

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Ngā Whakaturetanga – Legislation

Treaty Settlement legislation before the House of Representatives in 2021

Report by Dr Carwyn Jones

Whakataunga – Overview

The Ahuriri Hapū Claims Settlement Bill, the Moriori Claims Settlement Bill and the Ngāti Hinerangi Claims Settlement Bill were enacted in 2021. The Māori Commercial Aquaculture Claims Settlement Amendment Bill was progressed through the House in 2021. The Maniapoto Claims Settlement Bill, the Ngāti Maru (Taranaki) Claims Settlement Bill and the Ngāti Rangitihi Claims Settlement Bill were introduced to the House in 2021.

Kōrerorero – Discussion

Progress on settlement legislation through the House of Representatives was steady in 2021.

Amongst the legislation enacted this year, perhaps the most notable was the Moriori Claims Settlement Act. As recognised in the historical account in this Act, the Crown contributed to disseminating the myth that Moriori were extinct, racially distinct from, and inferior to, Māori. It is acknowledged that this myth has been persistent and caused damage to Moriori. The stigma associated with that myth led to generations of Moriori being reluctant to identify as Moriori or growing up in ignorance of their heritage. However, Moriori have worked “to rebuild their identity and culture as a distinct people with a unique heritage” and, having this history formally recognised in the settlement agreement and in the settlement legislation is of enormous significance.

(Continued at p 3)

Editors

Carwyn Jones
Craig Linkhorn

Publisher

Māori Law Review Ltd
PO Box 25433
Wellington 6146
New Zealand

T +64 4 472 2667

W maorilawreview.co.nz

Associate Editor

Toni Love

Student Editor

Hinemoana Markham-Nicklin

Consultant Editors

Tom Bennion
John Borrows
Judge Craig Coxhead
Jacinta Ruru
Māmari Stephens

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

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

ISSN 1172-8434



Use this QR code to visit our website

Contents

(2021) Hakihea Māori LR

Ngā Whakaturetanga – Legislation

Treaty Settlement legislation before the House of Representatives in 2021 – Dr Carwyn Jones and Hinemoana Markham-Nicklin	1
---	---

Te Kōti Matua – High Court

A promising start? – the Marine and Coastal Area (Takutai Moana) Act 2011: reflecting on key themes from a significant year of case law – Nopera Dennis-McCarthy	26
--	----

Takutai moana – customary marine title – joint application – <i>Re Reeder & Ors (Ngā Pōtiki Stage 1 – Te Tāhuna o Rangataua)</i> [2021] NZHC 2726 – Zoe Rose-Curnow	44
---	----

Te Kōti Pira Māori – Māori Appellate Court

Trusts – jurisdiction of the Māori Land Court – <i>Kruger v Nikora – Tūhoe – Te Uru Taumatua</i> [2021] Māori Appellate Court MB 444 (2021 APPEAL 444) – Elizabeth Derby	49
--	----

2021 Māori Appellate Court judgments – index	50
--	----

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



VICTORIA UNIVERSITY OF
WELLINGTON
TE HERENGA WAKA

BUDDLE FINDLAY

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

Disclaimer

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

Contents (continued) (2021) Hakihea Māori LR

Te Kōti Whenua Māori – Māori Land Court

Chief Judge's powers – status of land – application dismissed – <i>Kidd v Māori Owners – Whenuanui No 2B</i> (2021) Chief Judge's MB 1409 (2021 CJ 1409) – Elizabeth Derby	52
--	----

Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal

Ngā whakataunga tiriti – unfair, unsounds settlement process – <i>Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua</i> (Wai 3058, 2021; Wai 429, 2021; Wai 3068, 2021) – Craig Linkhorn	54
Waitangi Tribunal procedure – comity issues – <i>Memorandum-Directions of the presiding officer regarding jurisdictional issues – the National Fresh Water and Geothermal Resources Inquiry</i> (Wai 2358, #2.6.79) – Elizabeth Derby	66

(Continued from p 1)

The new settlement bills introduced includes bills to implement the settlement agreements of Maniapoto and Ngāti Maru, each iwi having had significant areas of land confiscated following the wars in Waikato and Taranaki, respectively. The third piece of settlement legislation introduced this year, the Ngāti Rangitihi Claims Settlement Bill, will, amongst other things, establish the Tarawera Awa Restoration Strategy Group to coordinate and promote the integrated restoration of the mauri of the Tarawera River catchment. This redress recognises the Crown's failure to protect the Tarawera River from pollution associated with the Tasman Pulp and Paper mill. This legislation also provides further financial redress for Ngāti Rangitihi, who have already received some commercial redress through the 2008 Central North Island Forests Iwi Collective Settlement.

Settlement legislation enacted in 2021

The Ahuriri Hapū Claims Settlement Bill, the Moriori Claims Settlement Bill and the Ngāti Hinerangi Claims Settlement Bill were enacted in 2021.

Ahuriri Hapū Claims Settlement Bill

Bill No.	216-2
Introduction	20/12/19
First Reading	12/03/20
Select Committee Report	Māori Affairs – 10/08/20
Second Reading	29/06/21
Third Reading	07/12/21
Assent	07/12/21

The Ahuriri Claims Settlement Bill (the Bill) will give effect to aspects of the deed of settlement dated 2 November 2016 between the Crown and Ahuriri Hapū.

Ahuriri Hapū comprise approximately 1,505 registered members. The seven Ahuriri Hapū are Ngāti Hinepare, Ngāti Māhu, Ngāti Matepū, Ngāti Paarau (which includes Ngāi Tahu Ahi), Ngāi Tāwhao, Ngāti Tū, and Ngāi Te Ruruku.

Ahuriri Hapū are based in and around Napier, in the Hawke's Bay region. Their area of interest is bounded by the sea to the east, the Kaweka Range to the west, the Ngaruroro River to the south, and the Esk River to the north. Ahuriri Hapū are one of six large natural groups negotiating the settlement of the historical Treaty of Waitangi claims of Ngāti Kahungunu. Ngāti Kahungunu is the third-largest tribal group in New Zealand.

The historical claims of Ahuriri Hapū are significant and include widespread land loss through early land purchasing, including the 1851 Ahuriri purchase that saw the loss of half their rohe, warfare and subsequent detention of their men on the Chatham Islands, the Crown's acquisition of Te Whanganui-ā-Orotu (the Napier inner harbour), and the effects of native land laws and social and economic developments that led to poverty within the iwi.

