi and Māori organisations, including iwi authorities". The claimants asserted that the Crown is struggling to meet these partnership obligations. Further, there is a power imbalance between the parties, and the onus is on Māori to initiate partnerships. The Crown only has to accept partnership applications, not carefully consider or accept them. Further, Oranga Tamariki will only partner with iwi and large organisations, at the expense of small ones.

The Crown stated that its partnerships are key to addressing the disparity and its work with strategic partners is showing positive results.

The Tribunal acknowledged that in some cases these partnerships can produce positive results. However, the evidence shows that this does not "reflect the entire partnership landscape." (At 156.) The current model impedes smaller Māori organisations, and the unbalanced nature of the partnerships means that the Crown is still failing to comply with the principle of partnership.

Changes to procurement policies

The claimants asserted that changes Oranga Tamariki has made to its procurement policies since 2017 are insufficient to reduce disparities, and "favour existing and largely Pākehā providers of social services." (At 127.)

The Crown acknowledged that, in the past, procurement used to be ad hoc and this has undermined collaboration with Māori. However, it submitted that its new model "embodies a Māori-centred practice framework" and

allows it to engage more widely with Māori organisations (at 128). Funding to Māori organisations has increased 65 per cent since 2017, and equates to 24 per cent of total funding.

The Tribunal was concerned about procurement practices that prioritise non-Māori service providers and agreed with the claimants that "Māori should play a more active role in determining who Oranga Tamariki contracts." (At 157.)

Changes to monitoring and accountability

Claimants said that Oranga Tamariki lacks external accountability, and without it "tamariki Māori and whānau will continue to experience negative outcomes." (At 129.) Staff behaviour is monitored internally, and the Ministry's staff are not accountable to whānau.

The Crown noted that Oranga Tamariki has new internal monitoring and quality assurance mechanisms. Further, an independent statutory body began monitoring Oranga Tamariki in July 2019. The Ministry of Social Development is also drafting "legislation to encompass the mechanisms and functions for independent oversight of the Oranga Tamariki system" (at 130).

The Tribunal welcomed Oranga Tamariki's changes, but considered that the lack of effective outside oversight is "one of the factors behind the inconsistency of practise". (At 158.)

Changes to permanent placement policies and practice

The 'Noho Ake Oranga' policy "encourages permanency and continuity in placements for vulnerable tamariki". (At 131.) The claimants said that Oranga Tamariki staff are preoccupied with permanent placement and that it "contributes to high rates of removal of tamariki Māori from their whānau." (At 131.) They claimed the "Hastings uplift" was characteristic of this, with permanent placement being considered while the mother was still pregnant.

Oranga Tamariki conceded that the policy "may not be fit for purpose in light of the changes made" to the Act, and Tamariki Māori are over-represented in permanent care placements.

The Tribunal agreed that the 'Noho Ake Oranga' policy was incompatible with section 7AA responsibilities, but noted that in late February 2021, it "has been replaced by a policy titled '[e]nsuring a safe, stable and loving home for tamariki in care'." (At 131.) Under this new policy, tamariki should only be placed with non-whānau in exceptional circumstances.

Changes to cultural competency

The claimants acknowledged the Ministry's efforts to increase cultural competency since 2017. However, the claimants still considered there to be "an ongoing lack of cultural competency", and questioned whether Māori were involved in policy development (at 135).

The Crown pointed to a number of developments since 2017 including a Māori Cultural Framework, new Māori specialist roles, and the introduction of hui-ā-whānau following reports of concern.

The Tribunal welcomed these developments, but noted that there was not enough evidence to say whether the situation has improved. Further cultural competency "is not a long-term solution to the problem of Crown intrusion into the domain of rangatiratanga." (At 160.)

Changes to section 78 uplift practices

The "Hastings uplift" from which this inquiry stems, involved a pēpi Māori being uplifted by Oranga Tamariki under a section 78 'without notice' order. The claimants acknowledged that changes had been made to approvals for uplift orders following this event. However, the claimants said that deficiencies remain. Tamariki Māori are still unjustifiably uplifted under section 78 orders.

The Crown responded that the number of without notice uplifts are expected to drop after the changes. Data also shows that the number of section 78 orders granted for tamariki Māori have been reducing since 2017. The Crown also submitted that "certain situations warrant the use of section 78 applications." (At 143.)

The Tribunal noted that the reduction in uplifts is positive. However the Tribunal said it "cannot overstate the breach of trust and good faith inherent in Oranga Tamariki's inconsistent and often unnecessary application of 'without notice' uplift protocols" (at 160).

Summary of findings on changes since 2017

The Tribunal found that since 2017 the Crown breached its Tiriti "obligation to honour the right of Māori to exercise tino rangatiratanga over their kāinga and taonga" by: (at 162)

- failing to partially repeal the subsequent child provisions;
- continuing to operate an inequitable and asymmetrical model in respect of partnerships and procurement;
- failing to oversee and consistently apply mechanisms for monitoring and accountability of social work practice, and by failing to apply best practices in terms of data collection and quality;
- failing to meaningfully reform permanency policy;
- failing to address persistent problems in the operation of family group conferences; and by inconsistent and unnecessary use of section 78 uplift protocols across a number of cases prior to mid-2019; and
- failing to ensure that te Tiriti / the Treaty provisions in the Oranga Tamariki Act 1989 are effective and clear.

Recommendations

The Tribunal's primary recommendation was "that the Crown steps back from further intrusion into what was reserved to Māori under te Tiriti / the Treaty, and allow Māori to reclaim their space" (at 185). To achieve this, it

recommended that a Māori Transition Authority be established. The Tribunal described it as being: (at 186)

[I]ndependent of the Crown and its departments. Its function will be to identify the changes necessary to eliminate the State care of tamariki Māori, and realise the vision that Oranga Tamariki has set for itself, that no tamaiti Māori will need State care.

The Tribunal believes a suitable body for this Authority already exists – the governance group for the Māori-led inquiry into Oranga Tamariki.

The Tribunal concluded its report by reflecting on the event which started this inquiry – the "Hastings uplift". It commended the mother and her family for allowing the story to be published, and said that during the hearings they were permitted to meet the mother and child – who they described as a "healthy and happy young man" (at 191).

The Tribunal recommended that "all ministers who carry the responsibility to decide what happens next, first make time to watch the Newsroom documentary of the attempted uplift in Hastings in May 2019" (at 191).

Te Kōti Matua – High Court

Judicial review – remedies recommendations – tikanga Māori

Mercury NZ Ltd v Waitangi Tribunal

[2021] NZHC 654
30 March 2021

Report by Carwyn Jones

Whakataunga – Overview and result

Partially successful judicial review of a preliminary decision of the Waitangi Tribunal to use its resumption powers to return two areas of land to Ngāti Kahungunu ownership. The decision was set aside and sent back to the Tribunal to reconsider.

