

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Te Hunga Roia Māori o Aotearoa – hui-ā-tau

Keynote address – Keeping ourselves honest: Māori lawyers and mana-based change

3 July 2021

Ani Mikaere, Pou Whakatupu Mātauranga, Te Wānanga o Raukawa

Te Hunga Rōia Māori o Aotearoa held its annual conference from 1-3 July 2021 at the University of Canterbury. The theme of the conference, given by Moana Jackson, was 'Māori Lawyers as Agents of Mana-Based Change'. This theme encouraged presenters and conference participants to think deeply about how lawyers can contribute to social justice by pursuing change grounded in mana and tino rangatiratanga. Ani Mikaere was invited to give the closing keynote address of the conference to reflect on the conference theme and to challenge participants to pursue mana-based change.

Hei tīmatanga – Introduction

In keeping with the theme of honesty, I have to admit that I have struggled with preparing this kōrero. I was not certain that I could find enough to say. In truth, my thoughts on the conference theme of Māori lawyers as agents of mana-based change can be summarised in just four brief points:

1. New Zealand is a colonial state.
2. The colonial state presents Māori with a limited range of options: resist, compromise or collaborate.
3. The law of the coloniser has been key to the success of colonisation, operating to nullify mana Māori.
4. There is, then, a fundamental contradiction inherent in the idea of Māori lawyers serving as agents of mana-based change.

All of this seems so self-evident that I could probably end here. However, that would make for a rather short address! So, at risk of stating the obvious, I will expand on each of these points.

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Kōrerorero – Discussion

New Zealand is a colonial state

I doubt whether any of you are surprised by my description of New Zealand as a colonial state. All of us who live here, tangata whenua and tauwiwi, live and breathe colonialism 24 hours a day, seven days a week.

There are those who find such a claim unpalatable, pointing to such developments as the Treaty claims process or the resurgence of Te Reo or the record numbers of Māori MPs as promising signs that we are moving—or have moved—“beyond” colonisation.

The short answer to this was provided by activist Bobbi Sykes when she famously responded to the description of Australia as “post-colonial” with the acerbic counter: “What? Have they left?”^[1] This razor-sharp retort may almost sound flippant, but it is not. As Moana Jackson has recently pointed out, decolonisation may have been accepted eventually as a right for those Indigenous Peoples who remain the majority population in their own lands but it has always been denied to those of us who now find ourselves outnumbered by colonisers who refuse to leave.^[2]

The countries where the colonisers stayed, established a government and became the majority were redefined as ‘settler colonies’ and the Indigenous peoples were excluded from any possibility of decolonisation.

And so, for those of us who are unfortunate enough to find ourselves now entrapped within settler colonies—in what might be described as a never-ending form of home invasion—the process of colonisation continues.

Unsettled by the taint of illegitimacy that underpins their position, the psyche of the settler coloniser is marked by a compulsive need to deny their role as usurper. Albert Memmi writes that the coloniser “endeavors to falsify history, he rewrites laws, he would extinguish memories—anything to succeed in transforming his usurpation into legitimacy”.^[3] We do not have to look very far to see this type of behaviour in the settler colony of New Zealand.

Take the Tuia 250 debacle, described on the Ministry of Culture and Heritage website as “a national opportunity to hold honest conversations about the past, the present and how we navigate our shared future”.^[4] We were reassured that this was a commemoration, not a celebration; we were funded to participate by showcasing the navigational feats of our tūpuna; and some of the harm done to Māori by Cook and his crew was acknowledged.

But little, if anything, about Tuia 250 was honest. It was primarily an exercise in mythmaking, not a meaningful attempt to grapple with the implications of colonialism. The very act of singling out 1769 as a date of significance merely reinforced the idea that the “real history” of Aotearoa didn’t begin until a white man “discovered” us. As Tina Ngata was quick to point out, no amount of reassurance about the importance of our “dual

heritage” could change the fact that the entire programme centred around Cook’s anniversary, our own stories about Kupe and others simply added on. “Directly or indirectly”, she said, the programme “[gave] merit to the idea that our identity is centred on Cook’s arrival”.^[5] (As an aside, why we would condone talking about Kupe in the same breath as Cook—a man famously described on national television by Haunani-Kay Trask as a “pestilential, syphilitic rapist”^[6] – is beyond me, but that is another talk for another day.)

The most problematic aspect of Tuia 250 is the way that Cook’s voyage was viewed in isolation from the colonising context within which it occurred. By 1769, after more than two centuries of watching on jealously while other European powers like Spain and Portugal amassed colonial empires, Britain was obsessed with achieving imperial dominance. By the turn of the 20th century that aim had been well and truly realised, the British empire covering nearly one quarter of the world’s land.^[7]

It is impossible to properly understand the significance of Cook’s voyage without an appreciation of the forces that produced it. He came here for the explicit purpose of adding to Britain’s colonial spoils, confident in his understanding that any Indigenous Peoples who he came across could be treated as less than human because that is how Europe chose to characterise us. It should come as no surprise to learn that his crew quite casually shot, killed or kidnapped Māori whenever things did not go their way. Such occurrences were not aberrations: far from it, they were the bread-and-butter of colonisation. The pattern of random violence, theft or other disgraceful conduct was repeated, over and over again, as Cook went on what Tina Ngata has so aptly described as his “crime spree”^[8] around Aotearoa. Little wonder that Arama Rata dubbed Tuia 250 a re-enactment of the invasion of Māori land by a replica “death ship”^[9] or that Anahera Herbert-Graves objected to the use of euphemisms such as “encounter” or “meeting” to describe Cook’s unwelcome invasion of our world, describing him as a ‘barbarian’.^[10]

Such views were brushed aside by Tuia 250 co-chair Jenny Shipley, who disingenuously described the murder of a number of individuals during the two days that the *Endeavour* visited Tūranganui-a-Kiwa as “unintended but tragic consequences” of Cook’s visit. She went on to praise “both Māori and Pākehā” who had shown a willingness to “explore the emotions” evoked by Tuia 250 rather than “arguing the facts of history”. She added that “there is no single truth here”, insisting that “it’s not necessary to argue about who is right and who is wrong”.

Shipley’s response illustrates nicely the phenomenon that Memmi describes: the revision of history, the wilful mis-remembering of events as part of a conscious effort to transform usurpation into legitimacy. It is quite simply incorrect to suggest that there is more than one “truth” about the shooting and kidnap of people at Tūranganui-a-Kiwa—or elsewhere, for that matter. The facts are uncontested. Nor is it remotely difficult to figure out who was right and who was wrong, unless you believe that Cook was justified in helping himself to Māori possessions while reserving to himself the right to shoot them when they took something that belonged to him. Or unless you think it was reasonable for him to have shot them without any

pretence of justification—in one instance, by his own admission, simply to impress upon them that the British were superior.^[11] Or unless you agree that, because our tūpuna were not white, he was perfectly entitled to claim Aotearoa for his imperial masters (note that if he'd found evidence that any European nation had planted its flag here before he arrived, he would have been compelled by the European colonisers' code of conduct to respect their prior claim).

By glossing over the unsavoury details of colonial power and the criminal acts that were committed in the name of that power, Shipley conveniently allows the present-day beneficiaries of colonial greed and violence to avoid taking responsibility for the advantages that they now enjoy. She neatly avoids having to acknowledge or deal with the contemporary legacy of imperialism. It is so much easier to fall back on statements of regret about the deeds of individuals who misread a situation than it is to admit that they were quite deliberately engaged in laying the foundation of Pākehā privilege upon which the edifice of the colonial state has been erected and has thrived. It is so much more comfortable to pretend that colonialism belongs to a safely distant past.

Cook's visit served as a brief but portentous introduction to the brutality of colonial ambition, opening the way to the onslaught that would inevitably follow. Tuia 250 served as a timely reminder that the colonial onslaught is far from over.

Resist, compromise, collaborate

The fact is that being Māori in a colonial state means that we can never simply “be”—consciously or otherwise, we are all compelled every day (and sometimes every hour of every day) to position ourselves in relation to colonial power. There may be the odd purist in our midst who claims to be in a perpetual state of resistance but the truth is that, unless they are superhuman, they are either delusional or they are being dishonest.

In my experience, daily existence in the colonial state of New Zealand is a constant trade-off between the things we can tolerate and those we cannot live with. We resist whenever possible. We compromise when we must, typically promising ourselves that we will do better next time or performing mental gymnastics in order to justify our actions. We collaborate when we lack the imagination or the energy to do otherwise and either wallow in guilt or try not to think about it. Sometimes we practice the time-honoured tactic of denial. Sometimes we go on the offensive, accusing others of doing nothing, of doing worse or of having no appreciation of how complicated our lives are.

It is sobering to realise that I have been engaged in this process, one way or another, for my entire life: as a child attending a predominantly Pākehā primary school in a small, highly conservative country town; as a quietly rebellious teenager at a church boarding school; as a law student who started out highly motivated but subsequently became disillusioned and disinterested; as an initially enthusiastic but then increasingly frustrated legal academic; and even now. If you are Māori, this process is inescapable. It is relentless. It wears you down.