Part 1 – acknowledgements and apology

The Bill records a lengthy list of the critical grievances of Ahuriri Hapū resulting from the Crown's actions. These include acknowledgements about Crown purchasing and associated promises both before and after the Native Land Court's processes were established, the treatment of Te Whanganui-ā-Orotu, war and the treatment of members of Ahuriri Hapū as a result of the Crown's attacks at Ōmarunui and Herepoho. The Crown acknowledges that by 1930 Ahuriri Hapū were left virtually landless.

Clause 10 of the Bill records the Crown apology including that the Crown profoundly regrets its many failures to live up to its obligations under the Treaty of Waitangi in its dealings with Ahuriri Hapū, and unreservedly apologises for the immense damage caused by its breaches of the Treaty of Waitangi and its principles.

Part 2 – cultural redress

The Bill provides for a statutory acknowledgement in relation to the Ahuriri Hapū Coastal Marine Area and statutory acknowledgements and deeds of recognition in relation to 12 other statutory areas, including the Esk, Mangaone, Mohaka, Ngaruroro, and Tutaekuri Rivers. Two reserves (Balls Clearing Scenic Reserve and the Ōtātara Pā Historic Reserve) will be subject to overlay classifications. Three properties will be vested in fee simple in the trustees of the post-settlement governance entity as cultural redress. One of these, Heipipi Pā, will continue to be administered as an historic reserve.

The Bill also provides that the Minister of Conservation, the Director-General of Conservation and Mana Ahuriri Trust must, by or on the settlement date, sign and enter into a partnership agreement relating to

the Ahuriri Hapū area of interest. The partnership agreement will be known as Te Kawa o Papa.

Part 3 – Te Muriwai o Te Whanga

A unique aspect of the Bill is the establishment of Te Komiti Muriwai o Te Whanga. This is a statutory committee, the purpose of which is “to promote the protection and enhancement of the environmental, economic, social, spiritual, historical, and cultural values of Te Muriwai o Te Whanga [the Ahuriri estuary] for present and future generations”. The Komiti will have eight members (four members appointed by the trustees of the Mana Ahuriri Trust, and one member appointed by each of the Hawke’s Bay Regional Council, Hastings District Council, Napier City Council, and the Minister of Conservation).

Part 4 – commercial redress

Mana Ahuriri Trust will receive financial redress of \$19.5 million. The Mana Ahuriri Trust will purchase Kaweka and Gwavas Crown Forest Licensed lands with neighbouring group Heretaunga Tamatea at settlement date. Mana Ahuriri Trust will also have the option of purchasing up to 18 other ‘deferred selection properties’. This Bill provides for the transfer of those properties should Mana Ahuriri Trust decide to purchase any of them. The Bill will also provide Mana Ahuriri Trust with a right of first refusal for 174 years over a further ten properties.

Select Committee report

The Māori Affairs Select Committee [reported](#) on the Bill on 10 August 2020. The committee received 34 submissions and heard oral evidence from nine submitters in Napier and Wellington. The committee recommended that the Bill be passed with a few minor and technical amendments.

The first amendment concerned clause 88 of the Bill. This clause enables the reallocation of appointments to Te Komiti Muriwai o Te Whanga if local government in Hawke’s Bay is reorganised. The committee recommended that the clause be altered to reflect the changes Parliament made in 2019 to the Local Government Act 2002 to ensure consistency between the Bill and existing legislation.

Clause 65 allows three properties to be vested in the trustees. Schedule 3 describes the properties and interests affecting the properties. The committee recommended minor amendments to Schedule 3 to add additional interests, remove expired interests and remove listed interests that have no direct effect on the property and are therefore not required in the Bill.

Beyond these amendments, the committee also considered the elections for Trustees of Mana Ahuriri Incorporated and Mana Ahuriri Trust and the summary of the historical account.

Many submissions raised concerns about the elections for the mandated body, Mana Ahuriri Incorporated and the PSGE, Mana Ahuriri Trust. Submitters noted that there had been no substantive elections held by

Mana Ahuriri Incorporated, therefore this needed to be remedied by having elections for Mana Ahuriri Trust. Some submitters were doubtful that elections would be held. This prompted Ngāti Pārau (Wai 2573) and Ngāti Tu and Ngāi Te Ruruku (Wai 2574) to submit claims to the Waitangi Tribunal. The Tribunal granted an urgent inquiry to consider whether the Crown had breached the principles of the Treaty of Waitangi because the mandated entity, by not holding substantive elections, had not established a proper mandate. The Tribunal concluded that the Crown's monitoring of Mana Ahuriri Incorporated was flawed because no elections had occurred between 2012 and 2016. The Tribunal acknowledged that it would not be desirable to re-run the ratification process so late in the settlement process and recommended that the Bill be introduced as soon as possible, on the basis that the PSGE agree to hold trustee elections for all trustee positions. As elections are not addressed in the Bill, the committee did not make any recommendations on this matter.

The committee acknowledged submissions that were concerned about the accuracy of the summary of the historical account, particularly the description of events that occurred at Ōmarunui. This account is set out in clause 8 of the Bill. The committee recognised that this description is one of the factors that led Ngāti Pārau, Ngāti Tu and Ngāi Te Ruruku to submit an urgent inquiry to the Waitangi Tribunal as they disagreed with the portrayal of the events that occurred. The Crown has since engaged in negotiations with the hapū to record the different perspectives of the events at Ōmarunui. These perspectives will be signed and published on Te Arawhiti's website. In light of this agreement, the committee concluded that an amendment to the Bill in respect of this concern was not required.

The Bill received assent on 13 December 2021.

Moriori Claims Settlement Bill

Bill No.	238-2
Introduction	25/03/20
First Reading	23/02/21
Select Committee Report	Māori Affairs – 19/08/21
Second Reading	09/11/21
Third Reading	23/11/21
Assent	25/11/21

The Moriori Claims Settlement Bill (the Bill) was introduced in March 2020. This Bill records the acknowledgement and apology given by the Crown to Moriori and gives effect to certain matters contained in the Deed of Settlement signed on 14 February 2020 by the Crown and Moriori.

Moriori is an imi (tribe) representing the indigenous people of Rēkohu and Rangihau (Chatham and Pitt Islands). All Moriori hokopapa to Rongomaiwhenua, the founding ancestor of Moriori. Hokopapa/whakapapa links exist between Māori and Moriori as Rongomaiwhenua's younger brother Rongomaitere voyaged to Aotearoa. Moriori developed an egalitarian society underpinned by a commitment to peace and harmony. Hokotehi Moriori Trust is the mandated imi authority that has engaged in negotiations with the Crown on behalf of Moriori people.