Judicial review – remedies recommendations – legal requirements – tikanga Māori in a tikanga-compromised world – tikanga is the applicable law	
Date	30 March 2021
Case	Mercury NZ Ltd v Waitangi Tribunal (548 KB PDF)
Citation	[2021] NZHC 654
Court	Te Kōti Matua – High Court
Judge(s)	Cooke J

Earlier/later decisions	Mercury NZ Ltd v Waitangi Tribunal [2020] NZHC 598; Decision preliminary to interim recommendations Wai 863, #2.835.
Legislation cited	High Court Rules 2016, Part 30; Judicial Review Procedure Act 2016, s 11; Treaty of Waitangi Act 1975, ss 5, 6, 8A, 8C, 8H, 8HA, 8HB; State-Owned Enterprises Act 1986, ss 9, 27; New Zealand Bill of Rights Act 1990, ss 6, 27; Public Works Act 1981; Treaty of Waitangi (State Enterprises) Act 1988, Preamble; Interpretation Act 1999, s 5; Crown Forests Assets Act 1989, cl 2, 3, 6, 15, s 36; Raukawa Claims Settlement Act 2014; Central North Island Forests Land Collections Settlement Act 2008, clause 4(2) of Schedule 2.
Cases cited	<i>New Zealand Māori Council v Attorney-General</i> [1987] 1 NZLR 641 (CA); Haronga v Waitangi Tribunal & Others [2011] NZSC 53, [2012] 2 NZLR 53; <i>Marlborough Aquaculture Ltd v Chief Executive of Ministry of Fisheries</i> [2003] NZAR 362; <i>Zhao v New Zealand Law Society</i> [2012] NZHC 2169, [2012] NZAR 894; <i>Singh v Chief Executive Ministry of Business, Innovation and Employment</i> [2014] NZCA 220, [2014] 3 NZLR 23; <i>A Lawyer v New Zealand Law Society</i> [2019] NZHC 1961; Raukawa Settlement Trust v Waitangi Tribunal [2019] NZHC 383, [2019] 3 NZLR 722; <i>Te Heu Heu & Tūwharetoa Māori Trust Board v Attorney-General</i> [1999] 1 NZLR 98; <i>New Health New Zealand Inc v South Taranaki District Council</i> [2018] NZSC 59, [2018] 1 NZLR 948; <i>Sullivan v Ministry of Fisheries</i> [2002] 3 NZLR 721 (CA); <i>New Zealand Council of Licensed Firearm Owners Inc v Minister of Police</i> [2020] NZHC 1456; <i>Patterson v District Court, Hutt Valley</i> [2020] NZHC 259; <i>Mahuta and Tainui Māori Trust Board v Attorney-General</i> [1989] 2 NZLR 513; McGirt v Oklahoma (2020) 591 US 1; Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733; <i>Attorney-General v Ngāti Apa</i> [2003] 3 NZLR 643 (CA); <i>Ngawaea v Ngāti Rehua-Ngātiwai ki Aotea Trust Board</i> [2021] NZHC 291.
Overview and result	The Crown, Mercury NZ, and the Raukawa Settlement Trust (the Applicants) applied to the High Court for judicial review of the Waitangi Tribunal's preliminary decision to use its resumption powers to return two areas of land to Ngāti Kahungunu ownership. The Applicants argued (among other things) that there needed to be a much closer nexus between the claim and the land which was proposed for resumption. Mercury NZ claimed that it had been wrongly excluded from participating in the resumption hearing before the Tribunal, and the Raukawa Settlement Trust claimed that it was wrong for land within its rohe (the Pouākani Lands) to be returned to Ngāti Kahungunu. Held, the Tribunal erred in its interpretation of the resumption powers, and it was inconsistent with tikanga Māori to recommend the return of land to an

	iwi that has no mana whenua over that land. Mercury's claim that it should have been allowed to participate in the hearing was dismissed.
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Kōrero whānui – Background

Following the 1987 Court of Appeal decision in the *Lands* case (where the transfer of assets to State-owned enterprises was temporarily halted pending the development of a process to prevent prejudice to Treaty settlements), the Waitangi Tribunal was given an adjudicative function in relation to these lands (and later Crown forestry lands) which allowed it to order that lands be returned to Māori ownership (a process called "resumption").

In the present case, the Waitangi Tribunal proposes to use this function to return two areas of land to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua. The first area of land is called the Pouākani lands, which is 787 acres of land in the central North Island, and the second area is the Ngāumu Forest in the Wairarapa.

The Pouākani lands are in the rohe of Raukawa and Ngāti Tūwharetoa, and the subject land is part of the Maraetai Power Station owned by Mercury NZ Limited (Mercury). The Pouākani lands were granted to Wairarapa Māori in the 20th century as compensation for Māori transferring title to the Wairarapa lakes to the Crown. The Crown had originally promised to give Wairarapa Māori alternative land of value in the Wairarapa, but instead (some years later) it gave Wairarapa Māori the Pouākani lands which were far from their rohe and inaccessible. Several decades later the government wanted to use some of that land for hydro-electric power, so the subject land was compulsorily acquired. The value of the land was estimated by the Tribunal to be in excess of \$600 million.

The Ngāumu Forest is currently licensed Crown forest land located in the Wairarapa, and related to Treaty breaches by the Crown between 1853 and 1865 from what is known as the McLean purchases. However, the findings of the Tribunal are not specific to the Ngāumu Forest lands.

Kōrerorero – Discussion

First issue: is the preliminary determination subject to judicial review?

The respondents (Wairarapa Moana ki Pouākani Incorporation and Ngāti Kahungunu ki Wairarapa Tāmaki Nui-ā-Rua Settlement Trust) opposed any judicial review, and claimed that a preliminary determination is not reviewable, only a final decision.

Under s 11 of the Judicial Review Procedure Act 2016, one of the reviewable decisions is a "proposed exercise of a statutory power". Counsel for the respondents referred the Court to a number of decisions which suggested that "some decisions prior to a final decision are outside that jurisdiction." (At [15].)

The Court found that the preliminary decision is amenable to judicial review. It did not accept that a "proposed exercise of statutory power" is only intended to cover "proposed decisions of a particular type" (at [19]), and disagreed with earlier authorities that suggest this.

The Court's discretion to grant judicial review "should not be restricted on the basis of a technical reading" of the legislation, and it is for the Court to determine the scope of the jurisdiction.

It is for the Court to decide whether it will intervene at a preliminary stage. Cooke J noted that in this case, several factors lend themselves to review – unlike some cases relied on by parties – the preliminary decision of the Tribunal is by the body which makes the final decision, and there is no right of appeal against its decision. The only available course is judicial review.

The Court acknowledged that the Tribunal indicated that its views were only preliminary, but the Court was of the view that the Tribunal had reached firm conclusions, and further evidence would not have a large impact.

The Court also acknowledged that judicial review would likely delay the Tribunal's proceedings, as court decisions may be appealed. However, the Court noted that it would not be helpful to delay the review here because "there is no direct authority on the meaning of the relevant legislative provisions, and the arguments that have now been advanced by the parties are critical to the outcome of the applications, and resumption claims more generally." (At [30].)

The Court rejected the argument the preliminary decision is not reviewable.

Second issue: did Mercury have the right to participate in the resumption hearings?

Mercury challenged the Tribunal's decision to exclude it from the resumption hearings. Section 8C of the Treaty of Waitangi Act 1975 identifies "the only persons entitled to appear and be heard" in the course of an inquiry into a resumption claim. These include the claimant, the Minister of Māori Affairs, any other Minister who applies, and any Māori who can show they have an interest in the inquiry. Mercury argued that this list is not exhaustive, and although s 8C describes those who are "entitled" to appear, other parties can apply for leave. Further, Mercury has a fundamental right to be heard consistent with natural justice.