But with age and experience comes perspective. Looking back over a lifetime you can begin to discern patterns. I have realised that the amount of time we spend engaged in one of these options as opposed to another varies, depending upon where we are and what we are doing. If we are lucky, we can exercise a degree of control over the situations we place ourselves into and the people we surround ourselves with.

For instance, as a young child I spent most of my time striving to be a model student. I was, in essence, a collaborator. I do not blame myself for this: I was just a kid and looking back on it, it seemed like the most obvious option. But I cannot pretend that I knew nothing about the consequences of resistance. I have the Māori classmate who threw his chair across the classroom, frustrated at hearing his name being uncaringly butchered by the teacher for the hundredth time in a day, to thank for that lesson. I knew the teacher was in the wrong. But if I am honest, I was also quietly relieved that I did not have a “complicated” Māori name for her to mispronounce.

My years as a student, both at college and at law school, were largely spent collaborating and compromising—punctuated, I like now to imagine, by small acts of resistance along the way. By the time I got to university I was regularly finding myself trying to rationalise compromise and collaboration by telling myself that they were merely part of a short-term strategy that would see me better-equipped for resistance in the long term.

But an ends-justifying-the-means kind of argument can only take you so far. Once I had become a legal academic, I found it increasingly difficult to justify pragmatism over principle. This is not to suggest that I never compromised or collaborated: I very soon found it was impossible to exist in that environment without doing plenty of both. But I spent an increasing amount of time feeling guilty about it. I also spent a lot more time trying to resist—and learning first-hand about the consequences of doing so.

The other thing I learned is that relentless self-reflection is exhausting. And exhaustion can impact on your ability to think clearly. It is surprisingly easy to lose focus on what you are doing and why.

I feel incredibly silly admitting it now, but when I took up a position at Waikato Law School in 1991, I was naïvely invested in its proclaimed vision of biculturalism. I mistook the rhetoric for commitment, and I expended a ridiculous amount of energy trying to help realise the goal of creating a bicultural law school. It took a few characteristically blunt words from Graham Smith to wake me up. One day when I was whining at him about how difficult my job was, he stopped me short by reminding me that the university was a Western institution and that it was foolish to imagine that I could change it. The most I could hope to achieve was to create a safe space for Māori within it

It was such a devastatingly obvious point and it really helped. Prioritising the creation and defence of a safe space for Māori meant I could narrow my focus when applying the “resist-compromise-collaborate” lens to my decision-making. If something had minimal impact on the immediate needs of Māori students, I let it slide. I reserved my energy for those battles that made the most difference to the day-to-day experience of Māori students and staff within the law school.

While this helped with the allocation of time and energy, however, it in no way altered the fact that much more of my time was spent compromising—and sometimes collaborating—than resisting. And, given my idealistic high hopes when I started at Waikato, merely carving out and then battling to defend a zone of relative safety within an overwhelmingly racist institution was never going to bring much satisfaction in the long term. So, inevitably, I moved on

For the past 20 years I have been at Te Wānanga o Raukawa. I would love to say that this means I have spent the last two decades not having to think about these matters—but, of course, life is never that simple.

Some of you will know that Te Wānanga o Raukawa is a product of Whakatupuranga Rua Mano, a 25-year iwi development plan initiated by Te Āti Awa, Ngāti Toa Rangatira and Ngāti Raukawa in 1975. The plan was instigated in response to the imminent threat of cultural extinction and Te Wānanga o Raukawa was established in 1981. It was initially very small^[12] and it was heavily reliant on the voluntary labour of people from iwi throughout Aotearoa who lent their support to the initiative. Throughout its first twelve years of existence, the Wānanga ran on the proverbial smell of an oily rag but it was entirely self-determining. And not by accident: one of the four underpinning principles of Whakatupuranga Rua Mano is Tino Rangatiratanga.

In 1989 wānanga were established as a new category of tertiary education institution (TEI) within the Education Act^[13] and in 1993 Te Wānanga o Raukawa received statutory approval as a “wānanga” within the terms of the Act. At around this time, the decision was made to open the doors to students from around Aotearoa and a period of rapid expansion followed. We are still a small player in the field of tertiary education, with approximately 1800 equivalent full time students (EFTS).

The decision to become a TEI within the terms of the Education Act was not an easy one. As you can imagine, resourcing was a constant and pressing need but there was concern about the potential loss of rangatiratanga. And experience to date confirms that our people were right to have been concerned. The line between state assistance and state interference has proven to be a fine one.

It has been undeniably helpful for our students to have access to financial support through student loans and so forth. And being funded as a TEI has enabled the Wānanga to employ staff, to upgrade its facilities and to increase the number of students and programmes. Nevertheless, funding has proven to be an ongoing bone of contention. In 1999, for example, we joined with the other two wānanga to bring a Waitangi Tribunal claim because the Crown had paid out a capital establishment grant to all categories of TEIs *except* wānanga. The Tribunal agreed that this was inequitable,^[14] but it was a further nine years before Te Wānanga o Raukawa settled its claim. In 2017 we lodged a further claim,^[15] citing inadequate support for our whakatupu mātauranga activity and our course provision. Negotiation of this claim is currently underway.

At the heart of our current claim is the relationship between tino rangatiratanga and kāwanatanga. In our view, the Crown does not

understand the limits of kāwanatanga, and this has made for a difficult Wānanga-Crown relationship. The price we have paid for the “privilege” of nearly three decades of chronic underfunding has been the requirement to engage in a never-ending, energy-sapping and largely pointless compliance dance. You would not believe the time and money that is expended jumping through often nonsensical Crown hoops. We resist as much as possible, but resisting is labour-intensive and sometimes it is just too hard or too exhausting.

There is nothing unique about our experience. The obstruction of revolutionary Māori initiatives by Crown meddling, posing as support, has been an all too familiar phenomenon during our recent history: other examples that could readily be cited include other Māori education initiatives such as kōhanga reo and kura kaupapa Māori.

So at the top of our claim negotiations agenda is the need to re-set the Wānanga-Crown relationship. We have made it clear that we no longer wish to be a TEI pursuant to the Education Act and we are committed to establishing new arrangements that will better reflect the balance between tino rangatiratanga and kāwanatanga that was foreshadowed in Te Tiriti o Waitangi. The Crown appears to have accepted our argument in principle—so now the really difficult (but exciting) work begins.

All of this is a roundabout way of saying that at Te Wānanga o Raukawa we are still faced with choices about which things to resist, which things we can compromise on and whether it is ever in our interest to collaborate. Working at a Wānanga does not make these dilemmas magically disappear because, like everybody else in this settler colony, we are still forced to live and breathe colonialism every day.

However, there are some important differences between working at the Wānanga and working in the university environment. To begin with, we strategise collectively. Rather than finding myself in the situation where one or two Māori staff are pitted against the institution, all staff at the Wānanga work together to figure out how the institution can most effectively challenge the Crown. Moreover, it is generally understood that collaboration is a dirty word and compromise a last resort—it is accepted without question that we should do everything possible to avoid finding ourselves in a situation where either of these is the only option. And finally, resistance is our bottom line, but it is not our target. We do not want to be defined by Crown expectations—which is what happens if we limit ourselves to resisting. We are actively seeking to move beyond resistance, to proactively imagining and designing our future relationship with kāwanatanga. This is challenging but invigorating work, made possible only by our resolve to make resistance our starting point rather than our end goal.

Coloniser law and mana Māori

I hardly need to tell any of you that when it comes to identifying examples of Crown law that have facilitated the colonial project while undermining mana Māori, we are spoilt for choice. In the nineteenth century we have the endless succession of Native Land Acts, the New Zealand Settlements Act 1863 and the West Coast Peace Preservation Act 1882, to name but

a few. During the twentieth century we have the various reiterations of Public Works Acts and yet more Māori land laws, including the infamous 1967 Māori Affairs Amendment Act. More recently we have such measures as the Resource Management Act 1991, which has given rise to the current, ham-fisted attempts to implement Significant Natural Areas under the National Policy Statement for Indigenous Biodiversity. As recently as 2004 we have the confiscatory Foreshore and Seabed Act and its cynical 2011 successor, the Marine and Coastal Area (Takutai Moana) Act.

These examples are quite stark, so it is easy to appreciate how they chip away at mana Māori by explicitly reinforcing colonial power. But it is just as important—probably more so, in fact—to consider examples where the erosion of mana Māori is less obvious. What about the raft of legislation which, like the Resource Management Act, refers explicitly to Māori concepts or to phrases such as the principles of the Treaty of Waitangi? Surely, such laws are seeking to uphold, rather than to diminish, mana Māori? The short answer is a resounding “no”. In the same way that Waikato Law School’s bicultural rhetoric could not change the monocultural nature of the institution, incorporation of Māori words and concepts into pieces of legislation cannot magically disconnect the state legal system from its colonial foundations.

