

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Ngā whakahaere rauemi – Trans-Tasman Resources: a cautious step forward for Māori rights

Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board

[2021] NZSC 127
30 September 2021

Dr Sarah Down and Emeritus Professor David Williams

Whakataunga – Overview and result

The Supreme Court upheld the decision to reject the approval of Trans-Tasman Resources Limited's application to mine for iron sands offshore. The decision is a significant win for affected iwi and represents a step forward for our understanding of Te Tiriti o Waitangi principles and the consideration to be given to Māori rights under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. While the Supreme Court unanimously accepted that tikanga is an applicable law, key complexities of how tikanga applies in the New Zealand courts were left for another day.

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Ngā whakahaere rauemi – Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) – Environmental Protection Agency – tikanga – Treaty of Waitangi principles – mining	
Date	30 September 2021
Case	Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board (1 MB PDF)
Citation	[2021] NZSC 127
Court	Te Kōti Mana Nui – Supreme Court
Judge(s)	Winkelmann CJ, William Young, Glazebrook, Ellen France, and Williams JJ
Earlier/later decisions	Environmental Protection Authority Te Mana Rauhi Taiao <i>Decision on Marine Consents and Marine Discharge Consents Application – Trans-Tasman Resources Ltd – Extracting and processing iron sand within the South Taranaki Bight</i> (August 2017) [DMC decision]; Environmental Protection Authority Te Mana Rauhi Taiao <i>Trans-Tasman Resources Ltd – Marine Consent Decision</i> (June 2014); <i>Taranaki-Whanganui Conservation Board v Environmental Protection Authority</i> [2018] NZHC 2217; Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2020] NZCA 86; <i>Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board</i> [2020] NZSC 67.
Legislation cited	Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1997, s 9; Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 4(1); Resource Management Act 1991.
Cases cited	Takamore v Clarke [2012] NZSC 116; <i>Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd</i> [2014] NZSC 38; <i>RJ Davidson Family Trust v Marlborough District Council</i> [2018] NZCA 316; <i>Environmental Defence Society Inc v Mangonui County Council</i> [1989] 3 NZLR 257; <i>Helu v Immigration and Protection Tribunal</i> [2015] NZSC 28; <i>Ortmann v United States of America</i> [2020] NZSC 120; <i>New Zealand Recreational Fishing Council Inc v Sanford Ltd</i> [2009] NZSC 54; Environmental Protection Authority Te Mana Rauhi Taiao <i>Decision on Marine Consent Application – Chatham Rock Phosphate Ltd – To mine phosphorite nodules on the Chatham Rise</i> (February 2015); <i>New Zealand Māori Council v Attorney-General</i> [1987] 1 NZLR 641; <i>Huakina Development Trust v Waikato Valley Authority</i> [1987] 2 NZLR 188; <i>Barton-Prescott v Director-General of Social Welfare</i> [1997] 3 NZLR 179; Tukaki v Commonwealth of Australia [2018] NZCA 324; Ngaronoa v Attorney-General [2017] NZCA 351; <i>Ngai Tahu Māori Trust Board v Director-General of Conservation</i> [1995] 3 NZLR 553; <i>Tainui Māori Trust Board v Attorney-General</i> [1989] 2 NZLR 513; Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation [2018] NZSC 122; Waitangi Tribunal Ko Aotearoa Tēnei: <i>A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture</i>

	and Identity (Wai 262, 2011); <i>Haida Nation v British Columbia (Minister of Forests)</i> 2004 SCC 74; <i>Chippewas of the Thames First Nation v Enbridge Pipelines Inc</i> 2017 SCC 41; <i>Clyde River (Hamlet) v Petroleum Geo-Services Inc</i> 2017 SCC 40; <i>Lewis v Wilson and Horton Ltd</i> [2000] 3 NZLR 546; <i>Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel</i> [2019] NZCA 175; Paki v Attorney-General [2012] NZSC 50; <i>Attorney-General v Ngati Apa</i> [2003] 3 NZLR 643; <i>Baldick v Jackson</i> (1910) 30 NZLR 343; <i>The Public Trustee v Loasby</i> (1908) 27 NZLR 801; <i>Zaoui v Attorney-General (No 2)</i> [2005] NZSC 38; <i>New Zealand Pork Industry Board v Director-General of the Ministry for Primary Industries</i> [2013] NZSC 154; <i>Television New Zealand Ltd v Viewers for Television Excellence Inc</i> [2005] NZAR 1; <i>Love v Porirua City Council</i> [1984] 2 NZLR 308; <i>Vodafone New Zealand Ltd v Telecom New Zealand Ltd</i> [2011] NZSC 138; <i>Bryson v Three Foot Six Ltd</i> [2005] NZSC 34; <i>Edwards (Inspector of Taxes) v Bairstow</i> [1956] AC 14.
Overview and result	The Supreme Court upheld the decision of the Court of Appeal to reject the approval of Trans-Tasman Resources Limited's application to mine for iron sands offshore in the South Taranaki Bight. The decision provides significant guidance on the interpretation of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. The judgment was split on a number of issues, but importantly, all judges were unanimous on Te Tiriti o Waitangi and tikanga issues and how decision-makers had to consider Māori interests. The decision confirms that close-ended Treaty of Waitangi provisions (i.e. Treaty provisions that provide a degree of specification of decision-makers' Treaty obligations) "must be given a broad and generous construction." Importantly, in examining Treaty principles the Court stressed the core guarantee of tino rangatiratanga as governing Māori customary interests as opposed to more abstract Treaty principles such as partnership or active protection. This supports a renewed focus on the texts of Te Tiriti. The Supreme Court also affirmed the finding in <i>Takamore</i> that "Māori custom according to tikanga is ... part of the values of the New Zealand common law". On this basis, the Supreme Court found that tikanga was an "applicable law" under the EEZ Act. However, more difficult questions concerning how tikanga is part of New Zealand law were deliberately set aside for another day. Overall, the Supreme Court concluded that the decision to grant the application did not effectively engage with the effect of the proposal on iwi parties

	and their “concern that they will be unable to exercise their kaitiakitanga to protect the mauri of the marine environment.”
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Hei tīmatanga – Introduction