The Court agreed that Mercury's rights of natural justice are engaged in the present case. However, Parliament has the supreme authority to enact laws and the text of the enactment is plain. The fact that it qualifies who is entitled to be heard means others are precluded from participating.

The Court agreed with the Tribunal that Mercury did not have a right to appear.

Issue three: did the Tribunal misinterpret the resumption powers?

The applicants submitted that the Tribunal misinterpreted the resumption powers. Under section 8A of the Treaty of Waitangi Act 1975, where a claim "relates in whole or in part to land or an interest in land" the Tribunal may recommend that the land be returned to Māori ownership: if it finds "that the claim is well-founded" and "that the action to be taken...to compensate for or remove the prejudice...should include the return to Maori ownership of the whole or part of that land or of that interest in land".

The applicants argued that a well-founded claim needs to relate to the land in question, whereas the Tribunal had interpreted "relates to" in a broader sense, finding that it could make "binding recommendations to compensate generally for the prejudice arising from tribal land loss" (at [52]).

Cooke J noted that he did not consider that "a separate assessment of the standard, or intensity of judicial review to be helpful" (at [65]) in addressing this issue. His Honour said there were factors pointing either way suggesting that the Tribunal's decision should or should not be scrutinised carefully, and neither were of assistance. The Court's role is to determine whether decisions are made lawfully, and the intensity of this task should not change.

The Court concluded that the Tribunal had not interpreted the resumption powers correctly. If the "well-founded claim does not need to involve breaches associated with the loss of ownership/rangatiratanga over the land in question", then such an interpretation would be "dislocated from the Treaty and the special relationship between Māori and the land" (at [81]).

The Court did not accept that land could be provided "in lieu" of other breaches (as the respondents argued). The resumption powers are specifically for Treaty breaches associated with the loss of the land in question. It is not appropriate for the Tribunal to consider other breaches, even closely interrelated ones, as is the case here, with the original land loss and broken promises in the Wairarapa.

The Court considered that the Tribunal went "beyond the adjudicative role given by Parliament" by assessing the overall impact of the Treaty breaches on Ngāti Kahungunu, and then ordering the return of land of sufficient value to restore the damage caused to the iwi.

His Honour did note that the lands at Pouākani (and potentially the Ngāumu Forest) are eligible to be considered for use of the resumption powers because of the breaches associated with the land in question. However, the lack of mana whenua was also an important consideration in deciding whether or not to recommend such return of land.

Issue four: is the determination inconsistent with tikanga and the Treaty?

Raukawa, one of the iwi with mana whenua, challenged the decision on the basis that it was wrong to recommend return of Pouākani lands to Ngāti

Kahungunu, as this would be inconsistent with tikanga and a contemporary Treaty breach.

The Court found that the Tribunal was not entitled to make a decision which was inconsistent with tikanga, or which would invoke a breach of Treaty of Waitangi principles.

Instead of just being an important relevant consideration in the exercise of the Tribunal's statutory powers; tikanga is a key part of the law, and is binding on the Tribunal. The Tribunal's determinations were "not consistent with the tikanga in relation to mana whenua." (At [107].) Those determinations would also be a Treaty breach for the iwi who did have mana whenua. The Court held that as an independent body created by statute, the Tribunal must comply with the principles of the Treaty.

The Court considered (at [118]):

[T]he fact that Ngāti Kahungunu has no mana whenua over the land is very significant, but not fatal to the claim for resumption. But the fact that other iwi have mana whenua over that land will likely be.

Issue five: interest on statutory compensation

The Crown challenged the preliminary decisions made by the Tribunal on the compensation to be paid in relation to the return of the Ngāumu Forest lands. Under the Crown Forest Assets Act 1989, the Crown has to pay compensation to the person to whom forest land is returned. The effect of the Tribunal's decision was that a higher interest rate would commence in 1992, four years after the claim was filed. The Crown argued that there were grounds for the four year period to be extended, saying it had done its best to progress the settlement of claims in a timely way. This submission was rejected by the Tribunal.

The Court agreed that the Tribunal had erred in its interpretation, and did not fully consider the relevant matters. It did not properly identify the Crown's obligations, assess the factors relevant to that obligation, or consider the reasons for delay in the process. The Tribunal also took into account irrelevant matters, such as the Crown's policy of encouraging iwi to engage in settlement discussions, rather than advancing a resumption claim.

Conclusion

The Tribunal's preliminary determinations were set aside, and the matter was remitted to the Tribunal to reconsider.

Ngā tākupu – Comment

This decision addresses several issues in relation to the exercise of the Tribunal's resumptive powers, although perhaps the most novel aspect of the reasoning in the judgment relates to the application of tikanga to the Waitangi Tribunal's statutory powers.

As noted above, Cooke J determined that the Waitangi Tribunal had misinterpreted its statutory powers by considering a broader range of

factors in reaching its preliminary determination than Parliament had intended. The judgment then goes on to consider whether the Tribunal's preliminary determination is consistent with tikanga and the Treaty of Waitangi. Cooke J found that the Tribunal does not have discretion to make decisions that are inconsistent with tikanga or inconsistent with the principles of the Treaty (at [104]). He determined that the preliminary determination was inconsistent with tikanga and the principles of the Treaty and was, therefore, unlawful (at [117]).

Cooke J acknowledged that the Waitangi Tribunal did consider tikanga in its preliminary determination. However, in his view, the Tribunal treated tikanga principles as important relevant considerations when, in this case, "tikanga forms a key part of the law to be applied" (at [104]).

The Tribunal had certainly given serious consideration to tikanga principles and how they might apply to the exercise of its resumptive powers in this claim. The Tribunal had convened a wānanga session to discuss the tikanga of redress and devoted a considerable part of its preliminary determination to explaining its consideration of tikanga principles. The Tribunal took the view that the language of sections 8A and 8HB of the Treaty of Waitangi Act 1975 allowed wide discretion to ensure that tikanga Māori is "properly incorporated" into the Tribunal's decision-making. In particular, the Tribunal determined that tikanga principles required a focus on providing "not only redress but resolution", and assisting the claimants to find ea (a state of resolution incorporating elements of restored relationships, balance, and reciprocity).

The Tribunal also considered tikanga-based arguments made by tangata whenua groups Raukawa and Ngāti Tūwharetoa, based on the rights of mana whenua. Raukawa and Ngāti Tūwharetoa argued that when the Crown originally granted the land at Pouākani, it undermined their mana, and the Tribunal would further exacerbate the hara of the Crown's original grant if it recommended the return of title of these lands to Wairarapa Māori. The Tribunal acknowledged that original hara (wrong) against Raukawa Ngāti Tūwharetoa and noted that "the ongoing presence of the Wairarapa Moana ki Pouākani Incorporation in their rohe, is a thorn in their side and the effects do not diminish with time". However, the Tribunal was also clear that ownership of land at Pouākani does not give Wairarapa Māori the status of tangata whenua there. "They are, like Pākehā landowners in the district, manuhiri (visitors) in tikanga terms" (Wai 863, #2.834, at [258]). And, the Tribunal noted, the legal situation is that the Tribunal cannot return this land to Raukawa and Ngāti Tūwharetoa, only to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua. The Tribunal took the view that the mana whenua arguments did not justify refusing to recommend the return of the relevant land at Pouākani to Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua.