We need look no further than the example of the principles of the Treaty of Waitangi to illustrate my point. This phrase was originally included in the Treaty of Waitangi Act 1975 as part of a misguided but well-intentioned bid to enable the Waitangi Tribunal to perform a miracle by reconciling the differences between Te Tiriti and the Treaty. But the principles of the Treaty have been utilised as a tool of colonialism. They have been rendered into a cluster of nauseatingly mealy-mouthed slogans (such as “the three Ps”) which may seem innocuous at first glance, but which have had the effect of elevating the Treaty while erasing Te Tiriti.

By the Treaty, I mean the English-language document which almost nobody signed but which, crucially for the Crown, cedes sovereignty. By Te Tiriti, of course, I am referring to the Māori-language document which was signed by the overwhelming majority of signatories and which—as the Tribunal itself found in the *Paparahi o te Raki* report—very clearly did not grant the Crown sovereignty but rather, a carefully curtailed authority (kāwanatanga) to manage its own unruly citizens.^[16] According to Te Tiriti, Māori explicitly retained complete political authority (te tino rangatiratanga) with respect to our own people and indeed to everything in our world, other than those things that we chose to relinquish to the Crown.

The way the principles of the Treaty have been interpreted and applied to inflate kāwanatanga at the expense of tino rangatiratanga cannot be characterised as an unfortunate development that could not have been predicted over forty-five years ago. Far from it. It is a salutary lesson in what happens when you incorporate a phrase like this into colonial law. Rather like inserting a concept such as kaitiakitanga into the Resource Management Act, it results in the appropriation of our concepts by agents of Pākehā law—judges, lawyers and even politicians—who unerringly define or redefine those concepts in accordance with their own

assumptions about the natural order of things. And at the heart of those assumptions is the immutability of Crown sovereignty.

Ultimately, of course, distinguishing between law that explicitly undermines mana Māori and law that does so more subtly is to split hairs. Because once you understand that Te Tiriti o Waitangi granted the Crown no more than kāwanatanga—authority to regulate the conduct of British citizens—it becomes clear that all law that emanates from the colonial legal system exceeds the limits of that authority. The very existence of the colonial legal system is a contradiction of mana Māori.

How can Māori lawyers serve as agents of mana-based change?

It probably feels as though I have done nothing but set out a plethora of seemingly intractable problems. Anyone can do that. Finding solutions presents more of a challenge.

I wondered initially about suggesting, as a starting point, a kind of lawyerly equivalent of the Hippocratic Oath: do no harm. But, given that the legal system in which you are working—by the mere fact of its existence—is harmful to mana Māori, such advice would be unachievable and therefore pointless. I certainly do not claim to have all the answers. In the end, the answer I came up with for myself was to leave the law school. But I am not suggesting that leaving is necessarily the solution for everyone. So, for those of you who want to remain, I offer the following thoughts and observations.

The first thing I want to stress is that nothing I have said is intended to come across as judgmental. As I have tried to explain, one of the most soul-destroying features of colonialism is the way it makes all of us complicit in its maintenance, one way or another. None of us are immune from that.

By the same token, lawyers bear a particularly intimate kind of complicity when it comes to sustaining the colonial legal system. It is important to acknowledge this. There is no point trying to deceive ourselves into believing that it is otherwise.

For Māori lawyers, this means that the pros and cons of your every action must be carefully considered, the benefits weighed against the costs. I acknowledge that this is not for the faint-hearted. But there is just no escaping the fact that relentless self-reflection, while exhausting, is necessary. Without it, the potential to do more harm than good is significant. It is the price to be paid if you want to practice with integrity. If nothing else, it encourages humility—a trait not typically associated with the legal profession but one which we would all do well to embrace.

Rather than setting ourselves up to fail by adopting a “do no harm” mantra, some might decide to settle for minimising the harm. Because there is no denying the extraordinary damage done to Māori, collectively and individually, by the state legal system. I know that some of you are both skilled and fearless in your efforts to defend our own from harm at the

hands of colonial law. This is important work which can make a huge difference to the lives of Māori individuals, whānau, hapū and iwi.

This approach is a bit like creating zones of safety within a fundamentally unsafe system (like a law school). It is not implausible to argue that anything that creates a better outcome for Māori is worth doing. But if that is the full extent of what we are doing, we need to be honest about that. We should not try to dress it up as anything more than it is.

We must also acknowledge the cost of what we are doing. Because working in this way does nothing to undermine the system as a whole. On the contrary, it makes the system stronger. As Audre Lorde said, “the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change”.^[17] So, while it might fairly be regarded as curmudgeonly to disparage our longing to celebrate a “win” from time to time (goodness knows, we could all do with a win once in a while) we must always remain conscious of what the occasional taste of “success” may be costing us in the long run.

If this all sounds rather oppressive and joyless, it is. But, as I am sure many of you have already realised, you are not necessarily constrained to acting according to the internal logic of the colonial legal system. There is nothing stopping you from encouraging your Māori clients to resolve their problems without turning to Pākehā law. There is nothing stopping you from supporting them to regain confidence in and to utilise our own law instead. I would encourage you to do this whenever you can.

I must add that I say this knowing very well that our own law has been denigrated, neglected and distorted by the agents of colonial law for a long time now. This means that it is not necessarily as simple as telling our people to “go home” or “ask the kaumatua” and then shrug our shoulders when things become too hard, returning to our colonised default setting of assuming that colonial law provides the only realistic answer. We should be willing to go further: what will it take to restore Māori faith in our own law? What role might you play in achieving that outcome? Are you able to leave your Western legal training and assumptions at the door?

If not, that is not the end of the world. It is not as though you have to play a central role. There are plenty of other ways for you to support the process. A law degree gives you a set of pretty useful skills that you can utilise in whichever way you choose. And of course, it is not as though your law degree represents the sum total of your skills and talents. You have all sorts of other abilities that you can bring to bear on whatever you do.

Which leads me to my final point. A law degree should neither define nor limit you. It does not condemn you to a life sentence of working within the confines of colonial law. But it does give you an intimate knowledge of that law—the kind of intimate knowledge that makes you ideally suited to unravelling it. Take a look around the room and imagine what could happen if we all committed to a collective goal of dismantling the colonial legal system.

Ngā kupu āpiti – Notes

[1] Smith, L *Decolonizing Methodologies: Research and Indigenous Peoples* (London & Dunedin: Zed Books & University of Otago Press, 1999) p 24.

[2] Jackson, M “Where to Next? Decolonisation and the Stories in the Land” in Elkington, B et al *Imagining Decolonisation* (Wellington: Bridget Williams Books, 2020) p 135.

[3] Memmi, A *The Colonizer and the Colonized* (London: Earthscan Publications, 2003) p 96.

[4] <http://mch.govt.nz>, accessed 24/06/2021.

[5] <https://www.stuff.co.nz/national/politics/116374482/tuia-250-the-return-of-the-death-ship>, accessed 25/06/2021.

[6] This statement was made during an interview with Paul Holmes and broadcast in New Zealand on the Holmes Show. Coincidentally, Haunani-Kay Trask died on the day this address was given: E te rangatira, e te wahine toa, moe mai rā.

[7] *St James Gazette*, quoted in Paxman, J *Empire* (London: Penguin Books, 2012), p 215.

[8] Ngata, T *Kia Mau: Resisting Colonial Fictions* (Wellington: Tina Ngata, 2019) pp 58-59.

[9] <https://www.stuff.co.nz/national/politics/116374482/tuia-250-the-return-of-the-death-ship>, accessed 25/06/2021.

[10] <https://www.stuff.co.nz/national/politics/116374482/tuia-250-the-return-of-the-death-ship>.

[11] Tina Ngata quotes from Cook’s journal where he confesses to having shot and killed a number of unarmed people who were fishing, not because they posed any threat but because “when we was once a long side of them we must either have stud to be knockd on the head or else retire and let them gone off in triumph and this last they would of course have attributed to their own bravery and our timouressness”. She goes on to conclude that “Cook’s decision to carry out this mass murder was not at all an act of self-defence—but merely one to exercise their superiority, so that the victims were not to think that they were in any way superior”: Ngata, T *Kia Mau: Resisting Colonial Fictions* (Wellington: Rebel Press, 2019) p 66.

[12] By 1991 it had just 40 students.

[13] Education Act 1989, section 162(2) and section 162(4)(b)(iv).

[14] Waitangi Tribunal, *The Wananga Capital Establishment Report* (Wai 718) (Wellington, 1999).

[15] The Te Wānanga o Raukawa Whakatupu Mātauranga claim (Wai 2698), lodged December 2017.

[16] Waitangi Tribunal, *Te Paparahi o Te Raki Report* (Wai 1040) 2014, p 528.