Part 1 – acknowledgements and apology

Clause 9 of the Bill acknowledges that past Crown actions or omissions have caused prejudice to Moriori and have constituted breaches of their obligations under the Treaty of Waitangi. The Crown recognises that until now it has failed to address the deeply-felt and long-standing grievances of Moriori in an appropriate way. The actions include the failure to act in a more reactive and proactive manner to end their enslavement, the failure to protect ta rē Moriori, the failure to protect Moriori from becoming virtually landless, the collection and trade of kōimi t'chakat Moriori (human remains), the failure to make any provision for Moriori and other Chatham Islanders to vote in parliamentary elections and have political representation and the Crown's contribution to the stigmatisation of Moriori as a racially inferior people who became extinct.

Clause 10 of the Bill records the Crown apology to Moriori, tchakat henu (tangata whenua) and waina pono (original inhabitants) of Rēkohu, karāpuna (ancestors) and mokopū for those actions and omissions and the damage and pain that those actions caused to Moriori. The Bill notes that the Crown is profoundly sorry for failing to uphold the partnership between the Crown and Moriori and failing to provide the protection envisaged by the Treaty of Waitangi and its principles.

Part 2 – cultural redress

Cultural redress includes the transfer of eight sites of land to Moriori. Some sites will be transferred subject to conditions, intended to protect existing third party rights and existing values such as public access and conservation. Clause 61 records that Owenga Property, Te Awanui, Glory housing property and Waipāua property will be vested in fee simple to the trustees of the Moriori Imi Settlement Trust. Rangiauria property, Waipāua coastal property, Glory block and Waihere block will be vested in fee simple to be administered as reserves.

The Bill provides overlay classifications over:

- Waikokopu (Canister Cove) Scenic Reserve and Waipāua Scenic Reserve;
- Mangere Island Nature Reserve;
- Part Wharekauri site 100 (eastern part);
- Rangatira Nature Reserve;
- Wharekauri site 102; and
- Manaua (Ocean Mail) Scenic Reserve.

The Bill provides for statutory acknowledgements to 16 areas of significance, 14 of which are also subject to a deed of recognition:

- Tikitiki Hill Conservation Area (statutory acknowledgement only);
- Coastal statutory acknowledgement area (statutory acknowledgement only);
- 11882 Owenga site;

- Hanson Bay South Marginal Strip;
- Henga Scenic Reserve;
- Lake Huro Marginal Strip;
- Owenga Marginal Strip;
- Pacific Ocean Marginal Strip;
- Petre Bay Marginal Strip;
- Pitt Straight Marginal Strip;
- Wharekauri site 101;
- Wharekauri site 103;
- Wharekauri site 104;
- Wharekauri site 105;
- Te Awatea Scenic Reserve; and
- Waitangi Marginal Strip.

Moriori Imi Settlement Trust will enter into co-management arrangements with the Department of Conservation over the J M Barker (Hāpūpū) Historic Reserve and an area of remnant forest within Waipaua Conservation Area remaining in Crown ownership, and the Waipāua Coastal property transferring to Moriori.

The redress provided in the settlement includes relationship redress. The Chief Executive of Te Arawhiti will write letters to various organisations including the Ministry of Education and Ministry of Health, the Minister for Energy and Resources. These letters are intended to raise the profile of Moriori, advise on matters of particular importance to Moriori, and encourage better engagement with Moriori. The Minister of Agriculture, the Minister for Biosecurity, the Minister of Fisheries, the Minister for Food Safety and the Minister of Forestry will issue protocols to determine how the agencies will interact with the Moriori Imi Settlement Trust when undertaking statutory duties and functions. The Moriori Settlement Trust will enter into relationship agreements with the Ministry for the Environment and the Department of Conservation. The Bill establishes a Hokoetanga Tiaki Miheke (an agreement for the protection of Moriori taonga) to foster a positive relationship between Moriori, the Ministry of Culture and Heritage, the Department of Internal Affairs and other cultural agencies. These actions will work towards repairing the relationship between the Crown and Moriori and will encourage collaboration and consultation.

The Bill provides for official name changes to several places:

- Waipaua changes to Waipāua;
- Blind Jims Creek changes to Pana/ Blind Jims Creek;
- Point Alison changes to Waimihi/ Point Alison;
- Napper Point changes to Tamarau Point;
- Taupeka changes to Tapuika;

- Red Bluff changes to Whenuahau Point;
- Te Whenuahau changes to Whenuahau;
- Western Reef changes to Rangihokopoi/ Western Reef; and
- Haupupu changes to Hāpūpū.

In addition to these name changes, four unnamed sites have been named:

- Manauea;
- Te Rangakiore Islands;
- Ta Upoko-o-Rangimene Reef; and
- Takapu Beach.

In addition to place name changes, the names listed below will be recorded as unofficial original Moriori names:

- Mangere Island as Maung' Rē;
- Ohira as Ōuira;
- Te Rangaapene as Te Ranga-a-Pehe;
- South East Island (Rangatira) as Hokoreoro;
- The Pyramid (Tarakoikoa) as Tcharako;
- Star Keys (Motuhope) [unofficial] as Motchu Hopo;
- The Sisters (Rangitahi) as Rakitchu;
- Motuhara (Bertier of the Forty Fours) [unofficial] as Motchu Hara;
- Nairn River as Ōrea;
- Point Munning as Tok' Karoro;
- Point Somes as Rerau;
- Waitangi Bay as Waiteki Bay;
- Port Hutt (Whangaroa Harbour) as Tei Kohuru;
- Cape Patisson as Tapuaki-o-Hiti;
- Point Durham as Paroa;
- Cape L'Eveque as Ko Ku Hewa;
- Waitangi as Waiteki;
- Taupeka Point as Tapuika Point;
- Round Rock (Rangitua) as Rangituka; and
- Rabbit Island as Wharekaikite.

Name changes will also occur to public conservation lands:

- Canister Cove Scenic Reserve changes to Waikokopu (Canister Cove) Scenic Reserve;
- JM Barker (Hapupu) Historic Reserve changes to JM Barker (Hāpūpū) Historic Reserve;

- Ocean Mail Scenic Reserve changes to Manauaea (Ocean Mail) Scenic Reserve; and
- Waipaua Scenic Reserve changes to Waipāua Scenic Reserve.

Part 3 – commercial redress

Hokotehi Moriori Trust will receive financial redress of \$18 million (plus interest accrued between signing the Agreement in Principle and the settlement date).

Part 4 – shared redress

Moriori and Ngāti Mutunga o Wharekauri have overlapping interests in the Chatham Islands. The negotiation process for shared redress is still ongoing.

The shared redress will include:

- the transfer of the bed of Te Whanga Lagoon and some adjoining lands;
- a management regime for Te Whanga Lagoon and some adjoining lands;
- a right of first refusal over Crown properties on the Chatham Islands;
- a new regime for the management of customary fishing on the Chatham Islands;
- the establishment of a Joint Planning Committee of the Chatham Islands Council;
- official geographic place name changes;
- a joint overlay classifications over the Cape Young portion of Wharekauri site 100;
- four Tikitiki Hill sites; and
- Kaingaroa School (land only) sale and lease back.