Cooke J determined that such a recommendation would be inconsistent with tikanga, and, as such, outside of the Tribunal's powers. Cooke J is careful to note that he is not claiming greater tikanga expertise than the Waitangi Tribunal members, rather he relies on the tikanga identified as relevant by the Tribunal itself. His reading of the Tribunal's preliminary determination is that the Tribunal has considered tikanga principles but

decided that, notwithstanding those principles, in this case, it would be appropriate to exercise its resumptive powers in favour of Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua (at [108]). Cooke J took the view that the Tribunal had come to a conclusion that was not consistent with tikanga in relation to mana whenua, noting the Tribunal's comments that it was "exercising judgment in a tikanga-compromised world" and that it was not disposed to let the 'mana whenua arguments' influence it against exercising its discretion (at [107]-[108]).

While it is encouraging to see the High Court recognising that there are instances where "tikanga will be the law, rather than merely being a source of it" (at [103], emphasis in original), this decision does raise some questions about the High Court's ability to engage with tikanga Māori. Even with expert evidence on the matters of tikanga, it appears that the Court may not have fully appreciated some aspects of the operation of tikanga as a system of law or, as a consequence, the Tribunal's application of tikanga. In particular, tikanga Māori is a values-based system, requiring a determination of how to give the best expression to foundational values or principles in a particular situation. This, inevitably, requires a balancing of different rights and obligations dependent on context. So, when the Tribunal stated that "we are not disposed to let the mana whenua arguments influence us against exercising our discretion in favour of recommending the return of the subject land at Pouākani", this does not necessarily mean that tikanga is not being followed. Instead, it might be read as a statement that the tikanga-based rights and obligations of mana whenua are not determinative of what a tikanga-consistent approach would be in these circumstances.

Similarly, the Tribunal's statement that it is "exercising judgment in a tikanga-compromised world" should not be read as an acknowledgement that its preliminary determination is inconsistent with tikanga. An approach that is consistent with tikanga would always take account of the full context of a situation. Practical considerations are not, of themselves, contrary to tikanga or a deviation from tikanga principles. Tikanga principles demand application that is sensitive to context and practical circumstances. This is not inconsistent with expert evidence that "there is no such thing as compromised tikanga". The Tribunal is simply recognising that it is required to make a recommendation in the context of Crown breaches of tikanga. This does not mean that the system of tikanga has been compromised or that the Tribunal itself must adopt an approach that compromises tikanga principles. It is simply a reflection of the unusual circumstances that have been created by the Crown's actions, in breach of both tikanga Māori and its Treaty obligations.

On the issue of consistency with tikanga, Cooke J finds that the Tribunal's ultimate conclusion is not consistent with tikanga and its statutory powers do not give it the discretion to reach such a conclusion (at [107]-[108]). Yet, he explicitly acknowledges that: (at [108])

The position would be different if the Tribunal had considered that its proposed decision was consistent with tikanga – for example if the other principles (such as ea) prevailed over those of mana whenua as a matter of tikanga...

One reading of the Tribunal's preliminary determination is that this is precisely the kind of balancing and consideration that the Tribunal undertook.

The situation in relation to the Pouākani lands is unusual. The Waitangi Tribunal went so far as to refer to this situation as *sui generis*. The most appropriate way to provide restoration and resolution in accordance with the Treaty of Waitangi Act 1975 and in accordance with tikanga Māori may not be clear-cut. As a result, this case illustrates the need for the courts to engage deeply with tikanga Māori where it is deployed, not only as a source of law, but as the relevant applicable law itself.

He kupu āpiti – Note

Zoe Rose-Curnow assisted with preparation of this article.

Judicial review – Crown entity disposal of land

Stafford v Attorney-General

[2021] NZHC 335
2 March 2021

Report by Zoe Rose-Curnow

Whakataunga – Overview and result

This judicial review case examined the Crown's refusal to place a moratorium on the disposal of land held by Crown entities in the wake of the Supreme Court's *Wakatū* decision. The applicant, Mr Stafford, was partially successful in that the Court decided that Crown entities have a duty to inform him of the pending sale of land. However, the Court found that the Crown could not have ordered a moratorium on the sale of land owned by Crown entities, and even if it could, Ministers were not wrong to refuse to do so.

Judicial review – Crown entities – disposal of land – constitutional and legal duties	
Date	2 March 2021
Case	Stafford v Attorney-General (321 KB PDF)
Citation	[2021] NZHC 335
Court	Te Kōti Matua – High Court
Judge(s)	Ellis J
Earlier/later decisions	
Legislation cited	Judicial Review Procedure Act 2016; High Court Rules, Pt 30; Declaratory Judgments Act 1908; Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014, ss 25, 192, 193, 199, 200; Land Transfer Act

	1952, s 145A; Land Transfer Act 2017, s 143; Crown Entities Act 2004, ss 15, 103, 107, 113, 114; State-Owned Enterprises Act 1986; Kāinga Ora–Homes and Communities Act 2019, ss 4, 14, 25, Pt 4.
Cases cited	<i>Proprietors of Wakatū v Attorney-General</i> [2017] NZSC 17, [2017] 1 NZLR 423; <i>Proprietors of Wakatū Inc v Attorney-General</i> [2012] NZHC 1461; <i>Proprietors of Wakatū v Attorney-General</i> [2014] NZHC 1785; <i>Proprietors of Wakatū v Attorney-General</i> [2014] NZCA 628, [2015] 2 NZLR 298; <i>New Zealand Māori Council v Attorney-General</i> [1987] 1 NZLR 641 (CA); <i>Accident Compensation Corporation v Stafford</i> [2018] NZHC 218, [2018] 2 NZLR 861; <i>Sims v Lowe</i> [1988] 1 NZLR 656 (CA); <i>Bishop Warden Property Holdings Ltd v Autumn Tree Ltd</i> [2018] NZCA 285, [2018] 3 NZLR 809; <i>Stafford v Attorney-General</i> [2018] NZCA 490; <i>Stafford v Accident Compensation Corporation</i> [2020] NZCA 164.
Overview and result	Mr Stafford applied for judicial review of Crown decisions not to place a moratorium on the disposal of land held by Crown entities in Nelson lands covered by the Spain award the subject of Mr Stafford's successful private law litigation establishing his ability to seek remedies for breach of fiduciary duty (the <i>Wakatū</i> case). Mr Stafford argued that the Crown should have used the Crown Entities Act 2004 to order such a moratorium, based on the fiduciary duties found in the <i>Wakatū</i> case to be owed to the customary owners of the Nelson tenths reserves. In a related case decided in 2020 (<i>Stafford v Accident Compensation Corporation</i>), the Court of Appeal by majority found that Mr Stafford did not have a caveatable interest (by reason of his fiduciary duties litigation against the Crown) in relation to commercial property owned by ACC in Nelson that the corporation wished to dispose of. Held, the Court found that land owned by any statutory entity is not Crown land, so no declarations can be made directly against those entities. Further, the Crown could not impose a moratorium on disposal of land owned by Crown entities because the prerequisites of any such order under the Crown Entities Act 2004 would not be met. Nor were Ministers wrong to refuse to make such an order. However, the Court found that Crown entities can be made subject to Crown "expectations" as to the disposal of land that affects Māori interests. Further, the Court decided that Crown entities themselves have a constitutional obligation to inform the applicant here of impending sales.