In *Trans-Tasman Resources*, the Supreme Court upheld the decision of the Court of Appeal to reject the approval of Trans-Tasman Resources Limited's (TTRL) application to mine for iron sands offshore in the South Taranaki Bight.^[1] This was the first opportunity the Supreme Court has had to consider the interpretation of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) and the decision provides significant guidance on the approach to be taken under that Act. The Court's findings regarding Māori rights have important implications beyond the EEZ Act, which is the focus of this article. *The Trans-Tasman Resources* decision represents a step forward for Te Tiriti principles, although it is more cautious and conservative about tikanga as part of the common law. The authors argue that this may not be such a bad thing.

Kōrero whānui – Background

In 2016, TTRL sought consents to extract and process 50 million tonnes of iron sand per year within the South Taranaki Bight. Affected iwi (Ngāti Ruanui and Ngā Rauru) were bitterly opposed to the application because of the potential and uncertain environmental impacts of the proposed activities and the effect on their kaitiakitanga.

On 3 August 2017, the Decision-making Committee (DMC) of the Environmental Protection Authority (EPA) granted the consents subject to conditions.^[2] Iwi, fisheries and environmental groups challenged the decision in the High Court. The High Court upheld the appeal and quashed the decision on the basis the DMC had taken an adaptive management approach to the application when that was prohibited under the Act.^[3] An appeal by TTRL to the Court of Appeal was dismissed,^[4] and TTRL further appealed to the Supreme Court.

The Supreme Court upheld the decision to quash the DMC's decision and remit the application back to the EPA for reconsideration. While TTRL claimed that remitting the application to the EPA is a victory,^[5] it is difficult to see that as the case given that is what would ordinarily be expected following a successful appeal of this nature.^[6] Indeed, Glazebrook J went a step further, arguing the application should be dismissed outright, indicating a strong view that TTRL will be unable to meet the tests set out in the majority's approach.^[7]

The decision is a jumble of four judgments spanning 130 pages. Importantly, the judges were unanimous in upholding the decision of the Court of Appeal, but the approaches were markedly different in some respects. Unusually, the decision starts with the dissenting judgment of William Young and Ellen France JJ which provides the most analysis and explanation (judgment delivered by Ellen France J). The majority, (Winkelmann CJ, Williams J and Glazebrook J) all give separate decisions,

in which they agree with much of the analysis provided by William Young and Ellen France JJ,^[8] but fundamentally disagree with their approach to interpreting the purpose provision.

Glazebrook and Williams JJ, while delivering separate judgments, were substantively on the same page, save with respect to the question of relief.^[9] Meanwhile, the Chief Justice mostly agreed with Glazebrook J's interpretation of the purpose provision, but disagreed on the relevance of economic considerations and provided some further nuances in her judgment.^[10] Interestingly, all judges agreed on Te Tiriti and tikanga matters (with Williams J adding an additional gloss in his short judgment, with Glazebrook J concurring). In short, the way the different judgments relate to each other is more than a little complicated. This article focuses on the findings of most importance to Māori, while leaving to others analysis of the more technical aspects of the decision.

Kōrerorero – Discussion

Purpose provision of the EEZ Act

The majority of the Supreme Court (Glazebrook and Williams JJ and Winkelmann CJ) found that s 10 of the EEZ Act “provides an overarching framework for decision-making”.^[11] Section 10(1) provides that the purpose of the EEZ Act is to:

- a. promote the sustainable management of the natural resources of the exclusive economic zone and the continental shelf;” and
- b. “...protect the environment from pollution by regulating or prohibiting the discharge of harmful substances and the dumping or incineration of waste or other matter.

The majority found the “operative force” of this section meant decision-makers have to weigh decision-making criteria under s 59 in a way that achieves both the s 10(1)(a) and s 10(1)(b) purposes.^[12] The majority held s 10(1)(b) is an environmental bottom line in the sense that, if the environment cannot be protected from pollution through regulation, then discharges of harmful substances or dumping must be prohibited.^[13] This bottom-line required that decision-makers apply a three-step test for marine discharge and dumping consents:^[14]

(a) Is the decision-maker satisfied that there will be no material harm caused by the discharge or dumping?

If yes, then step (c) must be undertaken. If not, then step (b) must be undertaken.

(b) Is the decision-maker satisfied that conditions can be imposed that mean:

- i. material harm will be avoided;
- ii. any harm will be mitigated so that the harm is no longer material;
- iii. any harm will be remedied within a reasonable timeframe so that, taking into account the whole period harm subsists, overall the harm is not material?

If not, the consent must be declined. If yes, then step (c) must be undertaken.

(c) If (a) or (b) is answered in the affirmative, the decision maker should perform a balancing exercise taking into account all the relevant factors under s 59, in light of s 10(1)(a), to determine whether the consent should be granted.