Shared redress between Moriori and Ngāti Mutunga o Wharekauri (other than the shared right of first refusal over Crown properties on the Chatham Islands and provision for non-commercial fishing regulations) will be addressed through a separate shared redress deed and Bill.

Select Committee report

The Māori Affairs Committee [reported](#) on the Bill on 19 August 2021. The Committee received 55 submissions and heard oral evidence from 12 submitters. The Committee recommended that the Bill be passed with minor and technical amendments.

Clause 60 sets out provisions relating to customary fishing regulations. The Committee recommends inserting a new subparagraph to clause 60(1)(b)(ii) to require the responsible Minister to consult with any persons materially affected by a change to rāhui areas. This would ensure that the appropriate consultation occurs with those affected. The Committee also recommends adding another subparagraph within the same section to

provide that people with a commercial interest in a species would be protected from the effect of a rāhui to remain consistent with the wording of Regulation 23(1)(e) of the Fisheries (Kaimoana Customary Fishing) Regulations. The Committee recommended amending clause 60(1)(e) so that the language is consistent with clause 5.43 of the Moriori Deed of Settlement and insert a new paragraph in 60(1) to allow clause 60 to provide for any other matter required by that clause in the Deed. The Committee also recommended removing clause 60(3) to ensure that the Bill is consistent with the provisions of the Secondary Legislation Act 2021 and some other minor amendments to ensure the Bill is consistent with the Acts that it refers to.

The Committee recommended amending s 60(1)(a) so that it includes the equivalent word for “kaitiaki” in ta rē Moriori, which is “tchieki”. Despite receiving a submission from Ngāti Mutunga o Wharekauri, who were concerned about the accuracy of the Bill’s historical account, the Committee did not recommend any changes to it and considered it to be an accurate summary of agreed facts between Moriori and the Crown.

The report also discussed matters that the Bill does not address including the protection of Te Ana a Nunuku and recognising ta rē Moriori as an official language.

The Bill received assent on 25 November 2021.

Ngāti Hinerangi Claims Settlement Bill

Bill No.	171-2
Introduction	09/09/19
First Reading	19/09/19
Select Committee Report	Māori Affairs – 19/03/20
Second Reading	21/07/20
Third Reading	06/04/21
Assent	12/04/21

The Ngāti Hinerangi Claims Settlement Bill (the Bill) will be the final settlement of all the historical Treaty of Waitangi claims of Ngāti Hinerangi resulting from acts or omissions by the Crown before 2 September 1992.

Ngāti Hinerangi are an iwi based in Matamata with an area of interest extending from the eastern Waikato to Tauranga including part of the Kaimai range. The Ngāti Hinerangi Trust holds the mandate to negotiate settlement with the Crown on behalf of Ngāti Hinerangi.

Part 1 – acknowledgments and apology

The Bill first sets out Crown acknowledgements that it bears responsibility for the outbreak of the 1864 war in Tauranga and that its actions breached the principles of the Treaty of Waitangi. The Crown acknowledged the effect of the 1865 Tauranga land confiscations and the subsequent cumulative acts that occurred which led to Ngāti Hinerangi becoming virtually landless. The Bill records a Crown apology to the hapū, whānau, tūpuna and mokopuna of Ngāti Hinerangi for a long list of conduct which was in breach of the Crown's obligations under the Treaty of Waitangi.

Part 2 – cultural redress

The Bill applies a taonga tuturu protocol issued under clause 26.

Statutory acknowledgment has been given to seven areas of significance, two of which are also subject to a deed of recognition:

- Kaimai range ridgeline;
- Part Kaimai Range;
- Te Ara o Maurihiro;
- Te Tapui Scenic Reserve within the area of interest;
- Waihou River and its tributaries within the area of interest;
- Part Maurihiro Scenic Reserve (statutory acknowledgment and deed of recognition); and
- Waianuanu (statutory acknowledgment and deed of recognition).

Three areas are subject only to a geothermal statutory acknowledgment only:

- Okauia Geothermal Resource;
- Taihoa Geothermal Resource; and
- Waiteariki Geothermal Resource.

The Bill provides for 14 fee simple estates in properties to be vested in the trustees. Eleven of these are to be administered as reserves:

- Okauia property (fee simple only);
- Turanga o Moana property (fee simple only);
- Wairere falls property (fee simple only);
- Nga Tamahine e Rua;
- Ngāti Hinerangi property;
- Ngāti Hinerangi Waipapa property;
- Te Ara o Maurihiro East property;
- Te Ara o Maurihiro West property;
- Te Hanga property;
- Te Mimiha o Tuwhanga;
- Te Taiaha a Tangata;
- Te Tuhi East property;
- Te Tuhi West property; and
- Te Wai o Ngāti Hinerangi property.

Of these properties, only the Ngāti Hinerangi Waipapa property is able to be transferred in full fee simple to the trustees of the Ngā Hapū o Ngāti Ranginui Settlement Trust by a written application to the Minister of Conservation. The properties of Te Tuhi East and Te Ara o Maurihiro East

can be transferred in an undivided half share of the fee simple to the trustees of the Nga Hapū o Ngāti Ranginui Settlement Trust with the consent of the Minister of Conservation.

Part 3 – commercial redress

Clause 98 of the Bill allows the Crown to transfer the fee simple estate in a commercial redress property to the trustees while clause 99 allows easements to be granted over any conservation areas or reserves required to fulfill the terms of the deed of settlement.

The Bill provides Ngāti Hinerangi with the exclusive right of first refusal over. Clause 114 states that a RFR landowner must not dispose of RFR land to a person other than the trustees of their nominees unless that land is disposed of in accordance with clauses 120-131(1); or in accordance with a waiver or variation given under cl 139; or within 2 years after the expiry date of an offer by the RFR landowner to dispose of the land to the trustees.

Select Committee report

The Māori Affairs Select Committee [reported](#) on the Bill on 19 March 2020. The committee received 47 submissions and heard oral evidence from nine submitters in Matamata. The committee recommended that the Bill be passed with a few minor and technical amendments.