Kōrero whānui – Background

In 2017 the Supreme Court upheld claims brought by the Proprietors of Wakatū Incorporation and Mr Stafford that the Crown owed fiduciary duties to reserve land for the customary owners of the Nelson tenths reserves. The 1845 Spain award ratified the sale of a large area of land (including in the Nelson area) from Māori to the New Zealand Company, on the condition that one tenth of the land was reserved for Māori, as well as existing Māori pā, urupā and cultivations. The Supreme Court found that the Crown did not ensure that all of the promised land was reserved on the Crown adopting the Company's obligations.

The Supreme Court sent the fiduciary duty litigation back to the High Court to determine questions of liability, defences and appropriate relief. That case has yet to be determined.

These judicial review proceedings arose from the Crown's refusal to place a moratorium on the disposal of land held by Crown entities in the Spain award area.

During the *Wakatū* proceedings, Treaty settlement negotiations for Te Tau Ihu claims had been put on hold pending the High Court's decision. Following this, the negotiations were concluded and settlement legislation took effect from 1 August 2014. The Settlement Act established a right of first refusal (RFR) for land owned by the Crown (or "Crown body") in Te Tau Ihu. The Act also expressly preserved the position of the *Wakatū* plaintiffs, as at the time those proceedings were still before the Court of Appeal. This RFR process, and the Crown's wider settlement obligations to the eight Te Tau Ihu iwi, was cited by the Attorney-General as one of the principal reasons why the Crown declined to give directions preserving Mr Stafford's position in the *Wakatū* proceedings.

After the release of the Supreme Court's *Wakatū* decision, counsel for Mr Stafford wrote to "Crown Law seeking a moratorium to ensure that any 'tenths' land remaining in Crown possession was protected from disposal", and suggesting an "early warning system" where agencies would notify Mr Stafford (via Crown Law) of a planned sale of land (at [46]).

The Crown agreed to implement such a system (known as the "Land Protection Mechanism" (LPM)) which "requires LINZ to report to Mr Stafford on a monthly basis as to whether there is any pending proposal to dispose of Crown-owned land within the Spain award area." (At [53].) However, Mr Stafford told the present Court that LINZ has not provided any such reports to him.

Immediately following the agreement on the LPM, Mr Stafford was made aware that the Accident Compensation Corporation (ACC) was planning to sell one of its properties in Nelson, which was within the Spain award area. Mr Stafford lodged a caveat against the title. Litigation ensued over whether the caveat should be sustained.

The High Court found that Mr Stafford did not have a caveatable interest in the ACC land but went on to observe it was reasonably arguable that the government could issue directions to ACC under ss 103 or 107 of the

Crown Entities Act 2004 (CEA), which would prevent the sale of the land. Mr Stafford appealed to the Court of Appeal, and ACC cross-appealed.

In the interim, Mr Stafford wrote to the Attorney-General "asking him to impose a moratorium on the disposal of all land held by the Crown, Crown agents, and State-owned enterprises within the Spain award area." (At [68].) Upon receiving no reply, Mr Stafford filed this judicial review proceeding, based on the Crown's failure to make a direction under ss 103 or 107 of the CEA in relation to the Nelson property owned by ACC. The Crown later confirmed that it would not make such a direction, and expressed doubt about its ability to do so.

The Court of Appeal's decision in *Stafford v ACC* was then released, which dismissed Mr Stafford's caveat appeal in general terms. The majority found that ACC is not bound by the fiduciary obligations owed by the Crown to Mr Stafford, nor could any interest that Mr Stafford had in the land be derived from the registered proprietor (ACC). These decisions were fatal to the caveat, so the Court did not need to decide whether Ministers could prevent ACC from disposing of the property under s 103 or s 107 of the CEA.

Kōrerorero – Discussion

Mr Stafford sought declarations that the Crown acted unlawfully in failing to impose a moratorium on disposals of Crown land within the Spain award area. Mr Stafford also sought declarations "consistently with the Crown's ongoing obligations as a fiduciary in the fiduciary duty proceeding" that land owned by ACC, the Nelson District Health Board, and the Nelson Marlborough Institute of Technology in the Spain award area be prohibited from alienation during the proceedings (at [87]).

Ellis J noted that these claims are predicated on the proposition that the Crown owes Mr Stafford and those he represents fiduciary duties in relation to the tenths and occupied lands. In *Stafford v ACC*, the majority found that it is not reasonably arguable that ACC is bound by fiduciary obligations owed by the Crown, nor could any interest that Mr Stafford has in the land be derived from the registered proprietor (ACC in that case). Ellis J found that this conclusion applies equally to the other Crown entity respondents in these proceedings: (at [136])

[Section] 15 of the CEA specifically states that a statutory entity is a body corporate and a legal entity separate from the Crown. Whatever control Ministers might or might not be able to exercise over such an entity, the Torrens implications of its clear and separate legal status, in terms of land ownership, seem to me to be inescapable. On any analysis, land of which a Crown agent (as defined under the CEA) is the registered proprietor is not Crown land.

The result being, Mr Stafford does not have a caveatable interest in the land owned by Crown entities, even if he is able to establish a historic breach of fiduciary duty by the Crown in relation to that land.

There can be no declarations made directly against Crown entity respondents, however, Ellis J noted that they could still be subject to

"expectations" from the Crown about the sale and disposal of land, and they may have their own obligations to Māori or to support the Crown in its Treaty relationship.

Could and should a moratorium have been directed under the CEA?

Mr Stafford alleged that the Crown acted unlawfully in refusing to use ss 103 and 107 of the CEA to direct a moratorium on land sales by Crown entities within the Spain award area.

Ellis J set out the text of the relevant sections: (at [142-143])

a direction may relevantly be made:

(a) under s 103 to a Crown agent, "to give effect to a government policy that relates to the entity's functions and objectives"; and

(b) under s 107 to a Crown entity, "to support a whole of government approach by complying with specified requirements ... to manage risks to the Government's financial position".

And, by virtue of s 113, directions may not be given that:

(a) relate to a statutorily independent function; or

(b) require the performance or non-performance of a particular act, or the bringing about of a particular result, in respect of a particular person or persons.

At the hearing, Mr Stafford confirmed he no longer relied on s 103, so the Court concentrated on s 107.

Mr Stafford argued that a direction could be made under s 107 to "support a 'whole of government approach' for the purpose of 'managing risk to the Government's financial position'." (At [151].) Ellis J did not agree that this was possible. Her Honour accepted that litigation risk is "capable of constituting a risk to the Government's financial position" (at [155]), but she did not see how "a moratorium might have the effect of managing that risk." (At [156].) The financial risk was the same whether Mr Stafford wanted the return of land or monetary compensation, because in order to return land to Mr Stafford as relief in the *Wakatū* proceedings, the Crown would have to reacquire the land for value. So the financial risk to the Crown is the same whether it has to "buy back Crown entity land the prior sale of which has been frozen by a moratorium", or "compensate Mr Stafford because the land has—in the absence of a moratorium—been sold" (at [156]).