Glazebrook and Williams JJ found that, in determining the question of material harm, economic considerations could be relevant but “only at the margins.”^[15] Winkelmann CJ disagreed on this point finding that, “whether the discharge of a harmful substance will cause material harm cannot be affected by considerations of economic benefit.”^[16]

William Young and Ellen France JJ disagreed finding that s 10 did not form a bottom line and decision-makers were required to make an overall assessment of the relevant factors in s 59, albeit with s 10(1)(a) and (b) purposes in mind.^[17] On their view, material harm may be able to be mitigated, avoided or remedied by conditions, although the Act’s provisions tend toward an approach favouring environmental protection. Ultimately, however, William Young and Ellen France JJ agreed with the majority that the DMC made a fundamental error of law in failing to favour caution and environmental protection as required by the Act in the face of uncertainty of effects on the environment (particularly with respect to the impact on marine mammals and seabirds).^[18]

There are aspects of these findings that deserve close attention, including the approach taken to whether decision-makers have an obligation to consider the precautionary principle and the implications and parallels of the decision for the Resource Management Act 1991 (RMA)—particularly with respect to the purpose provision and the way in which the *King Salmon* decision was considered. Scrutiny of these findings is particularly important in the context of debates over amending the RMA.

In sum, the majority of the Supreme Court interpreted the purpose provisions of the EEZ Act in a way that provides significant protection to the exclusive economic zone, which is welcomed.

The Treaty of Waitangi provision

Interestingly, the judgment of William Young and Ellen France JJ dealt with Treaty principles and tikanga (with Winkelmann CJ and Glazebrook and Williams JJ concurring). That the Court was unanimous on these specific points illustrates the seriousness with which the entire bench of the Supreme Court takes Te Tiriti and tikanga.

The EEZ Act includes a Treaty of Waitangi provision in s 12. However, unlike s 8 of the RMA which is set out in a general way for decision-makers to interpret, s 12 refers to a number of specific sections in the EEZ Act “[i]n order to recognise and respect the Crown’s responsibility to give effect to the principles of the Treaty of Waitangi.” Since 2000, governments have indicated a preference for this type of “specific” Treaty clause which directs decision-makers on Treaty obligations.^[19]

TTRL (and to some extent the Attorney-General who was an intervener) argued that because the “specific” treaty clause under the EEZ Act directs how decision-makers are to give effect to the principles of the Treaty of Waitangi (in contrast, for example, to s 4 of the Conservation Act 1987 which is open-ended) this narrowed the general relevance of Treaty principles.^[20]

Both the DMC and the High Court accepted that Parliament had made clear how decision-makers should give effect to Te Tiriti obligations under s 12, and that there was no wider obligation on decision-makers to consider Te Tiriti principles in decision-making.^[21] On this point, the Supreme Court’s unanimous finding was that:^[22]

...the move to more finely tuned subtle wording does not axiomatically give support to a narrow approach to the meaning of such clauses. Indeed, the contrary must be true given the constitutional significance of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. It ought to follow therefore that Treaty clauses should not be narrowly construed. Rather, they must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.

One of the directions under s 12 is that decision-makers must take into account the effects of activities on “existing interests”. The meaning of existing interests refers to (inter alia) “any lawfully established existing activity, whether or not authorised by or under any Act or regulations, including rights of access, navigation, and fishing”.^[23] The Supreme Court found that the Treaty provision gave “strong direction” to decision-makers to take into account the effects of the proposed activity on “existing interests” in a manner that recognises and respects the Crown’s obligation to give effect to the principles of the Treaty.^[24] It followed that tikanga-based customary rights and interests constitute “existing interests” including kaitiakitanga and rights claimed, but not yet recognised under the Marine and Coastal Area (Takutai Moana) Act 2011 (“MACA”).

This finding is welcomed, although it would have taken a narrow reading for the Supreme Court to have restricted Treaty principles in the manner argued by TTRL. Given judicial acceptance that the Treaty is an aid to statutory interpretation, such an approach to s 12 would, as iwi parties had argued, “produce a worse outcome than if there had been no reference to the Treaty at all”.^[25]

In reaching this outcome, William Young and Ellen France JJ relied on a broad cross-section of cases in which a generous interpretation of Treaty principles has been given.^[26] This provides critical affirmation of these authorities, including the under-cited *Huakina* decision. At the same time, the Supreme Court’s views on these decisions and their relevance in this context were not explored in any detail. Nor did the judges seek to venture any wider views on the place of Te Tiriti within Aotearoa New Zealand’s constitutional framework, save to cite *Huakina*.^[27]

The Supreme Court's decision on this point is important in the context of RMA reforms. Whether an amended RMA should have an open-ended Treaty provision (like s 4 of the Conservation Act 1987) or a provision that directs decision-makers as to their obligations is a key matter for debate. Regardless, this decision indicates that the courts will not narrowly construe Treaty clauses and they must be given a broad and generous construction.

Tikanga

Giving effect to Treaty principles and tikanga were viewed as intertwined by the Supreme Court. In particular, the directions under s 12 on giving effect to Treaty principles directed s 59(2)(a) be interpreted so that tikanga-based customary rights and interests are “existing interests”. Iwi parties argued that the existing interests that the DMC needed to consider are kaitiakitanga, rights recognised by the MACA Act, and interests under the fisheries settlement.^[28] The Court agreed with that approach finding:^[29]

That follows from the guarantee in art 2 of the Treaty of tino rangatiratanga in the context of the marine environment. The answer to the submission that the Court of Appeal goes too far in treating all customary interests in this context as existing interests is found in that guarantee.