Ngāti Hinerangi has decided to transfer ownership of three cultural redress properties to Tauranga Moana iwi to address overlapping interests in the rohe. These properties are the Ngāti Hinerangi Waipapa Scenic Reserve, Te Tuhi East Historic Reserve and Te Ara o Maurihiro East Historic Reserve. This transfer allows for the relationship between Ngāti Hinerangi and Tauranga Moana iwi to be set on a positive course. In accordance with clause 92 of the Bill, a joint management body will be established to manage the Te Tuhi East Historic Reserve and Te Ara o Maurihiro East Historic Reserve. This joint management body would be established on the date of registration of the transfer to the new owners. The committee recommended amending clause 91(8) to clarify how the Reserves Act 1977 would apply to the joint management body. The committee said this could be clarified by adding the following statement at the end of the clause; “the Reserves Act 1977 applies to the reserve as if the reserve were vested in the body (as if the body were trustees) under section 26 of that Act”.

The committee recommended altering clause 108(6) to remove the reference to the Pare Hauraki Ngahere Limited Partnership as this partnership has not yet been established. The committee noted that this amendment would clarify that the transfer of the balance of the land would be subject to the Crown forestry licence to the relevant entity specified in the legislation rather than to the Pare Hauraki Ngahere Limited Partnership.

The committee recommended removing the reference to Housing New Zealand Corporation in clause 113(1)(a)(ii) and replace it with Kāinga Ora-Homes and Communities to reflect the establishment of Kāinga Ora-

Homes and Communities in 2019 that replaced Housing New Zealand Corporation. The committee also recommended removal of clause 130, as it purports to allow Housing New Zealand to dispose of land to assist in social policy objectives, without making an initial offer to Ngāti Hinerangi. The committee considered that this clause was unnecessary, as Housing New Zealand has since been replaced and Kāinga Ora-Homes and Communities will not be permitted to dispose of right of first refusal land in pursuit of social housing objectives.

The committee also recommended changes to the legal descriptions in Schedules 2 and 3 to reflect recent surveys of the properties.

Opposition to the Bill

The committee report provides a summary of the opposition to the Bill. The opposition to the Bill resulted in three urgency applications before the Waitangi Tribunal, challenging the mandate of the Ngāti Hinerangi Trust and the PSGE. All claims have now been dismissed and attempts by those opposed to the Bill to withdraw from the Ngāti Hinerangi Trust mandate could not be completed.

Some concerns were raised as to whether Ngāti Hinerangi is entitled to settlement redress within the rohe of Ngāti Taka in the absence of evidence showing a historic connection to the Ngāti Taka rohe. The committee acknowledged that Ngāti Taka is a hapū of Ranginui. Ngāti Hinerangi undertook a tikanga-led process with Ngāti Ranginui to address overlapping interests. Therefore, the committee did not recommend any changes to the Bill in light of this concern.

The committee noted that one submitter was opposed to the marae-based PSGE structure, arguing that it was not fairly representative of all hapū. However, the committee acknowledged that it is not the role of the Crown to determine the representation structure, therefore they did not recommend any changes to the Bill in light of this concern.

Some submitters expressed concern that the Ngāti Hinerangi Trust had failed to conduct a proper election of trustees. The Ngāti Hinerangi Trust hapū representatives were elected in 2005 at a hui-a-iwi attended by representatives of all Ngāti Hinerangi hapū. In September 2012, members of the claimant community confirmed the trustees in advance of the Ngāti Hinerangi Trust mandated process. In November 2016, the Ngāti Hinerangi Trust issued a maintenance report and confirmed that at another hui-a-iwi earlier in the month the mandate of Ngāti Hinerangi Trust was maintained, and the Trust was mandated to represent Ngāti Hinerangi in Treaty negotiations. In 2017 and 2018 there were further elections for hapū representative trustees. The committee did not recommend any changes to the Bill in light of this concern.

The committee acknowledged concerns that Ngāti Pango would be left out of the Ngāti Hinerangi settlement and that Ngāti Tamapango was considered a “distinct” group from Ngāti Pango. However, in light of the shared whakapapa connections, the committee determined that Ngāti Pango and Ngāti Tamapango are representations of the same group and Ngāti Pango would not be excluded.

The committee heard submissions that Ngāti Hinerangi was keen to purchase Matamata College for leaseback to the Crown to reaffirm its standing in Matamata. The Crown determined that Matamata College was not available as part of redress to Ngāti Hinerangi. However, Ngāti Hinerangi was granted a first right of refusal over Matamata College, which will remain in place for 178 years.

The Bill received assent on 12 April 2021.

Settlement Bills in process in 2021

The Māori Commercial Aquaculture Claims Settlement Amendment Bill was progressed through the House in 2021.

Māori Commercial Aquaculture Claims Settlement Amendment Bill

Bill No.	322-1
Introduction	06/08/20
First Reading	08/12/20
Select Committee Report	Māori Affairs – 04/06/21
Second Reading	10/08/21

The Māori Commercial Aquaculture Claims Settlement Act 2004 (the Act) provides for a full and final settlement of Māori commercial aquaculture claims since 21 September 1992. The purpose of the Act is to provide for the allocation and management of aquaculture settlement assets. A summary of the Act can be found [here](#).

The Māori Commercial Aquaculture Claims Settlement Amendment Bill (the Bill) was introduced in August 2020. The Bill amends the sections of the Act that concern the allocation of settlement assets. The objective of this Bill is to improve the allocation and transfer process provided in the Act to better enable the allocation and transfer of aquaculture settlement assets to iwi. This will be facilitated by providing Te Ohu Kaimoana with a limited discretionary power to make determinations of aquaculture settlement allocation entitlements. This power is constrained to situations where Te Ohu Kaimoana is satisfied that the dispute resolution process set out in the Act has been unable to resolve the disagreement and it is clear that the relevant iwi are unable to reach a decision as to how the aquaculture assets should be allocated or where Te Ohu Kaimoana is satisfied that it cannot make a determination on aquaculture settlement allocation entitlements because it has been unable to recognise iwi aquaculture organisations for one or more iwi. Despite these changes, the fundamental elements of the Act are preserved.

The Bill has had its first reading and has been referred to the Māori Affairs Select Committee. During the first reading, Hon Meka Whaitiri emphasised that following extensive consultation, the Bill is widely supported by iwi and Te Ohu Kaimoana. The Bill provides a solution for many regions who are unable to access their aquaculture settlement assets due to a lack of unanimous agreement between iwi as to how those aquaculture settlement assets should be allocated. Currently, where an agreement cannot be reached, the assets remain held in trust and cannot be utilised by iwi to pursue their aquaculture aspirations. As explained in the Bill's

general policy statement, the Bill will enable iwi to access their aquaculture assets in an appropriate time frame, improve the delivery of the Crown's aquaculture settlement obligations, protect the interests of iwi who do not wish to claim their aquaculture settlement assets and support iwi aquaculture aspirations whilst further supporting the growth of the aquaculture industry. This streamlined allocation and transfer process supports iwi to maximise opportunities arising from treaty settlements, develop their position in the aquaculture industry and accelerate sustainable growth in the aquaculture industry.