[17] Lorde, A *The Master’s Tools Will Never Dismantle the Master’s House*, https://collectiveliberation.org/wp-content/uploads/2013/01/Lorde_The_Masters_Tools.pdf: accessed 9/9/2021.

Legal education

Reflecting on a bijural, bilingual and bicultural law degree

Article by Hinemoana Markham-Nicklin and Toni Wharehoka

Hinemoana Markham-Nicklin^[1] and Toni Wharehoka^[2] reflect on what should happen next to realise the delivery of legal education in Aotearoa that is bijural, bilingual and bicultural.

Hei tīmatanga – Introduction

From criminal justice reform to constitutional change, Moana Jackson has been leading mana-based change. Moana Jackson's work has always been decades ahead of its time. The New Zealand Council of Legal Education's (NZCLE) recent decision to make te ao Māori and tikanga Māori content compulsory for all law students follows longstanding calls from Māori legal academics, and reflects Moana Jackson's 1997 recommendation to introduce compulsory education of tikanga Māori to our law school at Te Herenga Waka | Victoria University of Wellington.^[3] The recent decision finally recognises that a legal education in Aotearoa must encompass tikanga Māori, the first law of Aotearoa. Such a step signals a movement towards what Justice Tā Joseph Williams terms the "third law of Aotearoa" where the first law, Māori law is colliding with the second law, Pākehā law.^[4]

Tikanga Māori is relevant and applicable to many facets of the state legal system, including legislation, the criminal justice system, public law, and property law. Therefore, law graduates must be "trained to work in a bijural, bicultural and bilingual Aotearoa New Zealand legal system" and they must be able to meaningfully engage with tikanga Māori in order to be effective lawyers.^[5] However, law schools must also be able to meaningfully engage with tikanga Māori in order to provide effective, culturally responsive and competent delivery of te ao Māori concepts. Currently, law school remains a tool of colonisation that continues to perpetuate the dominance of Pākehā law.^[6] If we are to shift to a truly bijural system which recognises tikanga Māori within its own right, we must decolonise our institutions to create a legal education that is bicultural, bilingual and subsequently bijural.

In Part Two this article discusses the growing recognition of tikanga Māori in the state legal system and therefore the requirement for law graduates to emerge from law schools equipped with the tools to operate in the unique legal landscape of Aotearoa. Further, it echoes the warnings from Moana Jackson in 1997 in relation to teaching tikanga and te ao Māori within law schools. In Part Three the article discusses our journey through law school and some of the challenges and opportunities we have faced. In Part Four the article unpacks the risks identified in Part Two and argues that we need to examine, understand and reconsider the values that the monocultural law school is built on to create a bicultural institution that is capable of teaching a truly bicultural degree. Finally, Part Five identifies the steps that need to be taken by law schools in order for Moana

Jackson's vision, expressed in 1997, to be fully realised and for the NZCLE decision to have its desired effect — for tikanga Māori to be recognised as law in its own right.

II Tikanga Māori in the law degree: the NZCLE decision

Tikanga Māori has emerged slowly through the cracks of the colonising power's legal system. In the modern era, tikanga Māori has been recognised in diverse statutory contexts including the Resource Management Act 1991, the Building Act 2004 and the Oranga Tamariki Act 1989. It has arisen in the criminal justice context through *Te Pae Oranga*,^[7] *R v Mason* and section 27 cultural reports.^[8] The Waitangi Tribunal | Te Rōpū Whakamana i te Tiriti o Waitangi in *Ko Aotearoa Tēnei* grappled with the notion that there ought to be more recognition of tikanga Māori in the context of intellectual property.^[9] *Te Urewera* and *Te Awa Tupua* have received statutory recognition of legal personhood, reflecting the kaitiaki relationship Māori have with the environment.^[10] In *Takamore v Clarke* and more recently in *Ellis*, the Supreme Court has begun to consider the role of tikanga Māori as a strand of law that informs Aotearoa's common law.^[11] These developments demonstrate it is crucial that the lawyers who emerge from law schools are equipped to work in the unique legal landscape of Aotearoa. This requires law students to engage with te ao Māori and tikanga Māori during their legal education.

The need for tikanga Māori and te ao Māori concepts to be implemented in law schools has been recognised and acted upon by the recent NZCLE decision.^[12] This decision calls for celebration. However, while Moana Jackson recommended this change in 1997, he warned that true biculturalism needed to be achieved before the incorporation of tikanga into legal education could be done.^[13] Law school operates as a tool of colonisation, a largely monocultural institution that further embeds the view that Pākehā law and Western knowledge are superior to tikanga Māori. Any change must begin with transforming the monocultural structure of the institution itself. In light of the NZCLE's decision, we echo this warning from Moana Jackson. In order for tikanga Māori to be properly implemented into legal education, law schools must first undertake structural and systemic change.

III Māori and the Pākehā law degree: our journey through law school

Our journey through law school has been curious. It is where, for the first time in our educational journey, we learned about Te Tiriti o Waitangi. It is where our first year law lecturer recited Chief Justice Prendergast's infamous words labelling Te Tiriti o Waitangi "a simple nullity" and noted his dismissive remarks that Māori were "barbarians", incapable of having social order or a system of law.^[14] It is where we have cringed when classmates roll their eyes and groan after our law lecturer announces that we will be spending a week learning about tikanga Māori in property law. It is where we have had to console our teina who have been subject to racist remarks by Pākehā lecturers or other students. It is where our names and other kupu are mispronounced. It is where we have sat in lecture

theatres, frozen, as other students debate the legitimacy of tikanga Māori as a source of law in Aotearoa and our inherent rights, as tangata whenua, guaranteed by Te Tiriti o Waitangi.^[15]

However, law school is also where we have reconnected with te ao Māori. At law school we have learned how tikanga Māori interacts with the state legal system. We have learned that tikanga Māori is a resilient force that is emerging through the cracks after being overlaid by Pākehā law. At law school we have found refuge in Ngā Rangahautira | Victoria University of Wellington Māori Law Students' Association, we have been taught by leading Māori legal academics and we have connected with Te Hunga Rōia Māori | the Māori Law Society. At law school we have rediscovered our own Māoritanga and affirmed our identity as proud, Māori tauira. At law school we have learned about indigenous rights, we have gained the tools we need to challenge the underpinnings of the common law system and we have joined the movement to decolonise and reindigenise Aotearoa.

It is difficult to reconcile this reconnection with te ao Māori within the colonial building that once housed Te Tiriti o Waitangi, leaving it to rot and be eaten by rats in the basement. But our reconnection with te ao Māori was not instigated by our law degree, or Old Government Buildings. This reconnection was instigated by Ngā Rangahautira, Dr Carwyn Jones, Māmari Stephens and other Māori tauira and legal academics. Just like tikanga Māori emerging through the cracks of the state legal system, Māori tauira and Māori legal academics are rising up and becoming agents of mana-based change in these monocultural institutions.

IV The risks of tikanga Māori in a Pākehā law degree

Although Moana Jackson recognised the importance of teaching tikanga Māori as part of the law degree, he argued that the teaching of tikanga within the Pākehā law degree is highly problematic.^[16] A bicultural law degree is needed. However, in order for the law degree to be bicultural, the institution itself must become bicultural. One way in which law schools can become bicultural is through the employment and empowerment of Māori academics within these institutions.^[17] Another way is by unpacking, understanding and reworking the values on which the monocultural institution is built.^[18]

An assumption which sits at the heart of the Pākehā law degree, and the institutions that deliver this degree, is that Pākehā law is “the” law and tikanga Māori is simply an “add-on”.^[19] In reality, Pākehā law is the second law of Aotearoa which was forced upon tangata whenua through colonisation. The assumption that Pākehā law is “the” law in Aotearoa is what is known as epistemological racism. This form of racism assumes that Western knowledge is superior to mātauranga Māori.^[20] In the Waitangi Tribunal's recent report on the Crown's actions dealing with tamariki, *He Pāharakeke, he rito Whakakīkinga Whāruarua*, epistemological racism is described as the most insidious form of racism.^[21] This is because it drives Crown policies that result in the assimilation of Māori.^[22]

In order to prevent this vicious cycle of epistemological racism continuing within our law schools and law degree, we must listen to Moana's call to Pākehā staff and students to scrutinise their own culture and realise that Pākehā law is not "the" law but a cultural construct on its own.^[23] This promotes understanding of the nature and history of Pākehā law in Aotearoa. As a result, our legal education will finally reflect that tikanga Māori was the first law in Aotearoa and the subsequent introduction of Pākehā law did not make it "the" law but the second law in New Zealand. This will help shift our law degree from being monocultural to bicultural.

Moana highlighted in his report that when Māori advocate for self-determination or seek autonomous structures there is often an accusation of the denial of "academic freedom".^[24] Although this debate may seem dated, there have been recent discussions of threats to academic freedom due to the compulsory teaching of indigenous content within universities in Canada — the debate is, unfortunately, still a live issue.^[25] As has been displayed in the Canadian context, it would not be surprising that within Aotearoa a call to dismantle the structure of the law school to create a truly bicultural degree will be met with such a response. Therefore, we must reconsider the concept of academic freedom before we can progress with structural change.