It is notable that the Court stressed the core guarantee of tino rangatiratanga as governing Māori customary interests as opposed to more abstract Treaty principles such as partnership or active protection. This supports an approach of focusing on the texts of Te Tiriti / the Treaty itself and seeing Māori customary rights as guaranteed by the Treaty.^[30]

Further into the judgment, William Young and Ellen France JJ addressed tikanga more explicitly. They started by making two points arising from *Takamore*:

- The English common law applies in New Zealand “only insofar as it is applicable to the circumstances of New Zealand” and it follows that subject to conflicting statute law, “our common law has always been seen as amenable to development to take account of custom”,^[31]
- “[t]he common law of New Zealand required reference to tikanga (as well as other important values and relevant circumstances).”^[32] And further that “Māori custom according to tikanga is ... part of the values of the New Zealand common law”.^[33]

The Court acknowledged commentators had suggested that *Takamore* had resulted in confusion as it did not explicitly address the possibility of customary law being recognised as law based on the doctrine of continuity and the additional tests set out in *Loasby* and by the Court of Appeal in their decision in *Takamore*.^[34] It was observed that it was correct that the Supreme Court in *Takamore* had not felt it necessary to “determine whether the tests for the recognition of custom at common law in cases such as *Loasby* were met or whether tikanga was a source of law on the approaches taken.”^[35]

In the present case the Supreme Court did not seek to clarify when or whether a finding on tikanga might be determinative in a case and whether

the tests set out in *Loasby* (a rather unusual case dating to 1908)^[36] remained good law. Rather, in a footnote William Young and Ellen France JJ simply observed: “We leave open for determination the questions of whether or not tikanga is a separate or third source of law and whether or not there should be any change to the tests for the recognition of customary law as law set out in *Loasby*.”^[37]

Relevantly however, the partial dissent of Elias CJ in *Ngāti Whātua Ōrākei* was also cited where the point was put directly: “Rights and interests according to tikanga may be legal rights recognised by the common law and, in addition, establish questions of status which have consequences under contemporary legislation.”^[38] It was noted that “[t]he issue in that case arose in the context of a strike-out application, but the approach indicates the way in which the common law in New Zealand has been developing.”^[39] This comment could be seen as a significant (albeit understated) indication of the present Supreme Court judge’s views.

In the context of the EEZ Act, it was noted that tikanga Māori means “a body of Māori customs and practices”. The Court observed that definition is not to be read as excluding tikanga as law, still less as suggesting that tikanga is not law, rather tikanga is “properly described as custom law”.^[40] It followed that tikanga will be “applicable law” in s 59(2)(l) “where its recognition and application is appropriate to the particular circumstances of the consent application at hand.”^[41]

Williams J concurred with the reasoning of William Young and Ellen France JJ but added the additional gloss that the question of the meaning of “existing interests” and “other applicable law” “must not only be viewed through a Pākehā lens.”^[42] He noted:^[43]

the Court of Appeal rightly pointed out, the interests of iwi with mana moana in the consent area are the longest-standing human-related interests in that place. As with all interests, they reflect the relevant values of the interest-holder. Those values—mana, whanaungatanga and kaitiakitanga—are relational. They are also principles of law that predate the arrival of the common law in 1840. And they manifest in practical ways, as William Young and Ellen France JJ note. There would have to be a very good reason to read them out of the plain words of s 59(2)(a), (b) and (l). I see no such reason.

The emphasis that the interests of iwi are defined by relational values which are also “principles of law” is important. It suggests that when the courts are inquiring into matters concerning Māori customary rights, they have to be understood by reference to tikanga and not through a Pākehā lens. While not cited by Williams J such an approach finds supports in other key cases, including the 1921 *Amodu Tijani* decision (cited in *Ngati Apa*)^[44] where the Privy Council warned against trying to render customary rights in conceptual terms “which are appropriate only to systems which have grown up under English law.”^[45]

In sum, the decision is useful in clarifying the Supreme Courts’ current view of the status of tikanga in the law (or at least the bounds of its uncertainty). In some respects, it is disappointing that no further observations were made on tikanga as binding law—or more wide affirmations of its

importance in the common law more generally. Interestingly, the Supreme Court did not really explore the Court of Appeal's findings on tikanga when the *Trans-Tasman Resources* case was before it. There Goddard J for the Court observed that "it is (or should be) axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand".^[46] Furthermore, the Supreme Court did not cite or consider recent cases of the High Court where the boundaries of tikanga as binding law have been tested.^[47]

However, the approach taken was careful and considered and it can be surmised that the Supreme Court felt it was the wrong context for a more wide-reaching decision on tikanga. It seems that the Supreme Court is more than aware of how high the stakes are for Māori, and the approach taken reflects the warning of the former Chief Justice Dame Sian Elias when she observed extra-judicially that she fears "decisions of courts that are too definite, leaving no room for movement in the future."^[48] Yet, in the same breath the former Chief Justice also argued that "it is high time to get our ideas in order and to think more creatively. We need to understand that when dealing with fundamentals of the legal order, we need to think constitutionally."^[49]

While the Supreme Court has delayed staking out the ground on tikanga, it is clear the issue cannot be avoided in *Ellis*—although whether they will need to go so far as to decide whether tikanga can be binding in law in that context is unknown.^[50] Recently, the Supreme Court issued a statement to the public noting that substantive arguments on the guilt of *Ellis* will be heard in October 2021 and the Court will deliberate subsequently.^[51] Reading between the lines, a decision may still be some time off.