Select Committee report

The Māori Affairs Committee [reported](#) on the Bill on 4 June 2021. The Committee received 10 submissions and heard oral evidence from 6 submitters. The Committee noted that submissions on the Bill were supportive and considered that the Bill would allow iwi to advance their interests and aquaculture opportunities and progress their economic, cultural and social objectives. The Committee recommended that the Bill be passed without amendment.

Some submitters proposed further amendments to the Bill including that there should be wider recognition and involvement of hapū and whānau in the allocation process for settlement assets and that the Bill should include provisions that consider applicants who are before the High Court on the Marine and Coastal Area (Takutai Moana) Act 2011 or who are in negotiations with the Crown. The Committee did not recommend these amendments largely because they were outside the scope of the Bill.

Settlement Bills introduced in 2021

The Maniapoto Claims Settlement Bill, the Ngāti Maru (Taranaki) Claims Settlement Bill and the Ngāti Rangitīhi Claims Settlement Bill were introduced to the House in 2021.

Maniapoto Claims Settlement Bill

Bill No.	104-1
Introduction	03/12/21
First Reading	14/12/21
Select Committee Report	Māori Affairs – 04/06/21
Second Reading	10/08/21

The Maniapoto Claims Settlement Bill gives effect to certain matters contained in the Deed of Settlement signed on 11 November 2021 between the Crown and Maniapoto. The Bill will be the final settlement of all the historical Treaty of Waitangi claims of Ngāti Maniapoto resulting from acts or omissions by the Crown before 21 September 1992. Ngāti Maniapoto's rohe includes the King County and the adjacent marine environment including part of the exclusive economic zone.

Part 1 – acknowledgment and apology

The Bill sets out a historical account of the relationship between the Crown and Ngāti Maniapoto and acknowledges that the cumulative effect of the Crown's breaches of the Treaty of Waitangi have affected the economic,

physical, cultural and spiritual well-being of Ngāti Maniapoto. The Crown makes specific acknowledgements in the Bill in relation to the Taranaki and Waikato wars, unfairly labelling Ngāti Maniapoto as rebels, land confiscation, Te Ōhākī Tapu, the Native Land Court, 1890s Crown purchasing, contributions of Ngāti Maniapoto to New Zealand's war efforts and socio-economic issues among other matters. The Bill records a Crown apology to the hapū, whānau, tūpuna and mokopuna of Ngāti Maniapoto for its many breaches of the Treaty of Waitangi and its principles and especially apologises for failing to uphold Te Ōhākī Tapu through which Ngāti Maniapoto sought to establish a relationship with the Crown.

Part 2 – cultural redress

The cultural redress provided for in the Bill includes the placing of a pou whenua, protocols, statutory acknowledgements, a deed of recognition, the vesting of 36 sites of significance and provisions relating to interests in the exclusive economic zone. The Bill also sets out the natural resources redress including the requirements for a joint management agreement and the Crown's acknowledgement of the statement of significance of Ngā Wai o Maniapoto.

The following properties are vested in fee simple:

- Mangapehi Railway Station property
- Te Kūiti Pā Railway Yard carpark
- Te Puna o Te Roimata

The following properties are vested in fee simple to be administered as reserves, subject to conditions:

- Aratoro property
- Arorangi property
- Awaroa property
- Hangatiki property
- Hauturu West property
- Herekawe property
- Kahurewa property
- Kurukuru property
- Mangakahu property
- Mangaokewa property
- Mapara property
- Mokau Estuary property
- Mokau property
- Ngaherenga property
- Omaru Falls property
- Piropiro Ketemaringi site A

- Piropiro Ketemaringi site B
- Rākaunui property
- Ranginui property
- Tainui property
- Tapuae property
- Te Arero property
- Te Raumauku Caves property
- Te Umuroa property
- Waiharakeke property
- Whareorino site A
- Whareorino site B
- Whareorino site C
- Whareorino site D
- Whareroa property

The following properties are to be jointly vested in fee simple to be administered as reserves, subject to conditions:

- Hikurangi property
- Tangitu property
- Waihuka property

The Crown offers a statutory acknowledgement over the following areas:

- Coastal statutory acknowledgement area
- Huioteko Scenic Reserve
- Hutiwai Conservation Area
- Kahuwera Scenic Reserve
- Kawhia Harbour (Rakaunui) Scenic Reserve
- Kawhia Harbour (Waiharakeke) Scenic Reserve
- Mahoenui Conservation Area
- Marokopa Falls Scenic Reserve
- Part Matakana Conservation Area (area linked to Te Puta Spring)
- Moeatoa Scenic Reserve
- Mohakatino Conservation Area
- Mokau River Scenic Reserve
- Ngā Wai o Maniapoto
- Ngatamahine Scenic Reserve
- Ngutunui Stream Scenic Reserve

- Okahukura Scenic Reserve
- Puketapu Historic Reserve
- Rukuhia Domain Recreation Reserve
- Tapuae Scenic Reserve
- Taumatini Scenic Reserve
- Te Kauri Park Scenic Reserve
- Te Kuiti Aerodrome
- Te Nau Nau property
- Totoro Scenic Reserve
- Turaerae Scenic Reserve
- Waitewhena Conservation Area

The Crown offers a statutory acknowledgement and deed of recognition over the following areas:

- Kakepuku Mountain Historic Reserve
- Mangapohue Natural Bridge Scenic Reserve
- Part Pirongia Forest Park

Part 3 – commercial redress

The Bill also sets out the commercial redress including the transfer of commercial redress properties and deferred selection properties. The Deed of Settlement articulated that the commercial and financial redress totalled \$165 million.

The Bill received wide support however National party members sought clarification on the “meaning, nature, extent, and effect” of clause 124, which covers marine interests in the exclusive economic zone. The Maniapoto Claims Settlement Bill passed its first reading on 14 December 2021 and was referred to the Māori Affairs Select Committee.

Ngāti Maru (Taranaki) Claims Settlement Bill

Bill No.	36-2
Introduction	19/05/21
First Reading	06/07/21
Select Committee Report	Māori Affairs – 21/12/21

The Ngāti Maru (Taranaki) Claims Settlement Bill gives effect to the Deed of Settlement signed on 27 February 2021 between the Crown and Ngāti Maru. The Bill will be the final settlement of all the historical Treaty of Waitangi claims of Ngāti Maru resulting from acts or omissions by the Crown before 21 September 1992.