Under the Education Act, New Zealand universities are characterised as the "critic and conscience of society".^[26] This allows academics to freely voice their opinions and ideas within their teaching and beyond the walls of the university without fear of reprimand.^[27] As a result, it is a potential risk that academics may use their role as the "critic and conscience" of society to question the role of tikanga and te ao Māori within the law degree and disseminate these ideas to students and those beyond the walls of the University. Further the concept of academic freedom may prompt a pushback from academic staff if there are suggestions to restructure the institution, as it will affect the way they teach and regulate their courses. The issue is further complicated because the content of the law degree in Aotearoa is affected by decisions of the New Zealand Council of Legal Education.

However, in his other work, Moana has said that freedom of speech should not make another feel less free.^[28] Freedom of speech is not an unqualified right.^[29] The same idea can be applied to "academic freedom". "Academic freedom" should not allow Māori knowledge to be seen as less than Pākehā knowledge. It should not be unqualified. Law schools must ensure that academics, through the use of "academic freedom", are not allowed to use their influence to make tikanga Māori be seen as less than Pākehā law. It is only with these baselines that we can ensure a truly bicultural institution and a bicultural law degree emerges and can flourish.^[30]

V Moving forward: a truly bijural, bilingual and bicultural law degree

The NZCLE decision is a great first step in realising Moana Jackson's vision from 1997. However, law schools do have a long journey ahead of them to ensure that cultural distortion of tikanga and te ao Māori does not happen and the degree they provide is truly bilingual, bicultural and

subsequently bijural. In continuing the work Moana has begun, we list a set of demands that reflect his suggestions from 1997. Although suggesting radical change may seem impossible and unrealistic, Moana highlighted in a recent speech that when ancestors crossed Te Moana-nui-a-Kiwa they overcame what they believed was impossible through courageous wisdom.^[31] He further highlighted that courage “is simply a deep breath you take before a new beginning”.^[32] This is how we achieve this new beginning for our legal education:

- Reconsider the values our institutions are built on, such as “academic freedom”, to ensure that epistemological racism does not survive;
- Employ and empower Māori legal academics in our institutions;
- Give an integral role to Māori Studies departments in teaching tikanga and te ao Māori, as they are guardians of this knowledge, to show the wider context in which tikanga and te ao Māori exist;
- Make te reo Māori compulsory within the law degree, as this is the only way tauria can understand the intricacies of tikanga, te ao Māori and te Tiriti o Waitangi;
- Recognise whānau, hapū and iwi obligations of Māori tauria to ensure they are properly supported through their studies; and
- Consult mana whenua to ensure that our tikanga Māori courses reflect the tikanga of the land upon which our institutions sit.

Ngā kupu āpiti – Notes

[1] Ngāti Kahungunu ki te Wairoa and Ngāti Pāhauwera.

[2] Taranaki and Te Atiawa.

[3] Moana Jackson *He Waka Eke Noa: A Report for the Faculty of Law, Victoria University of Wellington* (Ngā Kaiwhakamarama | Ngā Ture | Māori Legal Services, Wellington, 1997) at 24.

[4] Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 11.

[5] Ngā Pae O Te Māramatanga “[Inspiring National Indigenous Legal Education for Aotearoa New Zealand’s Bachelor of Laws Degree — Phase One: Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand](#)” (Borin Foundation, Wellington, 2021) at 8.

[6] Jackson, above n 3 at 24.

[7] See New Zealand Police “Te Pae Oranga Iwi Community Panels” <<https://www.police.govt.nz/>>.

[8] [R v Mason](#) [2012] NZHC 1849; and Sentencing Act 2002, s 27.

[9] Waitangi Tribunal [Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity](#) (Wai 262, 2011).

[10] Te Urewera Act 2014, s 11; and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.

[11] *Takamore v Clarke* [2012] NZSC 116; *Ellis v R* [2020] NZSC 89.

[12] New Zealand Council of Legal Education “Te Ao Māori and Tikanga Māori” (7 May 2021) <<https://nzcle.org.nz/>>.

[13] Jackson, above n 3, at 115 and 124.

[14] *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 at 77 and 78.

[15] While we acknowledge the differences between Te Tiriti o Waitangi and the Treaty of Waitangi, for the purposes of this article we use “Te Tiriti o Waitangi” to cover both versions.

[16] Jackson, above n 3, at 124.

[17] Jackson, above n 3 at 120. This subject was further explored by our dear friend Rhianna Morar. See Rhianna Morar “Ka Whawhai Tonu Mātou: Intellectual Work and the Settler-Colonial University” (LLB(Hons) Research Paper, Victoria University of Wellington, 2021).

[18] Jackson, above n 3, at 49.

[19] At 44.

[20] Waitangi Tribunal *He Pāharakeke, he rito Whakakīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 52.

[21] At 52.

[22] At 52.

[23] Jackson, above n 3 at 49 and 52.

[24] At 53.

[25] See Karen Drake “Finding a Path to Reconciliation: Mandatory Indigenous Law, Aishinaabe Pedagogy and Academic Freedom” (2017) 95 Can Bar Rev 10 at 33; and Frances Widdowson “The Threat to Academic Freedom, Freedom of Inquiry and Academic Standards” (6 June 2019) Fronteir Centre for Public Policy <www.fcpp.org>.

[26] Education Act 1989, s 162(4)(a)(v).

[27] D Gareth Jones, Kerry Galvin and David Woodhouse *Universities as Critic and Conscience of Society: The Role of Academic Freedom* (Te Wahanga Tatari Kaute Tohungatanga o ngā Whare Wananga o Aotearoa | New Zealand Universities Academic Audit Unit, Wellington, 2000) at 2.

[28] Moana Jackson “No one’s exercise of free speech should make another feel less free” (6 May 2018) E-Tangata <www.e-tangata.co.nz>.

[29] See Human Rights Commission *Human Rights in New Zealand* (Wellington, 2010) at 131–132; New Zealand Bill of Rights Act 1990, s 5; and Human Rights Act 1993, s 131.

[30] Jackson, above n 3 at 49 and 114.

[31] Moana Jackson “Moana Jackson: Decolonisation and the stories in the land” (9 May 2021) E-tangata <www.e-tangata.co.nz>.

[32] Jackson, above n 31.

Te Kōti Matua – High Court

Takutai moana – tests to recognise customary marine title

Re Edwards (Te Whakatōhea No. 2)

[2021] NZHC 1025
7 May 2021

Report by Andrew Irwin

Whakataunga – Overview and result

Several applicants have had their customary marine title (CMT) and protected customary rights (PCR) recognised over a number of areas in the eastern Bay of Plenty. This is the second case where the Court has made findings on CMT and PCR under the Marine and Coastal Area (Takutai Moana) Act 2011, and the first case to deal with overlapping applications and the requirements for rights recognition in detail.

Takutai Moana – customary marine title recognised – eastern Bay of Plenty	
Date	7 May 2021
Case	Re Edwards (Te Whakatōhea No. 2) (1.6 MB PDF)
Citation	[2021] NZHC 1025
Court	Te Kōti Matua – High Court
Judge(s)	Churchman J
Earlier/later decisions	Re Whakatōhea [2020] NZHC 1549.
Legislation cited	Marine and Coastal Area (Takutai Moana) Act 2011, ss 4, 6, 7, 9, 11, 26-28, 47, 50, 51, 52, 53, 56, 57, 58, 59, 60, 61, 62, 98, 105, 106, 110, 114, 125; Foreshore and Seabed Act 2004, ss, 13, 32; Evidence Act 2006, s 7; Te Ture Whenua Māori Act 1993, s 129.
Cases cited	Re Dargaville [2020] NZHC 2028; Re Paul [2020] NZHC 2039; <i>Commerce Commission v Fonterra Co-operative Group Limited</i> [2007] NZSC 36, [2007] 3 NZLR 767; <i>Barton-Prescott v Director General of Social Welfare</i> [1997] 3 NZLR 179 (HC); <i>New Zealand Māori Council v Attorney-General</i> [2007] NZCA 269; Ngaronoa v Attorney-General [2017] NZCA 351; <i>Attorney-General v Ngāti Apa</i> [2003] 3 NZLR 643 (CA); Trans-Tasman Resources v Taranaki-Whanganui Conservation Board [2020]

	NZCA 86; <i>Te Runanganui o te Ika Whenua Society v Attorney-General</i> [1994] 2 NZLR 20 (CA); <i>Amodu Tijani v Secretary, Southern Nigeria</i> [1921] 2 AC 399; <i>Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)</i> [2021] NZHC 291; Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733; <i>R v Symonds</i> (1847) NZPCC 387 (SC); <i>Wi Parata v Bishop of Wellington</i> (1877) 3 NZ Jur (NS) 72 (SC); <i>Re The Ninety Mile Beach</i> [1963] NZLR 461; Bristol v Ngāti Rangī Trust [2017] Chief Judge's MB 269 (2017 CJ 269); <i>Tau v Ngā Whānau o Morven & Glenavy – Waihao 903 Section IX Block</i> [2010] Māori Appellate Court MB 167 (2018 APPEAL 167); <i>John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board</i> (1998) 25 Tai Tokerau MB 212 (25 TTK 212); <i>Ngāti Hokopu ki Hokowhitu v Whakatāne District Council</i> [2002] NZEnvC 421, (2002) 9 ELRNZ; <i>Tsilhqot'in Nation v British Columbia</i> [2014] 2 SCR 256; <i>Delgamuukw v British Columbia</i> [1997] 3 SCR 1010; <i>Northern Territory v Griffiths</i> [2019] HCA 7; <i>Ahousaht Indian Band v Attorney-General of Canada</i> 2007 BCSC 1162.
Overview and result	A number of hapū and iwi applied for recognition of CMT and PCR in the eastern Bay of Plenty. Three other applicants under the Act appeared as interested parties as their claims overlapped with the applicants in this case. As the case was the first to consider overlapping applications the Court dealt with several novel legal issues under the Act. Held, the Court recognised the applicant's CMT in respect of three areas, and several individual hapū had PCR recognised in respect of a number of discrete activities.