In the meantime, it seems appropriate to think creatively about the fundamentals of how Aotearoa, New Zealand can take up the wero first issued in 1996 by Sir Edward Taihakurei Durie, then Chief Judge Durie of the Māori Land Court, when he asked: "[w]ill we recognise the laws of England or the laws of New Zealand and if the latter, will we hone our jurisprudence to one that represents the circumstances of the country and shows that our law comes from two streams?"^[52]

Effects on Māori interests

The broad approach taken by the Supreme Court on Treaty principles and tikanga directed how decision-makers had to consider Māori interests. The Supreme Court found that the DMC's decision did not effectively grapple with the effect of the proposal on iwi parties and their "concern that they will be unable to exercise their kaitiakitanga to protect the mauri of the marine environment."^[53]

What was required was for the DMC to indicate an understanding of the nature and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply. Here, while there was some reference to spiritual aspects, the primary focus does appear to have been on physical and biological effects, for example, of the sediment plume. Further, while the DMC acknowledged there would be "some impact" on kaitiakitanga,

mauri and other cultural values, that significantly underrated the effects. The DMC then needed to explain, albeit briefly, why these existing interests were outweighed by other s 59 factors, or sufficiently accommodated in other ways.^[54]

This point was again stressed by William Young and Ellen France JJ when they discussed the relevance of tikanga to the proceedings noting that “the iwi parties in this case emphasise the mauri of the area. Considering the proposed activity in terms of tikanga may indicate that material harm extends beyond the physical effects of a discharge, or that pollution can be spiritual as well as physical.”^[55] Acknowledgement that decision-makers must look beyond physical aspects is important and may assist in shifting decision-makers away from a Pākehā worldview of effects.^[56] However, the uncertainties of the physical impacts were clear in this case, making the impact on mauri and wairua obvious. The extent to which the courts are willing to consider purely spiritual or cultural effects in resource management decisions when there are no, or minor physical effects, remains a critical question.^[57] The recent *Transpower* decision made under the different statutory context of the RMA by Palmer J provides an important precedent that the views of affected iwi can be determinative even in situations where the concerns held are primarily spiritual and cultural as opposed to physical.^[58]

MACA

An additional element of the decision is that the iwi parties argued that their claims under MACA should be considered as an “existing interest”. It was found that the DMC’s conclusion that they were not an existing interest and could not be considered as “any other relevant matter” was an error of law. William Young and Ellen France JJ found:^[59]

the processes such as that provided for by the MACA Act are not the source of such customary interests but rather provide a mechanism for their recognition. Thus, we agree with the Court of Appeal that rights claimed under the MACA Act but not yet granted may qualify as “existing interests”.

This is relevant for two reasons:

- a. This finding affirms that decision-makers need to take into account claimed but unproven interests under MACA.
- b. It could be argued decision makers should take into account Māori claims in other contexts. There is support for that approach in the Canadian jurisprudence of the Honour of the Crown.^[60]

Ngā kupu whakatepe – Concluding comments

The fact the Supreme Court was unanimous on key matters of the Treaty of Waitangi and tikanga is very encouraging in affirming the importance of both in the law of Aotearoa New Zealand. The decision did not however provide much clarification on tikanga as binding law—that question was deliberately set aside for another day. There is obviously much at stake in determining how tikanga is part of the common law and this decision shows that the highest court of Aotearoa New Zealand is acting with due caution. While there are indications that the Supreme Court wishes to

move towards recognising tikanga as part of the common law, the present judges have made it clear they will chart that course carefully.

Ngā kupu āpiti – Notes

* Dr Sarah Down co-authored this article with Emeritus Professor David Williams.

[1] *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

[2] The application was decided on the casting vote of the chairperson after the four members split 2:2. Environmental Protection Authority, Te Mana Rauhi Taiao “Decision on Marine Consents and Marine Discharge Consents Application – Trans-Tasman Resources Ltd – Extracting and processing iron sand within the South Taranaki Bight” (August 2017) <<https://www.epa.govt.nz/assets/Uploads/Documents/Marine-Activities-EEZ/Activities/7f11a030cb/TTRL-Marine-Consent-Decision-EEZ000011-FINAL-version.pdf>>. An earlier application made by TTRL in November 2013 was declined by a differently constituted decision-making committee (DMC) in June 2014: Environmental Protection Authority, Te Mana Rauhi Taiao “Trans-Tasman Resources Ltd – Marine Consent Decision” (June 2014).

[3] However, the High Court decision took a narrow approach to questions of Māori rights. For comment see, Sarah Down and David Williams “Tikanga Māori: an integral strand of the common law of New Zealand” [April 2021] *Resource Management Journal* 19.

[4] For analysis of the Court of Appeal decision see: Craig Linkhorn “Tikanga Māori – existing legal interests – Treaty clause not necessarily exhaustive – Trans-Tasman Resources” [April 2020] *Māori Law Review* <[Tikanga Māori – existing legal interests – Treaty clause not necessarily exhaustive – Trans-Tasman Resources – Māori Law Review](#)>.

[5] Tara Shaskey “Both sides claim victory in Supreme Court ruling quashing South Taranaki seabed mining consents” *Stuff NZ* (online ed, New Zealand, 30 September 2021) <<https://www.stuff.co.nz/business/126525818/both-sides-claim-victory-in-supreme-court-ruling-quashing-south-taranaki-seabed-mining-consents>>.