Part 1 – acknowledgment and apology

The Bill includes a historical account and acknowledges that Ngāti Maru’s relationship with the Crown has been one characterised by loss of land,

identity and autonomy. The Crown makes specific acknowledgements in relation to the wars in Taranaki, unfairly treating Ngāti Maru as being in rebellion, confiscation of land and failure to fulfil promises to return land. The Crown acknowledges that its breaches of te Tiriti o Waitangi undermined Ngāti Maru's traditional systems of authority and knowledge, and the rituals and art forms associated with their maintenance and development, compromised their economic capacity and threatened the physical, cultural and spiritual wellbeing of the iwi. The Bill records a Crown apology to the tūpuna, descendants, hapū, and whānau of Ngāti Maru for the many breaches of the Treaty of Waitangi and its principles, especially in relation to the wars in Taranaki in the 1860s, the Crown's confiscation of land, imprisonment of Ngāti Maru men without trial after they participated in protests at Parihaka, and the invasion and destruction of Parihaka.

Part 2 – cultural redress

The Bill vests 16 sites of cultural significance in Ngāti Maru as cultural redress.

The following properties are vested in fee simple:

- Tahora Railways property
- Former Matau School House property
- Former Tarata School House property
- Former Tarata School property
- Purangi Domain property
- Tarawai Property
- Te Kerikeringa – Toetoe Road property

The following properties are vested subject to conditions:

- Te Kerikeringa - River property (subject to scenic reserve status, with New Plymouth District Council as the administering body)
- Pūrangi property (subject to scenic reserve status, with New Plymouth District Council as the administering body)
- Tarata property (scenic reserve status, with New Plymouth District Council as the administering body)
- Tangarakau River property (subject to historic reserve status, with the Ngāti Maru governance entity as the administering body)
- Waitara River No 3 property (subject to historic reserve status, with the Ngāti Maru governance entity as the administering body)
- Whangamomona River property (subject to historic reserve status, with the Ngāti Maru governance entity as the administering body)
- Stratford Railway Strip property (subject to local purpose reserve status, with Stratford District Council as the administering body)
- Tarata Domain property (subject to the recreation reserve status, with New Plymouth District Council as the administering body)

- Tāngarākau Marginal Strip property (joint vesting with Ngāti Hāua subject to historic reserve status, with Ngāti Maru and Ngāti Hāua as the administering body)

The Crown offers a statutory acknowledgement over the following areas:

- Kirikiri property
- Part Tāngarākau Forest Conservation Area
- Tangarakau River and its tributaries within the area of interest
- Whangamomona River and its tributaries

The Crown offers a statutory acknowledgement and deed of recognition over the following areas:

- Matau Conservation Area
- Whetu Conservation Area
- Ngatoto Conservation Area
- Part Whangamōmona Forest Conservation Area
- Part Tāngarākau Forest Conservation Area
- Part Waitaanga Conservation Area
- Part Pouiatua Conservation Area
- Okau Scenic Reserve
- Mataru Scenic Reserve
- Part Rerekapa Falls Recreation Reserve
- Part Moki Conservation Area
- Jury Conservation Area
- Kerekeringa Conservation Area
- Autawa Road Conservation Area
- Kirai Scenic Reserve
- Marginal Strip — Waitara River
- Waitara River and its tributaries within the area of interest
- Manganui River and its tributaries within the area of interest
- Patea River and its tributaries within the area of interest

The cultural redress also includes the establishment of a joint management agreement to improve the health of the Waitara River by creating a role for Ngāti Maru on the Waitara River Committee. The Committee will be jointly made up of equal numbers of representatives nominated by Taranaki Regional Council and by iwi with interests in the river.

The Crown acknowledges the long-standing traditional, cultural and historical association of Ngāti Maru with the Maru Taiao area. The Bill calls for a Maru Taiao plan to be established to identify the values of Ngāti Maru

in relation to the Maru Taiao area and the resource management issues of significance to Ngāti Maru in relation to the Maru Taiao area. In accordance with the Bill, local authorities must take the Maru Taiao plan into account when preparing or reviewing a policy statement or plan under the Resource Management Act 1991.

The Crown also recognises the long-standing cultural, historical and traditional association of Ngāti Maru with pākohe and pūrangi. The Bill provides for the governance entity to allow members of Ngāti Maru to search for and remove Crown-owned pākohe or pūrangi in the relevant area in accordance with a cultural materials plan agreed to by the trustees and the Minister of Conservation and without authorisation from conservation legislation or without a permit under s 8(1)(a) of the Crown Minerals Act 1991.

Part 3 – commercial redress

The commercial and financial redress is not specified in the Bill. However, the Deed of Settlement included financial redress of \$30 million and the right to purchase the following properties:

- Te Wera Crown Forest Licensed land on settlement date
- 31 Treaty Settlements Landbank properties on a deferred selection basis
- 3 school sites (land only) on a deferred selection basis, to be leased back to the Crown
- Stratford Police Station (land only) on a deferred selection basis, to be leased back to the Crown.

Ngāti Maru will also receive an exclusive right of refusal for 179 years from the settlement date over specific Crown-owned properties within Ngāti Maru's rohe and a shared right of refusal over specific properties in the area.

Part 4 – Select Committee report

The Māori Affairs Select Committee [reported](#) on the Bill on 21 December 2021. The Committee received and considered 35 submissions and heard 8 oral submissions. The Committee proposed some amendments.

The first amendment is in relation to the administration of the riverbed within the Whanganui River catchment area. The Bill provides for the transfer of three properties that are conservation land within the Whanganui River catchment area, one of which is shared redress with Ngāti Hāua. These sites potentially contain riverbed owned by Te Awa Tupua but are managed by the Department of Conservation. Te Arawhiti sought the views of Ngāti Maru and other groups on how the riverbed should be administered. Ngāti Maru, Ngā Tāngata Tiaki o Whanganui (the post settlement governance entity for the Whanganui River settlement), Te Pou Tupua, and Ngāti Hāua agreed that it is no longer appropriate for the Department of Conservation to manage these sites and Te Pou Tupua should have these responsibilities instead. The Committee recommended that the Bill be amended to give effect to this agreement.

The second amendment relates to the resource consent process relating to the joint management agreement for the Waitara River. Clause 87 discusses the process for considering resource consent applications under the joint management agreement. Clause 87(1)(b) states that the clause would also apply to specified resource consent applications made to territorial authorities which lead to New Plymouth District Council seeking clarification of its role under the agreement. Ngāti Maru have agreed that the joint management agreement was only intended to apply to applications for resource consent between the Taranaki Regional Council and Ngāti Maru. The Committee recommends removing the reference to territorial authorities in clause 87.