In any case, Ellis J considered that there was no obligation to exercise such a power here. It would be difficult for Mr Stafford to establish a constructive trust over the land, as the Crown Entity would need to have obtained the land on notice of his interest in it. A moratorium would not, by itself, protect his interests because for the Crown entity land to be available to him, it would need to be transferred to the Crown. Any obligation owed by the Crown to protect his interests is also tempered by its binding RFR

obligations to settled iwi, and a moratorium would be inconsistent with the RFR process.

Other "soft" powers

The Attorney-General had sent letters to various Crown entities requesting that they "consider advising" the Crown of any intentions to dispose of land in the Spain award" (at [166]).

The Court noted that the Crown has in the past, expressed its "expectations around land disposal processes involving such entities in much more forthright terms, where potential Treaty claims are in play": (at [168])

... in July 2014 Cabinet decided that responsible ministers should write to non-core Crown agencies setting out Crown expectations in relation to the disposal of land. Those expectations included engaging with iwi, having regard to the customary interests of iwi and alerting responsible ministers to any issues regarding iwi or Māori interests in land arising from proposals sales or disposal of land.

The Court also found that Crown entities have also expressly recognised their obligation to support the Crown in its Treaty relationship. Ellis J noted that this showed that "such entities remain—notwithstanding their legal separation and independence—'creatures' of the Crown", and it would be wrong if the Crown was able to avoid obligations to Māori by creating such entities (at [170]).

Ellis J used the Kāinga Ora—Homes and Communities Act 2019 as a specific statutory example of this "constitutional principle in action". (At [171].) The Act specifies a number of duties to "recognise and respect the Crown's responsibility to consider and provide for Māori interests" (s 4).

Where Crown entity respondents are not subject to such statutory obligations, Ellis J said that "the reality is that they now have clear notice of Mr Stafford's claims relating to land in the Spain award at (sic) area." (At [173].) Her Honour posited that, as far as she knew, they are subject to the Government expectations referred to above, and there is a "wider constitutional principle also at play". If a Crown entity wished to dispose of land within the Spain award area, Ellis J suggested that: (at [173])

[T]here is something akin to a duty to advise Mr Stafford (whether directly or through the Crown) of that intention, in a timely way. Notwithstanding that the entities themselves owe no specific fiduciary duties to Mr Stafford in relation to tenths land, they must, I think, be subject to a wider obligation of good faith—as a function of their status as Crown entities—in circumstances such as the present. The existence of such an obligation is not sourced in any Ministerial direction and, in my view, is not inconsistent with the independence of the entities concerned.

This means that Crown entities have an obligation to notify Mr Stafford if they are entering into a disposal process, unless there is "no possibility that the particular piece of land might be held on constructive trust" for him. (At [174].)

Conclusions

In relation to the Crown entity respondents who own land in the Spain award area the subject of the ongoing *Wakatū* proceedings, the Court found that:

- land owned by them is not directly available as relief in the *Wakatū* proceeding because they are separate legal entities;
- s 107 of the CEA cannot be used to order a moratorium on the sale of land owned by them, and even if it could, Ministers were not wrong to refuse to make such an order;
- Ministers should have advised the affected entities that they were expected to notify Mr Stafford of any proposed disposals; and
- the entities are themselves obliged to notify Mr Stafford of any proposed disposals, either because of their own statute (in the case of Kāinga Ora), or "as a matter of general good faith arising in the particular and unusual circumstances of this case" (at [185]).

In the case of the Crown, Ellis J noted that the Crown has already accepted that the LPM needs to be strengthened, however she did not hear from counsel on the disputed matters in relation to this. Accordingly, the parties were directed to make further submissions on this point.

Takutai Moana – 2020 in review

Article by Andrew Irwin

Andrew Irwin reviews procedural developments, principally from 2020 in the operation of the Marine and Coastal Area (Takutai Moana) Act 2011.

Whakataunga – Overview

The High Court has started to hear claims for customary marine title and protected customary rights under the Marine and Coastal Area (Takutai Moana) Act (the Act).

The Court has also issued a number of minutes which give guidance to claimants and interested parties as to the operation of the Act, and proceedings before the Court generally.

This article will focus on those interlocutory decisions and in doing so will cover:

- The background to the Act;
- Current proceedings before the High Court;
- The appointment of pūkenga;
- Engagement with the Crown;
- The jurisdiction to create a marine reserve; and
- The late filing of memoranda in the High Court.

Kōrerorero – Discussion

Background to the Act

In 2003 the Court of Appeal held, in *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA), that the Māori Land Court had jurisdiction to consider claims that the foreshore and seabed had the status of Māori customary land. In 2004 the Foreshore and Seabed Act was enacted in response. The Act removed the Māori Land Court's jurisdiction, vested the full legal and beneficial ownership of the "public foreshore and seabed" in the Crown, guaranteed public rights of access, navigation and fishing, and provided for a form of recognition of Māori interests in the takutai moana. Recognition would be through agreements recognising "territorial customary rights" and orders recognising (non-territorial) customary rights. Few applications were made to the Court and the Crown engaged with only a few groups under the 2004 Act.

The Marine and Coastal Area (Takutai Moana) Act 2011 repealed and replaced the 2004 Act. The 2011 Act restored any customary title interests that had been extinguished under the Foreshore and Seabed Act. The 2011 Act provided two application pathways for Māori: either direct engagement with the Crown or an application to the High Court. The Act required applications to be filed in court by 3 April 2017. The two main forms of customary interests recognised by the Act are customary marine title and protected customary rights.

On the basis of memoranda filed by the Crown mapping all applications that were filed, it appears that approximately 190 applications were filed with the High Court and 378 applications were made for direct engagement with the Crown. Together with the applications made under the 2004 Act that were transitioned into the new regime, it appears the entire takutai moana of Aotearoa is subject to an application for recognition of customary interests.

[Re Tipene](#) [2016] NZHC 3199 was the first case where the High Court applied the tests for customary marine title. The case concerned an area of 200m in radius between two islands off the south-west coast of Rakiura (Stewart Island). The Court found customary marine title exists over that area.

(Editorial note to update: the High Court has more recently recognised customary marine title and protected customary rights in [Re Edwards \(Te Whakatōhea No. 2\)](#) [2021] NZHC 1025, refused to do so in [Re Clarkson](#) [2021] NZHC 1968 and has recognised customary marine title in [Re Reeder \(Tauranga Moana\)](#) [2021] NZHC 2726.)

Current proceedings before the High Court

The High Court is case managing all High Court applications centrally through the Wellington Registry. Many documents relating to the applications are located on the following website: <https://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/marine-and-coastal-area-takutai-moana-act-2011-applications-for-recognition-orders/>

A series of case management conferences has been held each year since 2018, with the last round just having been completed in June 2021.

In September 2017, Collins J issued a minute stating that he had been asked by Venning J to manage all proceedings commenced under the Act, noting:^[1]

The vast number of proceedings under the Act creates logistical challenges that the court will do its best to manage. Appropriate resources will be committed to ensuring the court can respond to the administrative challenges of these proceedings.

Section 125 of the Act gives priority to applications that were commenced in the Māori Land Court under the Foreshore and Seabed Act 2004.^[2] The Attorney-General identified eight priority proceedings under s 125.^[3]

Hearings commenced in 2020 for the Edwards/Whakatōhea application starting in August 2020 in Rotorua, with Churchman J presiding. His Honour issued a decision in May 2021 – [Re Edwards \(Te Whakatōhea No. 2\)](#) [2021] NZHC 1025.