[6] See the finding of William Young and Ellen France JJ that this is the “usual course on an appeal of this nature” (at [229]). See also the finding of Williams J that “as a matter of principle, I would be most reluctant to take away from an expert statutory decision-maker the final reassessment of the substantive merits of the application” (at [299]).

[7] At [288]-[299]. Debbie Ngarewa-Packer as spokesperson for Ngāti Ruanui made clear that she saw this as a “technicality”, adding: “The courts have determined this type of activity doesn’t sit within the legislation.” Karen McVeigh “New Zealand supreme court blocks seabed mining consent” *Guardian* (online ed, United Kingdom, 1 October 2021) <https://www.theguardian.com/environment/2021/oct/01/new-zealand-supreme-court-blocks-seabed-mining-consent>>.

[8] See [10] for a summary of the key areas of agreement.

[9] See [237]-[238] for Glazebrook’s summary of her views on the other judgments of the decision. Williams J also took a slightly different approach to other marine management regimes (see [298]-[299]). The difference between Williams J and Glazebrook J on relief was that Glazebrook J found that the decision should not be remitted back to the EPA for reconsideration.

[10] See for example, Winkelmann CJ’s analysis of the relevance of the New Zealand Coastal Policy Statement. At [331]. See also, her nuance on three-stage test, at [318].

[11] Here Glazebrook J drew a parallel with the findings on s 5 of the RMA in the *King Salmon* decision (*Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593). At [240].

[12] Section 59 identifies a number of mandatory relevant considerations in relation to the determination of an application for a marine consent. Different considerations apply to marine discharge and dumping (see s 59 (2A) and (2B)).

[13] Glazebrook J at [245].

[14] At [261].

[15] At [259].

[16] At [316].

[17] At [7], [59].

[18] At [10], [131]. On the requirements to favour caution and environmental protection under the EEZ Act, see ss 61 and 87E.

[19] See for example, Environmental Protection Authority Act 2011, s 4 and Public Records Act 2005, s 7, Environmental Reporting Act 2015, s 5. Noting however, that there are still a few more recent general Treaty clauses, see Urban Development Act 2020, s 4.

[20] Noting however, that TTRL and the Attorney-General did not contend “that s 12 has the effect of ousting Treaty principles.” At [150].

[21] Although the DMC accepted that Te Tiriti principles could colour their interpretation of other provisions.

[22] At [151].

[23] EEZ Act, s 4(a).

[24] At [149].

[25] *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 (3 April 2020) at [161].

[26] Citing: *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 and 233; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [36]-[37]; *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [46]; *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) [Whales case] at 558; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) [Coals case] at 518; and *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [48]-[54].

[27] Citing the finding of Chilwell J in *Huakina Development Trust v Waikato Valley Authority* that cases “show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute” of the Crown’s Treaty obligations. At [150].

[28] At [154].

[29] Ibid.

[30] This approach was also evident in the judgment of Goddard J in the Court of Appeal decision (at [165]-[166]). See also, for example, Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi Guidance” (22 October 2019) CO (19)5.

[31] At [166]. It was noted that in *Paki* the majority said that the common law presumption of Crown ownership “could not arise in relation to land held by Māori under their customs and usages, which were guaranteed by the terms of the Treaty of Waitangi”. Citing *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18].

[32] At [167].

[33] Ibid. citing the judgment of Elias CJ in *Takamore v Clarke* [2011] NZCA 587; [2012] 1 NZLR 573 (23 November 2011) at [94].

[34] At [168]. Citing Natalie Coates “The Recognition of Tikanga in the Common Law of New Zealand” [2015] NZ L Rev 1 at 12. See also Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 120-123. It is of note, that Glazebrook J (alongside Wild J) was part of the majority in the Court of Appeal that did articulate a test for the recognition of customary laws. *Takamore* at [109]-[135].

[35] At [168].

[36] *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

[37] At footnote 282.

[38] At [167].

[39] *Ibid.*

[40] At [169].

[41] At [9].

[42] At [297]. Williams J made clear that he was not suggesting that the reasons of William Young and Ellen France JJ took this approach but noted that this was a point he wished to make explicit.

[43] At [297]. Glazebrook J concurred with Williams J in her judgment at footnote 371.

[44] *Ngati Apa v Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643 (19 June 2003) at [33], [54].

[45] *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399; [1921] UKPC 80. This point was also emphasised in the recent MACA decision *Re Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025 (7 May 2021) [121]-[128]. For an interesting early consideration that Māori fisheries rights should not be seen through a Pākehā lens see: *Regional Fisheries Officer v Williams*, NZSC Palmerston North M116-78, 12 December 1978, citing *Regional Fisheries Officer v Tukapua*, unreported Palmerston North M.33/75 13 June 1975.

[46] *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 at [177]) For comment see Sarah Down and David Williams “Tikanga Māori: an integral strand of the common law of New Zealand” [April 2021] *Resource Management Journal* 19.

[47] *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 29; *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181; *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201; *Mercury v Waitangi Tribunal* [2021] NZHC 654.

[48] Sian Elias, ‘The Meaning and Purpose of the Treaty of Waitangi’ (Hui-a-Tau Conference 2015, Te Hunga Roia Māori o Aotearoa, 4 September 2015) <[The meaning and purpose of the Treaty of Waitangi – Dame Sian Elias – Māori Law Review \(maorilawreview.co.nz\)](https://maorilawreview.co.nz/2020/12/sir-edward-taihakurei-durie-student-essay-competition-2020-interrogating-ellis-v-the-queen-tikanga-maori-in-the-common-law-of-aotearoa-new-zealand/)>.