Hei tīmatanga – Introduction

Rū ana te whenua, whatiwhati te moana i tā rāua pānuitanga i tēnei whakataunga a te Kōti Matua e pā ana ki ngā tikanga ki te takutai moana.

The High Court has issued its second decision recognising the existence of customary marine title since [Re Tipene](#) [2016] NZHC 3199. This, however, is the first decision that comprehensively addresses the nature of the tests for both customary marine title (CMT) and protected customary rights (PCRs). Any practitioner involved in proceedings under the Marine and Coastal Area (Takutai Moana) Act 2011 must become familiar with this decision.

Kōrero whānui – Background

In 1999 the late Claude Edwards filed an application in the Māori Land Court seeking recognition of Whakatōhea's customary rights in the takutai moana. After the enactment of the Marine and Coastal Area Act 2011, the application was transferred to the High Court.

Mr Edwards's application was a "priority application" as it existed when the Act came into effect.

In 2017, twelve other Whakatōhea applications associated with Mr Edwards's application were submitted, along with three overlapping applications.

Several of the applicants formed two groups: Whakatōhea Kotahitanga Waka (WKW) and Te Kāhui Takutai Moana o Ngā Whānui me ngā Hapū (Te Kāhui). Three other applicants were Te Ūpokorehe, Ngāi Tai, and Ririwhenua.

A number of interested parties participated. Three applicants who did not want their claims determined but with overlapping interests were Ngāti Awa, Te Whānau a Apanui and Te Whānau a Harawaka. The Attorney-General appeared to assist the Court and in the "interests of the public". Other interested parties provided submissions about their own interests in the area or to oppose the applications.

The application area is in the eastern Bay of Plenty and is (broadly) from Maraetōtara in the west to Tarakeha in the east. The areas which overlapped with other claims were the western Ōhiwa Harbour, Whakaari Island and Te Paepae o Aotea (Volkner Rocks).

The Court found that the applicants met the test for CMT in respect of three areas, but did not meet the test in the area around Whakaari and Te Paepae o Aotea. The boundaries are to be determined at the next hearing in February 2022.

Several individual applicants also had PCRs recognised for certain customary activities.

Kōrerorero – Discussion

Nature of the title recognised by the Marine and Coastal Area Act

At [22]-[56] the Court sets out a discussion of the background to the Act and the statutory criteria for CMT and PCRs. The Court notes (at [33]) that the specific rights actually conferred by the Act are much narrower and more limited than the customary title and rights that Māori would have enjoyed and exercised in the foreshore and seabed as at 1840. The Court also notes (at [34]-[36]), but does not resolve, an argument that the Act does not create customary title, but merely reverses the extinguishment of customary title under the Foreshore and Seabed Act 2004.

Importantly, the Court says (at [55]) the fact that the property rights conferred by the Act "are so limited and so different to common law property rights of ownership" means that:

- attempting to interpret or define concepts used in the Act by reference to common law proprietary rights is inappropriate; and
- the usefulness of reference to Canadian and Australian authorities in relation to aboriginal title is lessened.

The Court says (at [57]) that as the focus of both CMT and PCRs is on the rights exercised in accordance with tikanga at 1840, it would commence by examining the situation prior to 1840. At [58]-[76] the Court reviewed the evidence of customary title prior to 1840 (also set out in Appendix B to the judgment) and the law relating to the recognition of customary title, concluding (at [58]) that at 1840 certain groups had “mana motuhake”, “tino rangatiratanga” and customary title over specified areas of the takutai moana.

Burden of proof

Applicants for recognition orders are required by s 98 to prove all the positive elements set out in the tests for PCRs in s 51 and for CMT in s 58, but have no obligation to prove that their customary rights have not been extinguished. It is assumed in the absence of proof to the contrary that customary interests have not been extinguished: [99].

The standard of proof is the balance of probabilities, except that s 106(3) creates a presumption in favour of non-extinguishment: [100].

The meaning of “holds the specified area in accordance with tikanga”

There is a significant discussion (at [104]-[144]) of the principles concerning the meaning of the words “holds in accordance with tikanga”.

Whilst not noted in this discussion, these words have underpinned the statutory definitions of “native land” and “Māori customary land” since the 1860s. The Native Lands Act 1865 (s 2) defined the term “Native Land” as “lands in the Colony which are owned by Natives under their customs or usages.” This statutory definition was continued essentially unaltered through to the Māori Affairs Act 1953. Te Ture Whenua Māori Act 1993 (s 129(2)(a)) was the first enactment that referred to Māori customary land as being “land that is held by Maori in accordance with tikanga Māori”, where the words “tikanga Māori” replaced “their customs or usages”.

The Court notes (at [124]-[126]) the 1998 *John da Silva v Aotea Māori Committee* decision, where the Māori Land Court had stated, in reference to the words in the 1993 Act “held by Māori in accordance with tikanga Māori”, that it was not appropriate to determine Māori customs and usages from a “Pākehā or Court perspective ... from the outside looking in” but “according to tikanga Māori – from the inside.” The Māori Land Court in that decision said the word “held” did not connote ownership “but rather that it is retained or kept in accordance with tikanga Māori”.

The Court rejected submissions from the Crown and certain landowners that to establish an area was held in accordance with tikanga required applicants to show an intention and ability to control the relevant area. That submission relied, in part, on Canadian case law. The Court accepted (at [138]) that where customary title was proved in Canada, the applicant group gained exclusive possession at common law. The Court also held (at [139]) that CMT is not the equivalent of customary title to the takutai moana: it cannot be owned and is subject to the exercise of substantial rights by others, including access, navigation and fishing. Whether the test

is met or not is not to be decided in accordance with common law or other principles addressing customary title to land, “but in accordance with the tikanga that is applicable to the specified area of the takutai moana”. The Court concluded:

[144] The task for the Court in considering whether the requirements of s 58(1)(a) of the Act have been met is therefore not to attempt to measure the factual situation against western property concepts or even the tests at common law for the establishment of customary land rights. It is also not particularly helpful to attempt to apply the Canadian and Australian jurisprudence on Aboriginal title. The critical focus must be on tikanga and the question of whether or not the specified area was held in accordance with the tikanga that has been established.

Exclusivity and “shared exclusivity”

The test for CMT (s 58(1)(b)(i)) in an area requires a group to have “exclusively used and occupied it from 1840 to the present day without substantial interruption”. The Court rejected (at [150] and [152]) similar submissions from the Crown and landowners that this element of the test also required applicants to prove an intention and ability to control, based on Canadian and English decisions.

The Court then considered (at [153]-[170]) the concept of “shared exclusivity”: the notion that applicant groups with overlapping interests could together, as against the rest of the world, have a form of exclusive use and occupation. On this point the Court concluded:

- Unlike Western proprietary concepts noted above, it is consistent with the purpose of the Act and the focus in s 58(1) on tikanga that the concept of shared exclusivity to be available in New Zealand, as it is in Canada ([168]).
- The Act permits a jointly held area of CMT rather than two overlapping CMTs for the same area held by different parties ([169]).
- The relevance of the applicant group owning abutting dry land will depend on the facts, but in this case was of limited significance ([172]).
- It is difficult to see how the ability to control access to abutting dry land could be determinative of CMT, because the Act provides that CMT is subject to extensive general rights of access, navigation and fishing ([173]).
- The ability to exclude others is at odds with the tikanga values of whanaungatanga and manaakitanga ([174]).
- While shared exclusivity is not a default position under the Act, it goes too far to suggest that there must have been some express agreement in 1840 for shared exclusivity to exist (at [179]-[180]).