The Clarkson application also commenced in November 2020, with a judgment issuing in July 2021 ([Re Clarkson](#) [2021] NZHC 1968).

The Ngāti Pāhauwera application commenced in Napier on 9 February 2021 with Churchman J presiding and was scheduled to last seven weeks.

Stage 1 of the Ngā Potiki application was heard in Tauranga in April 2021 with Powell J presiding. It is scheduled to last three weeks. Stage 2 is anticipated to commence in September 2021 and last for six weeks. (Editorial note to update, judgment on the stage 1 matters was given in October 2021 – [Re Reeder](#) [2021] NZHC 2726).

Between August 2019 and August 2020, the Court also issued a number of judgments which gave “guidance to claimants and interested parties as to the operation of the Act and the rights of various parties to participate in proceedings under the Act.”^[4] These cases were summarised by Churchman J in a Post-Case Management Conferences 2020 minute:^[5]

(a) *Re Collier & Ors* [2019] NZHC 2096, a small number Ngāpuhi applicants had requested certain questions to be referred by the Court to the Māori Appellate Court under s 99 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). This decision, declining that request gave guidance on when it might be appropriate for the Court to utilise s 99.

(b) *Re Ngāti Whakaue ki Maketū Hapū* [2019] NZHC 2360. This decision addressed the entitlement of an interested party to participate in a hearing and the role of the former Attorney-General appearing as counsel for an interested party, along with the circumstances when it may be appropriate for the Court to hold a preliminary hearing under HCR 10.15 of the High Court Rules 2016 (HCR).

(c) *Re Ngāti Torehina* [2019] NZHC 2658. This judgment addressed and defined the role and status of the Attorney-General in proceedings under the Act holding:

- (i) the statute specifically permitted the Attorney-General to become an interested party;
- (ii) the Court also had inherent jurisdiction to permit the Attorney-General to become an intervenor in the public interest;
- (iii) the Act did not cast the Attorney-General as a defendant or require him to be a contradictor in all cases, but he was free to oppose aspects of an application where issues of public interest justified that;
- (iv) cases relating to the inherent jurisdiction of the High Court gave some guidance as to what might be in the public interest;
- (v) if challenged, the Attorney-General is obliged to satisfy the Court that there is a legitimate public interest which justifies the position being taken;
- (vi) as an interested party, the Attorney-General does not support any sectional interest, only the interests of the public generally.

(d) *Re Ngāti Pāhauwera Development Trust* [2020] NZHC 1139. The Court struck out part of an amended application that materially changed the original application. The decision gives some guidance as to what amendments are permissible and what amendments are not.

(e) *Re Whakatōhea* [2020] NZHC 1549. This case dealt with the question of what sort of preliminary issues are able to be dealt with by the Court prior to a substantive hearing, and when it will be appropriate for a party to apply for a direction under s 61(1)(b) of the Te Ture Whenua Māori Act 1993.

(f) *Re Whakatōhea/Ruatakenga* [2020] NZHC 1905. This case gave guidance on the level of specificity required in an application to comply with the provisions of the Act.

(g) *Re Dargaville* [2020] NZHC 2028 and *Re Paul* [2020] NZHC 2039, the Court struck out the two “national” applications and clarified the consequences of the failure by applicants to comply with the various statutory requirements in notices of application and the consequences of attempting to amend an application so as to advance claims on behalf of applicants who had not been identified in the original application, and whose claims were filed out of time.

The appointment of pūkenga

A pūkenga is an independent witness who, under s 99(1)(b) of the Act, may be appointed in accordance with the High Court Rules 2016. Eligible appointees must have “knowledge and experience of tikanga”.

Several minutes of the Court in the Takutai Moana proceedings involve discussion of who may be appointed as a pūkenga. Appointment by the Court is a consultative process, and the Court generally asks for suggestions from the parties as to who they believe is most appropriate.^[6]

Expert witnesses under the High Court Rules are usually expected to be independent, in the sense of “having no relationship, association or interest connected with the parties or a subject matter of the application”.^[7] Churchman J noted that some submissions made by applicants on the appointment of pūkenga “discounted individuals nominated on the basis that they are not entirely ‘independent’”.^[8] His Honour adopted the Court’s approach in *Re Tipene* where it concluded:^[9]

In this important legislation, obtaining the advice of a person with relevant knowledge and experience must outweigh the need for strict independence in the sense of someone with no relationship, association or interest connected with the parties or the subject matter of the application.

Although they are appointed under the High Court Rules, it is not possible nor desirable for a pūkenga to be completely independent, because they must have knowledge of the tikanga of the applicants. To have such knowledge they will likely have some connection with the applicants.^[10]

Current and former members of the Waitangi Tribunal have been nominated as pūkenga. The Attorney-General queried this and, in one application, counsel for an applicant noted that it may be uncomfortable for them to cross-examine a pūkenga, then appear before them in the Tribunal.^[11] Churchman J found that there was no reason in principle why a member of the Tribunal cannot be a pūkenga. Only if they worked on an inquiry that was directly relevant, for example, the Marine and Coastal Area (Takutai Moana) Act 2011 Waitangi Tribunal Inquiry, would they be

disqualified. Being “uncomfortable” cross-examining a pūkenga is also not a disqualifying factor, however Churchman J noted that when appointing a pūkenga, the Court will have regard to the level of opposition or support for a candidate, and whether this is objectively justified.^[12]

Engagement with the Crown

As mentioned above, applicants may engage directly with the Crown (rather than applying to the High Court) for recognition of their customary interests. Churchman J noted in his Post-2020 case management conferences minute that “[l]ittle progress has been made in initiating direct engagement” and the Crown’s timetable for engagement (then) extended until 2045.^[13]

One of the applicants requested from the Court, a “direction that the Crown confirm whether it intends to enter into direct negotiations with the applicant and if so, when those negotiations can commence.”^[14] The Court did not make such a direction but Churchman J expressed disappointment that some applicants have not received a substantive response from the Crown, “given the indication by the Crown as to likely progress in respect of notifying applicants about direct negotiations that the Court received 12 months ago”.^[15]

In one situation, Churchman J refused to allow Ngāi Tai and Ririwhenua to withdraw part of their application from the application before the Court. Parts of their application overlap with a priority application and with the area claimed by several other Whakatōhea applicants. In October 2020, Ngāi Tai and Ririwhenua indicated to the Court that they had been engaging with the Crown and wished to continue with this in preference to having the Court determine the parts of the application which overlap with others.^[16] The Court reminded the applicants that those who have “sought direct engagement cannot, in respect of the same area also advance an identical claim in proceedings before the Court”, and having sought to participate as an applicant rather than an interested party, they could not at this late stage, withdraw from these proceedings.^[17] If they withdrew their claim in respect of these overlapping areas “having elected to participate as an applicant...they would not be able to then resurrect such a claim by way of direct engagement.”^[18]

Jurisdiction to create a marine reserve

The priority applicant in the Te Whakatōhea application filed an amended application seeking the declaration of a marine reserve near Whakaari (White Island).^[19] The Court stated that it had no jurisdiction to declare a marine reserve and if it did make any orders in relation to Whakaari then the holders of any orders “would obviously have significant input into any application in relation to a marine reserve that might subsequently be made.”^[20] For this reason, among others, the court declined leave to file the amended application.