[49] *Ibid.*

[50] This would not be necessary on the approach adopted by Natalie Coates as counsel for Ellis. See *Ellis v The Queen* SC 49/2019 [2020] NZSC Trans 19, “Tikanga Appeal”, 25 June 2020. For comment on the case see: Elliott Harris “Interrogating Ellis v The Queen: Tikanga Māori in the common law of Aotearoa New Zealand” [2020] *Māori Law Review*, December 2020 <<https://maorilawreview.co.nz/2020/12/sir-edward-taihakurei-durie-student-essay-competition-2020-interrogating-ellis-v-the-queen-tikanga-maori-in-the-common-law-of-aotearoa-new-zealand/>>.

[51] Supreme Court “Media Release: Peter Hugh McGregor Ellis v R (SC 49/2019)” 16 September 2021.

[52] Eddie T Durie “Will the Settlers Settle? Cultural Conciliation and Law” (1996) 8(4) *Otago Law Review* 449.

[53] At [160].

[54] At [161].

[55] At [172].

[56] See for example, *Aotearoa Water Action v Canterbury Regional Council* [2020] NZHC 1625. See also Jacinta Ruru “Māori Legal Rights to Water: Ownership, Management, or Just Consultation?” [2011] *Resource Management Theory and Practice* 119.

[57] Compare *Wakatu Inc v Tasman District Council* [2012] NZRMA 363 (ENC). For comment see: Toni Love “Incorporating Māori approaches to ecosystem management in marine management” [July 2018] *Māori Law Review* <<https://maorilawreview.co.nz/2018/07/incorporating-maori-approaches-to-ecosystem-management-in-marine-management/>>.

[58] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.

[59] At [154].

[60] See for example, *Clyde River (Hamlet) v Petroleum Geo-Services Inc* 2017 SCC 40, [2017] 1 SCR 106.

Te Kōti Matua – High Court

Takutai moana – customary marine title – refused

Re Clarkson

[2021] NZHC 1968
30 July 2021

Report by Zoe Rose-Curnow

Whakataunga – Overview and result

Unsuccessful application for customary marine title on the basis that such an application would exclude others who also have interests, and the Court was not convinced that the application group had a mandate from others. The applicants were invited to re-submit their application as being for non-exclusive protected customary rights.

Takutai moana – customary marine title declined – applicant group does not have mandate	
Date	30 July 2021
Case	Re Clarkson (1.5 MB PDF)
Citation	[2021] NZHC 1968
Court	Te Kōti Matua – High Court
Judge(s)	Mallon J

Earlier/later decisions	<i>Re Clarkson</i> HC Wellington CIV-2011-485-789, 14 September 2020; <i>Re Clarkson</i> HC Wellington CIV-2011-485-789, 29 August 2013; <i>Re Clarkson</i> HC Wellington CIV-2011-485-789, 9 April 2014; <i>Re Clarkson</i> HC Wellington CIV-2011-485-789, 24 February 2016; <i>Re Clarkson</i> HC Wellington CIV-2011-485-789, 12 February 2019; <i>Re Clarkson</i> HC Wellington CIV-2011-485-789, 10 February 2020.
Legislation cited	Marine and Coastal Area (Takutai Moana) Act 2011, ss 4, 9, 11, 16, 18, 20, 21, 51, 52, 58, 59, 60, 62, 66, 94, 98, 99, 100, 103, 106, 107, and 125; Foreshore and Seabed Act 2004; Māori Councils Act 1900; Māori Social and Economic Advancement Act 1945; Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 3.
Cases cited	Re Tipene [2016] NZHC 3199, [2017] NZAR 599; Re Tipene [2017] NZHC 2990, [2018] NZAR 150; Re Edwards (No 2) [2021] NZHC 1025; <i>Re Rihari</i> [2019] NZHC 2658; <i>The Porangahau Native Land Case</i> Napier Minute Book No 14/15; <i>John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board</i> (1998) 25 Tai Tokerau MB 212 (25 TTK 212).
Overview and result	An application for customary marine title (CMT) was brought by three members of the Clarkson whānau (two sisters and their mother), on behalf of the whānau group. The applicant group affiliates with the Ngāti Kere hapū and Ngāti Kahungunu and Rangitāne iwi. The application area is a marine and coastal area on the east coast of the North Island, and covers approximately 14.6 km of the coastline and goes out 12 nautical miles. The applicants based their claim on land holdings and associated authority of their tīpuna. The Clarkson whānau have retained shares in the surrounding land (most relevantly, shares in Porangahau 1B4N2). Four other applications from groups representing Ngāti Kere, Ngāti Kahungunu, Rangitāne, and Te Hika o Pāpāuma either partially or completely overlapped the application area. These groups opposed the Clarkson application. Ngāti Kere stated that the Clarkson application is contrary to hapū tikanga – this kind of application should be made on behalf of hapū, not whānau. Ngāti Kere's MACA application was mandated by members of the hapū through a hui in 2016. Ngāti Kere submitted that the Clarkson application did not have wider support. The applicants said they have a mandate from their wider whānau from an annual general meeting in July 2005, which was attended by Ngāti Kere kaumatua. However, the Court did not accept this because at that time the application was for orders under the Foreshore and Seabed Act 2004 and was concerned