Substantial interruption – raupatu

The Act does not define what “substantial interruption” might mean ([188]). In this case, in 1866 the Crown confiscated 448,000 acres of land in the eastern Bay of Plenty. The raupatu clearly produced widespread economic hardship, but did not substantially disrupt the relationship the applicants had with the takutai moana ([200], [204] and [270]). Although many hapū were displaced from traditional coastal settlements, reservations were

made along the coast ([201]). There was no evidence applicant groups living in the area were denied access to the takutai moana ([203]). In terms of tikanga, the confiscation of lands and destruction of property would not have severed the connection with the takutai moana ([206]).

Substantial interruption – resource consents and local government regulatory activities

In terms of resource consents granted in the takutai moana, there is nothing in the RMA or predecessor legislation that would indicate Parliament intended the grant of a resource consent would extinguish customary rights ([223], [227]). While the physical activities and structures authorised by a resource consent (such as wharves, jetties, slip ways, sewerage or other outfall pipelines) may have the practical effect of substantial interruption, the fact of a resource consent does not automatically have that effect ([224], [229] and [230]).

The regulation of the takutai moana by local authorities is the same: there must be a clear intention to extinguish customary rights. One such activity which would have this effect is reclamation ([226], [271]). Whether a structure lawfully constructed in the takutai moana amounts to substantial interruption is a question of fact ([271]).

Substantial interruption – third party use and occupation

Whether third-party use or occupation of the takutai moana is sufficient to amount to a substantial interruption (or to otherwise preclude CMT) is a question of fact ([256]). In this case, there was insufficient evidence provided to the Court to allow any such conclusion ([256]). Because CMT is expressly subject to rights of navigation, fishing and access, the fact that third parties have used boat ramps, accessed the foreshore and sea for recreational and/or commercial purposes or gone fishing is not sufficient of itself to exclude CMT ([257], [264], [269]). The presence of some third-party activities, such as marine farms, may be sufficient to amount to substantial interruption in that area ([258]).

Tikanga

The Court discusses (at [272]-[331]) tikanga and recent jurisprudence concerning tikanga. Some points of note are:

- It is not the role of the Court to define the tikanga of the applicants, but rather the proper authorities on tikanga are those who have been tasked or honoured with the mātauranga of their tupuna ([272]).
- The use of the word “tikanga” in s 58(1)(a) is obviously intended to refer to the principles of customary law that govern the relationship between iwi, hapū and whānau and the takutai moana and the rights and responsibilities that flow from that ([279]).
- Drawing from luminaries including (now Supreme Court justice) Sir Joseph Williams, Tā Hirini Moko Mead, Professor Emeritus David Williams and Tā Edward Taihakurei Durie, the values that have been said to be at the centre of tikanga include: whānaungatanga, mana, tapu, utu, kaitiakitanga, whakapapa, manaakitanga, aroha, mana tupuna and wairua ([282]-287)).

- Even though here there was no substantial interruption to the applicant groups' use and occupation of the takutai moana, in accordance with tikanga not every interruption would have severed the connection ([297]). Ahi kā, that is periodical or regular use consistent with ownership, could be sufficient to maintain a connection ([299]).
- In terms of whakapapa, the Court found, on the basis of the report of the pukenga, that the various groups had established their whakapapa to the earliest settlement of Te Moana-a-Toi ([307(a)]). They were able to establish their mana in respect of the whenua and takutai moana by whakapapa and through discovery, the naming of and relationship with geographical features, long and continuous occupation and raupatu ([307(b)]).
- Because the hapū of Whakatōhea share whakapapa with other iwi (Ngāti Awa, Te Whānau-a-Apanui and Ngāi Tai), it is not possible at the boundaries of the Whakatōhea rohe to draw straight lines on a map where it could be said that Whakatōhea ceased to hold an area in accordance with tikanga in favour of another iwi or hapū ([307(d)]).
- In terms of the report provided to the Court by pukenga appointed under the Act, although not bound by that report, the report's recommendations on tikanga were likely to be highly influential ([325]).

Protected Customary Rights

The Court held the fact another group holds CMT in an area does not automatically preclude a different group from obtaining an order for PCRs in the same area ([398]).

On the assumption there is sufficient evidence, the Court accepted the following activities could be the subject of a PCR (see [669]):

- collecting firewood;
- gathering driftwood;
- collecting sand, mud, stones and/or rocks;
- collecting shells;
- gathering certain plants;
- whitebaiting;
- taking of wai tai for rongoā purposes;
- using wai tai for bathing and healing purposes;
- landing and launching vessels;
- using the takutai moana for transport and navigation;
- travelling to a specific location to pass down mātauranga to future generations;
- wānanga;
- hui;
- tangihanga;
- burials;
- baptisms;

- planting certain plants; and
- exercising kaitiakitanga activities, including monitoring the activities of other users of the takutai moana, collecting rubbish, environmental projects (such as planting pingao and spinifex) and the creation of maps for certain purposes.

It appeared that it is key that applicant groups must provide evidence of (see, for example, [496]):

- the particular area where the activity is practiced;
- what tikanga was involved; and
- whether the activity is still being carried out today.

The Court found the following activities could not be the subject of PCRs:

- kaimoana and fishing ([487]);
- bird snaring ([495]);
- hunting for tītī ([495]);
- exercising rangatiratanga and the right to control and have a voice ([576]);
- applying or reinstating traditional placenames ([601]);
- exercising mana motuhake and tino rangatiratanga, other than where physical activities are involved or natural and physical resources used ([630]);
- the use of stingrays and sharks for rongoā ([631]);
- the recovery of tohorā/whales ([635]); and
- the taking of teeth and bones of deceased marine mammals ([636]).

Te Kōti Pira Māori – Māori Appellate Court

Removal of trustees – breach of trustee duties – conflict of interest

Walters v Wikiriwhi – Oruanui 9 and Others

[2021] Māori Appellate Court MB 102 (2021 APPEAL 102)
17 May 2021

Report by Hinemoana Markham-Nicklin

Whakataunga – Overview and result

The lower Court determined that one of the trustees (Mr Walters) had breached the trust order as he had voted and participated on matters despite having a clear conflict of interest. The rest of the trustees had breached their duties as they had failed to identify this conflict of interest. The appellants were removed as trustees. The lower Court ordered Mr Walters to pay \$128,475 to the trust. The appeals in relation to the conflict of interest and removal of trustees were dismissed and the appeal in relation to the payment owed by Mr Walters was partially allowed.

Appeal – removal of trustees – breach of trustee duties – conflict of interest	
Date	17 May 2021
Case	Walters v Wikiriwhi – Oruanui 9 and Others (364 KB PDF)
Citation	[2021] Māori Appellate Court 102 (2021 APPEAL 102)
Court	Te Kōti Pira Māori – Māori Appellate Court
Judge(s)	Deputy Chief Judge Fox, Judges Savage and Reeves
Earlier/later decisions	Wikiriwhi v Walters (2020) 232 Waiariki MB 212 (232 WAR 212); 2020 Māori Appellate Court MB 249-399 (2020 APPEAL 249-399).
Legislation cited	Te Ture Whenua Māori Act 1993, s 58.
Cases cited	Rameka v Hall [2013] NZCA 203; Fenwick v Naera [2015] NZSC 68; Pook v Matchitt – Matangareka 3B Block [2019] Māori Appellate Court MB 167 (2019 APPEAL 167); Apatu v Puna – Owhaoko C Trust [2010] Māori Appellate Court MB 34 (2010 APPEAL 34); Taurua v Harawira – Te Tii Waitangi A [2017] Māori Appellate Court MB 328 (2017 APPEAL 328); Re Perenara [2004] 10 Waiariki Appellate MB 233 (10 AP 233); Crampton-Smith v Crampton-Smith [2011] NZCA 308, [2012] 1 NZLR 5; Urwin v Te Kura – Te Reti B and Te Reti C Block (2014) 74 Waikato Maniapoto MB 277 (74 WMN 277); Chirnside v Fay [2007] 1 NZLR 433 (SC); Personal Representatives of Tang Man Sit v Capacious Investments Ltd [1996] 1 AC 514 (PC); United Australia Ltd v Barclays Bank Ltd [1941] AC 1 (HL).