Late filing of memoranda in the High Court

The Court has expressed dissatisfaction with the late filing of memoranda by counsel. It expressed this concern following the 2020 case

management conferences.^[21] Where the Court has given a deadline for the filing of memoranda, counsel's duty to the Court is (of course) to file within that timeframe. The Court noted some counsel had not filed memoranda until the day of the relevant case management conference or at all.

In one situation, the Court has expressed its dissatisfaction where:

- counsel sought, in a one-line email to the Registrar, an extension to file submissions on a strike-out application after the due date for submissions (with the extension being declined);^[22]
- counsel had not responded to the Court's request about the timing of a hearing, but later (and after the Court had timetabled the hearing) informed the Court that counsel was unavailable (being overseas) without adequate reason;^[23] and
- counsel had stated steps would not be taken in certain cases until an unrelated application for leave to appeal to the Court of Appeal had been addressed.^[24]

In an August 2020 minute Churchman J expressed concern that counsel was continuing fail to comply with timetable or other orders due to counsel's wish to obtain leave to appeal a decision in another proceeding. His Honour noted that the "Court is concerned that a number of ethical obligations on counsel may have been breached", including:^[25]

(a) the obligation that a lawyer must treat others involved in Court processes with respect;

(b) the obligation on a lawyer not to undermine the processes of the Court;

(c) the obligation that a lawyer who has been retained by a client must complete the regulated services required by the client unless the lawyer is discharged by the client, the lawyer and the client have agreed that the lawyer is no longer to act for the client, or the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination.

The Court required counsel in that case to file a memorandum to explain counsel's actions. In October 2020, Churchman J was not satisfied with the response and instructed the Registrar to provide the relevant documentation to the Law Society "for such further action as they see fit".^[26]

Ngā kupu āpiti – Notes

- [1] Minute of Collins J dated 27 September 2017 at [2].
- [2] At [4].
- [3] At [6].
- [4] Minute of Churchman J, dated 25 August 2020 [Post-Case Management Conferences 2020] at [2].
- [5] At [2].
- [6] Minute of Churchman J, dated 25 August 2020 [Post-Case Management Conferences 2020] at [48].
- [7] Minute (no.18) of Churchman J, dated 8 July 2020 [Edwards - Pukenga Appointment Proposal] at [16].
- [8] At [18].
- [9] At [16], quoting *Re an application by Tipene* [2015] NZHC 2923, at [26].
- [10] Minute of Churchman J, dated 25 August 2020 [Post-Case Management Conferences 2020] at [50].
- [11] Minute (no.10) of Churchman J, dated 14 October 2020 (pdf, 189 KB) [Ngāti Pāhauwera – Appointment of Pūkenga] at [2].
- [12] Minute (no.10) of Churchman J, dated 14 October 2020 (pdf, 189 KB) [Ngāti Pāhauwera – Appointment of Pūkenga] at [8].
- [13] At [8].
- [14] Minute (no.15) of Churchman J dated 15 June 2020 [Counsel for Papauma Marae Trust excused from attending Wellington CMC] at [2].
- [15] At [5].
- [16] Minute (no. 32) of Churchman J, dated 9 October 2020 [Whakatōhea hearing – Application for Ngāi Tai and Ririwhenua to discontinue].
- [17] At [13].
- [18] At [14].
- [19] Minute (no .31) of Churchman J, dated 9 October 2020 [Whakatōhea hearing – Leave to file fourth amended originating application declined], at [4].
- [20] At [6].
- [21] Minute of Churchman J, dated 25 August 2020 [Post-Case Management Conferences 2020] at [18].

[\[22\]](#) Minute (no. 4) of Churchman J, dated 22 April 2020 [Applications to participate in Ngati Pahauwera Strike Out Application].

[\[23\]](#) Minute (no.28) of Churchman J dated 16 July 2020 [Maanu Paul Application – CIV-2017-485-512 – Strike Out Proceedings].

[\[24\]](#) Minute (no. 28) of Churchman J, dated 28 August 2020 [Edwards Hearing – Participation of Manu Paora Whanau] at [14].

[\[25\]](#) Minute (no. 28) of Churchman J, dated 28 August 2020 [Edwards Hearing – Participation of Manu Paora Whanau] at [28].

[\[26\]](#) Minute (no. 36) of Churchman J, dated 29 October 2020 [Re Manu Paora Whanau participation] at [20].

Te Kōti Whenua Māori – Māori Land Court

Trusts – AGM held online – COVID-19

Pera v Broomfield-Hoet – Tuhuna 16B

(2021) 229 Taitokerau 190 (229 TTK 190)
6 May 2021

Report by Hinemoana Markham-Nicklin

Whakataunga – Overview and result

A trust held its 2020 AGM online and passed a resolution allowing trustees to continue to be trustees beyond the expiry of their terms. The AGM must be held again and the trustees' terms had expired.

Trusts – AGM held online via Zoom – COVID-19 – trustee positions held over since 2017 – 2020 AGM must be held again	
Date	6 May 2021
Case	Pera v Broomfield-Hoet – Tuhuna 16B (236 KB PDF)
Citation	(2021) 229 Taitokerau 190 (229 TTK 190)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge M P Armstrong
Earlier/later decisions	
Legislation cited	Te Ture Whenua Māori Act 1993, s 67; Māori Reservation Regulations 1994, regs 7, 19, 21; COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020, ss 10, 12, 13.
Cases cited	<i>Hamilton – Tuahu 3X (Erepeti Marae)</i> (2009) 34 Gisborne Appellate MB 230 (34 APGS 230).
Overview and result	Application challenges two actions carried out by Te Kotahitanga Māori Reservation Trust (the trust) regarding holding an online annual general meeting (AGM) in 2020 and passing a resolution at the 2017 AGM allowing trustees to remain in office beyond the term set by the charter for the marae, until the rebuild of the marae is complete. Held, Court directed that the 2020 AGM must be held again, in person, within the following three months. An election must be held at the AGM to elect four trustees. The AGM must be facilitated by an independent person on behalf of the Court and the Principal Liaison Officer must file a report on the outcome of the AGM. The Court emphasised that the meeting is a 're-run of the 2020 AGM' and does not replace the 2021 AGM. The Court considered the trust was not entitled to hold the AGM electronically as its actions did not comply with the requirements in the COVID-19 Response (Requirements for Entities – Modifications and Exemptions) Act 2020, including the requirement that a majority of trustees had to pass a resolution in

	writing in accordance with ss 12 and 13 of that Act and notify the rest of the trustees, beneficiaries and Chief Registrar of that resolution. Further, an electronic meeting did not comply with the marae charter. Clause 4.6.1 of the marae charter provides that trustees have a three year term. However, four of the trustees' terms had expired and the trustees passed a resolution at the 2017 AGM allowing the trustees to remain in office, notwithstanding their term having expired. The Court considered that resolution did not comply with the requirements for altering the charter established in cl 8 and therefore the resolution was invalid.
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Pipiri 2021 – additional content online

Te Kōti Pira – Court of Appeal

[Leave to appeal](#) – declined – no second appeal – *Tito v Tito* [2021]
NZCA 164 – Hinemoana Markham-Nicklin