	with the gathering of karengo from the foreshore for whānau consumption. It was not an application for customary marine title over the specified area. The applicants also submitted that because they have ownership of land in the area, they are distinct from those who only have customary rights, and not land. The Court expressed concern that there are other shareholders in Porangahau 1B4N2 besides the applicants, and there is no evidence that the applicants have a mandate from the other owners of Porangahau 1B4N2. If land holding was sufficient for the award of CMT, then all those with shares in Porangahau 1B4N2 should hold the CMT or appoint the holder of the CMT on their behalf. Her Honour considered that the applicants' "reliance on land ownership as distinguishing the applicant group from others with customary rights in the specified area is misplaced." (At [194].) Owning land that abuts the application area is not a mandatory consideration. It is only one of many relevant factors in determining whether customary marine title exists. Held, the application for CMT was refused. On whether the applicants have met the statutory test for CMT, the Court noted that the test is whether they "hold" the specified area in accordance with tikanga, which, as noted in <i>Re Edwards</i>, is something different to being the proprietor of the area. The Court found that the applicant group does not hold the application area in accordance with tikanga. The Judge was hesitant to dismiss the application outright because no new applications can now be filed under the MACA Act. The Court determined that the dismissal should not take effect for six months to enable the Clarkson whānau to decide if they would instead like to pursue a protected customary rights order (PCR) in relation to karengo.
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Te Kōti Whenua Māori – Māori Land Court

Alienation – sale – within PCA – exemption from special valuation

Te Riaki – Ngongohau 5 – Ngaurukehu A10 Sec 3 and Other Blocks

(2021) 437 Aotea MB 177 (437 AOT 177)
17 August 2021

Report by Craig Linkhorn

Whakataunga – Overview and result

The Court approved an alienation by sale from one Māori incorporation to another, relying on the transfer being within the preferred class of alienees.

Alienation – sale – within preferred class of alienees – exemption from special valuation	
Date	21 September 2021
Case	Te Riaki – Ngongohau 5 – Ngaurukehu A10 Sec 3 and Other Blocks (229 KB PDF)
Citation	(2021) 437 Aotea MB 177 (437 AOT 177)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Harvey
Earlier/later decisions	66 Whanganui MB 272-273 (66 WG 272-273); 19 Aotea MB 93-94 (19 AOT 93-94).
Legislation cited	Te Ture Whenua Māori Act 1993; ss 151, and 158.
Cases cited	<i>Mihinui – Maketu A100</i> (2002) Waiariki Appellate MB 230 (II AP 230); Lett – Waipu 4A3E1 and Kapakapa 5 Blocks (2021) 431 Aotea MB 100-106(431 AOT 100-106).
Overview and result	A proposed alienation of land (1.2823 ha) by way of sale from one Māori incorporation to another came before the Court for approval. Because the purchase price agreed was below the rateable value a special valuation would ordinarily be required to assess a fair price. Held, confirmation of alienation by sale granted. Exemption from special valuation discussed. 82% of the selling incorporation's shares were voted in favour of the alienation. The two incorporations had considerable common ancestry links among shareholders. The importance of this was explained by the Court at [15]: "The <i>Maketu A100</i> decision is authority for the proposition that it is inconsistent with tikanga for different hapū within the same iwi to acquire lands belonging to each other without a significant and compelling genealogical connection. This was to ensure that hapū land interests were not acquired by neighbouring hapū which ultimately could result in a

	fundamental and unintended shift of hapū land tenure by stealth." Applied here, the Court decided (at [17]) that it was "satisfied that the whakapapa relationship was sufficiently proximate to fall within the proper definition of preferred class of alienees as set out in the Act. There was evidence of descent from a common tīpuna and the whakapapa connection was also strengthened by the fact that there were lands belonging to connected whānau nearby." The Court accepted the committee of management had made an informed decision on valuation for the alienation. However, the orders made (at [22]-[23]) do not contain a decision exempting the Incorporation from obtaining a special valuation despite this being identified (at [1]) as part of the application and in light of s 158.
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Whiringa-ā-nuku 2021 – additional content online

Te Kōti Whenua Māori – Māori Land Court

[Chief Judge's powers](#) – application to amend succession order dismissed – *Hita v Hita* – *Kaihu* 1A2E3B2 (2021) Chief Judge's MB 1233 (2021 CJ 1233) – Elizabeth Derby

[Chief Judge's powers](#) – incorrect succession order amended – *Carley* – *Succession to Herbert Adams* (2021) Chief Judge's MB 1264 (2021 CJ 1264) – Elizabeth Derby

[Status of land](#) – refusal to change status – *McMeekin v Carkeek* – *Makuratawhiti* 8B2B1 (2021) 436 Aotea MB 286 (436 AOT 286) – Elizabeth Derby

[Succession](#) – SILNA land interests – equal division of shares – *Hiroti* – *Succession to Rira Peti Hiroti* (2021) 72 Te Waipounamu MB 271 (72 TWP 217) – Elizabeth Derby

[Trusts](#) – adoption of charter – appointment of replacement trustees – *Stewart v Manu Ariki Marae Reservation Trust* – *Manu Ariki Māori Reservation* (2021) 436 Aotea MB 209 (436 AOT 209) – Elizabeth Derby

[Trusts](#) – enforcement of trust obligations – *York* – *Matakohe North Eastern Portion Lot 54 Section 3B1 Māori Reservation* (2021) 235 Taitokerau MB 288 (235 TTK 288) – Elizabeth Derby

[Trusts](#) – review of whanau trust – *Phillips* – *Ahipara A4* (2021) 438 Aotea MB 10 (438 AOT 10) – Elizabeth Derby