Overview and result	Appeal against a decision of the Māori Land Court to remove the appellants as trustees for the Oruanui 9 Trust and the Oruanui 10 Trust (the trusts). Additionally, one of the appellants, Mr Walters appealed against an order requiring him to pay \$128,475 to the Oruanui 10 Trust. The lower Court found that Mr Walters had breached the trust orders and s 227A of Te Ture Whenua Māori Act 1993 as he participated and voted on matters despite having a clear conflict of interest. The lower Court determined that the other trustees had breached their duties as they had failed to identify and manage this conflict of interest. On this basis, Judge Coxhead in the lower Court ordered that all trustees be removed. The three issues to be determined were; (1) was Judge Coxhead correct in finding Mr Walter's conflict of interest was not identified or managed by all trustees and that this constituted a breach of their trustee duties? (2) was Judge Coxhead correct in removing the trustees (s 240) without first contemplating whether removal was warranted? (3) was Judge Coxhead correct in determining that equitable damages should be awarded in this case? Held, appeal dismissed in respect of the first two issues and appeal partially upheld in respect of the order for equitable compensatory damages. In relation to the first issue, the Court confirmed that there was clearly a conflict of interest and the trustees did not manage the conflict in accordance with cl 5 of the trust order, s 227A, case law, and best practise. On the second issue, the Court confirmed that the removal of the trustees was the appropriate action following their failure to perform their duties satisfactorily. On the third issue, the Court partially upheld the appeal on the basis that there was no reliable valuation evidence and there was insufficient evidence of any significant expenditure by Mr Walters on improvements. Therefore the matters relating to the third issue will be remitted back to the lower Court for further consideration. The Court also directed the lower Court to appoint an independent responsible trustee.
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Status of land – exception to s 2(2)(f)/53 applies

Peacocke – Part Puketiti 2B2B 1

[2021] Māori Appellate Court MB 48 (2021 APPEAL 48)
26 March 2021

Report by Hinemoana Markham-Nicklin

Whakataunga – Overview and result

Appeal challenging a decision of the Māori Land Court determining that Part Puketiti 2B2B 1 block was Māori freehold land, arguing instead that the block was General land. The Court confirmed that the land is Māori freehold land.

Appeal – status of land – Māori freehold land – exception to s 2(2)(f) Māori Affairs Act 1953 applies – dismissed	
Date	26 March 2021
Case	Peacocke – Part Puketiti 2B2B 1 (300 KB PDF)
Citation	[2021] Māori Appellate Court 48 (2021 APPEAL 48)
Court	Te Kōti Pira Māori – Māori Appellate Court
Judge(s)	Judge Coxhead (presiding), Judges Reeves and Stone
Earlier/later decisions	<i>Peacocke – Part Puketiti 2B2B 1 Block and Lot 1 Deposited Plan South Auckland 33533</i> (2020) 205 Waikato Maniapoto MB 202 (205 WMN 202).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 18(1)(h) and 131(a); Māori Affairs Act 1953, ss 2(2)(f) and 226.
Cases cited	<i>Deputy Registrar v Te Bach 2007 Ltd – Ohawini D8</i> (2010) 15 Taitokerau MB 3 (15 TTK 3); <i>Succession to Nehe Kopua</i> (1978) 15 Ruatoria MB 238 (15 RUA 238); <i>Haddon v Rahui Te Kuri Inc – Pakiri R</i> (1994) 3 Taitokerau Appellate MB 178 (3 APWH 178); Deputy Registrar – Te Ketī A2 (2011) 15 Taitokerau MB 76 (15 TTK 76); Dobson – Ahipara 2B47 Block (2014) 74 Taitokerau MB 139 (74 TTK 139); Moore – Part Oakura F2A [2020] Māori Appellate Court MB 209 (2020 APPEAL 209); <i>Scott – Rangianewa 4C2C3E</i> (1968) 12 Whanganui Appellate MB 208 (12 APWG 208); Savage-Pickett – Section 15B3 Block VIII Tairua Survey District (2011) 30 Waikato Maniapoto MB 201 (30 WMB 201); Taurua Survey District (2011) 30 Waikato Maniapoto MB 201 (30 WMB 201); Taurua Survey District (2011) 30 Waikato Maniapoto MB 201 (30 WMB 201); Taurua Survey District (2011) 30 Waikato Maniapoto MB 201 (30 WMB 201); <i>Holtite Ltd v Jost (Great Britain) Limited</i> [1979] RPC 81; <i>Auckland Regional Authority v Codelfa Construction Ltd</i> [1981] 2 NZLR 300; <i>Chartbrook Ltd v Persimmon Homes Ltd</i> [2009] UKHL 38.
Overview and result	Appeal challenging a decision of the Māori Land Court determining that Part Puketiti 2B2B 1 block was Māori freehold land. The trustees of Totoro Trust argued that the block was General land. The block was originally owned by Raimona Lee and Puku Doherty. In 1980 after Ms Lee sold her shares

to Ian Walsh, the block was mistakenly vested in Walsh as the sole owner, and the Doherty shares were erroneously extinguished.

The lower Court concluded that the transfer from Lee to Walsh did not take effect according to its tenor (meaning s 226(2) of the Māori Affairs Act 1953 did not operate to bring into effect an instrument of transfer) (the 1953 Act) because of the error and as such the block was Māori freehold land. Section 2(2)(f) of the 1953 Act provides that Māori freehold land will be deemed General land in certain circumstances. However, here the lower Court decided this section was not intended to provide for the present circumstance, where a transfer did not occur in accordance with what was intended by the parties.

Alternatively, the lower Court queried whether s 2(2)(f) of the 1953 Act could be set aside by exception. This section deems Māori freehold land to be General land except where it appears on the face of the instrument of transfer that the land has remained Māori freehold land. The lower Court ventured, tentatively, that there was enough of an indication on the face of the instruments that the land would remain Māori freehold land.

On both accounts the lower Court concluded that the land was Māori freehold land.

On appeal, the Court considered two issues; (1) did the 1980 instrument of transfer take effect in accordance with its tenor? (2) does s 2(2)(f) of the 1953 Act apply to deem the block to be General land? This case turns on construction of the 1953 Act and a time period in which registration under land transfer legislation was not mandatory.

Held, appeal dismissed.

In relation to the first issue the Court concluded that the 1980 transfer did in fact take effect in accordance with its tenor (meaning s 226(2) of the 1953 Act, a declaratory provision, was operable).

Answering the second issue, the Court concluded that, nevertheless, the exception in s 2(2)(f) applies so the deeming effect of that provision did not come into play. Several contextual aspects of the 1980 memorandum of transfer aided the Court's analysis. These included the fact that it was clear that there was more than one owner of the block as Lee transferred 44.8125 shares out of a total of 54.0000 shares, the fact that it refers to the sale and purchase agreement that was confirmed by the Māori Land Court and the fact that it contained the certificate of confirmation by the Māori Land Court. The confirmations were only required if the land was

	Māori land. On this basis, the Court confirmed that the land's status is Māori freehold land. The Court observed that there have been three categories of cases considering s 2(2)(f) of the 1953 Act (at [15]-[19]). First, are those situations where a transfer registered in breach of the 1953 Act passes indefeasible title, it does not automatically change the status of the land so transferred from Māori freehold land to General land. The second category of cases consider the express exception in s 2(2)(f) ("except where it appears on the face of the instrument of transfer that the land has remained Māori freehold land"). Those cases concluded that something unequivocal needed to be set out in the transfer and that those completing transfer would take an active step to indicate that the land was to remain Māori freehold land. The third category concerns transfers of undivided shares in Māori freehold land. "The general principle is that the transfer of an undivided share in Māori freehold land does not trigger s 2(2)(f) of the 1953 Act, meaning that the land remains Māori freehold land." This case fell into the second and third categories meaning it can be distinguished from transfers that breached the 1953 Act. What the lower Court had expressed tentatively, the Appellate Court relied on as the reason to dismiss the appeal. In doing so the Appellate Court gave voice to reservations about earlier, lower court cases, requiring that something unequivocal needed to be set out in the transfer (at [28]-[29]) but refused to formulate an alternative test reasoning that the matter was case specific. In part the Appellate Court's reservations turned on its construction of the word "appears" in the section of the legislation as not necessarily requiring express words or something unequivocal. While accepting it could not look behind the face of the instrument the Court said (at [28](e)), "An unequivocal statement that the land is to remain Māori freehold land following transfer is clearly sufficient. But it should not be a requirement. For example, it may appear on the face of the instrument of transfer that the land is to remain Māori freehold land based on a number of cumulative factors, none of which may be unequivocal by themselves."
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Hōngongoi 2021 – additional content online

Te Kōti Pira Māori – Māori Appellate Court

[Injunction](#) – upheld – *Peihopa v Peihopa – Kaikou H* [2021] Māori Appellate Court MB 180 (2021 APPEAL 180) – Hinemoana Markham-Nicklin

[Injunction](#) – status of land – forfeiture orders – *Nicholas v The Official Assignee – Lot 6 DP 34349* [2021] Māori Appellate Court MB 228 (2021 APPEAL 228) – Hinemoana Markham-Nicklin

[Injunction](#) – upheld – occupation order – no constructive trust – *Nicholas v Te Amo – Te Whaiti-Nui-A-Toi Block* [2021] Māori Appellate Court MB 273 (2021 APPEAL 273) – Hinemoana Markham-Nicklin

Te Kōti Whenua Māori – Māori Land Court

[Status of land](#) – evidence of necessity – refusal to change status – *Tapsell – Lot 1 Owhatiura South 5 Block* (2021) 257 Waiariki MB 176 (257 WAR 176) – Elizabeth Derby