The third amendment related to the removal of resumptive memorials in Taranaki. The Bill would remove the memorials on land relating to Ngāti Maru's settlement redress and remove the Waitangi Tribunal's jurisdiction to order resumption in favour of Ngāti Maru. Generally, the Crown removes all remaining resumptive memorials on land once historical claims have been settled through legislation. Te Arawhiti is considering whether to amend the bill to remove other resumptive memorials within fully settled areas of the Taranaki region. As this had not been discussed with Ngāti Maru, Te Arawhiti decided it would be more appropriate to remove the memorials at a later date. The Committee supported this approach.

The Committee recommended that the Bill be passed with these amendments.

Ngāti Rangitihi Claims Settlement Bill

Bill No.	17-2
Introduction	24/03/21
First Reading	22/06/21
Select Committee Report	Māori Affairs – 17/12/21

The Ngāti Rangitihi Claims Settlement Bill gives effect to the Deed of Settlement between Ngāti Rangitihi and the Crown. The Bill will be the final settlement of all historical Treaty of Waitangi claims of Ngāti Rangitihi resulting from acts or omissions by the Crown before 21 September 1992.

Part 1 – acknowledgment and apology

The Bill includes a historical account and makes specific acknowledgements in relation to Ngāti Rangitihi's military service, the impact of native land laws on Ngāti Rangitihi, the Crown lease and purchase of land within Ngāti Rangitihi's territory, public works takings, pollution of the Tarawera River and a failure to actively protect te reo Māori. The Bill records a Crown apology for the many hardships and tribulations Ngāti Rangitihi have endured, and unreservedly apologises for the Crown's failure to fulfil its obligations under the Treaty of Waitangi.

Part 2 – cultural redress

The Crown offers a statutory acknowledgement over the following areas:

- Ash Pit Road Marginal Strip (Te Kauae)
- Lake Rerewhakaaitu Recreation Reserve

- Lake Tarawera Historic Reserve and part Lake Tarawera Scenic Reserve
- Ohinekoao Recreation Reserve
- Ohinekoao Scenic Reserve
- Rerewhakaaitu Conservation Area
- Tarawera River Marginal Strips

The Crown offers a statutory acknowledgement and deed of recognition over the following areas:

- Crater Block Crown Land
- Part Lake Tarawera Scenic Reserve
- Tarawera Cut Wildlife Management Reserve
- Tarawera River

The following properties are to be vested in fee simple to be administered as reserves, subject to conditions:

- Awarua
- Matata property
- Mihimarino
- Moura property
- Ngāheretā property
- Omanuhiri
- Ongarara
- Otaramuturangi
- Ōtūkapuarangi
- Pakipaki o Roohi
- Te Kahao o Rongomai
- Te Kaokaoroa
- Te Tapahoro Campground
- Te Tirohanga o Niheta
- Te Tūāhu o Rangiaohia
- Waimangu Volcanic Valley
- Whakapoukarakia

Te Tapahoro is to be vested in fee simple subject to a conservation covenant.

The cultural redress also includes a whenua rāhui, which acknowledges the traditional, cultural, spiritual and historical association of Ngāti Rangitihī with a site of significance. The Bill provides whenua rāhui over the Lake Tarawera Historic Reserve and Part Lake Tarawera Scenic

Reserve. The whenua rāhui places obligations on the New Zealand Conservation Agency and relevant Conservation Boards to have regard to the protection principles for the area and consult the trustees prior to approving a strategy or plan that relates to the whenua rāhui area.

The Bill also provides for a joint advisory committee to be established for advising trustees on conservation matters affecting Part Matata property and Whakapoukarakia. The Bill also establishes a statutory body called the Tarawera Awa Restoration Strategy Group with the purpose of supporting, coordinating and promoting the integrated restoration of the mauri of the catchment.

Part 3 – commercial redress

The commercial and financial redress is not specified in the Bill. However, the Deed of Settlement included financial redress of \$11.3 million made up of a share of Crown forest land in the central North Island and financial redress. The Deed provided that Ngāti Rangitahi will also have the right to purchase within a deferred selection of two years and a first right of refusal over Matatā School site (land only) for a period of 178 years from the settlement date and a right of first offer over the Rotomahana Bay of Plenty Landcorp Farm.

Part 4 – Select Committee report

The Māori Affairs Select Committee [reported](#) on the Bill on 17 December 2021. The Committee received 20 submissions and heard oral evidence from 7 oral submitters. The Committee recommended that the Bill be passed with minor and technical amendments. The amendments related to altering clause 6(2)(g)(iv) to ensure that it is consistent with other current legislation and takes into account the changes Parliament made in the Trusts Act 2019 and further changes updating the descriptions and interests for whenua rāhui area and cultural redress properties in clause 63 and Schedules 2 and 3.

The Committee also considered concerns raised by submitters from Tūhourangi about cultural redress sites being offered to Ngāti Rangitahi (such as the Waimangu Volcanic Valley). Some submitters believed that Ngāti Rangitahi did not have the right to seek redress in the Tarawera region. These concerns led to an application for urgent inquiry in the Waitangi Tribunal which was ultimately declined. The Committee decided it was not appropriate to comment on the matter but sought to acknowledge the concerns from the submitters. If there are disagreements between iwi regarding specific items of redress, the Crown expects them to be resolved by agreement between the interested groups. The Committee acknowledged the agreement made between Te Mana o Ngā Rangitahi and the Tūhourangi Tribal Authority relating to transferring the ownership of Ōtūkapuarangi in full and Waimangu in part to Tūhourangi. These sites will be jointly administered by the two iwi.

Ngā kupu āpiti – Note

The Acts and Bills reviewed here can be accessed at www.legislation.govt.nz.

Hinemoana Markham-Nicklin assisted with preparation of this report.

Te Kōti Matua – High Court

A promising start? – the Marine and Coastal Area (Takutai Moana) Act 2011: reflecting on key themes from a significant year of case law

Report by Nopera Dennis-McCarthy

Hei tīmatanga – Introduction

A decade after its enactment, 2021 saw the first major wave of case law emerging from the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). Three cases (with a fourth soon to be released) by three separate High Court Judges were published, concerning different areas and iwi, hapū and whānau across Aotearoa New Zealand. My position as expressed in this article is that the cases reflect not only a promising start to the application of the Act for claimant iwi, hapū and whānau, but also are indicative of a broader trend in the Aotearoa New Zealand legal system: that the Courts are increasingly engaging and applying both tikanga Māori and the common law together as Aotearoa's "third law",^{[1](#)} creating a legal system unique to this country and its people.

In my view, three key themes can be ascertained from the case law concerning the Act so far. They are the:

- a. application of tikanga Māori as law and evidence;
- b. exclusivity; and
- c. mandate of the applicants.

After setting out the background to the Act and the 2021 case, I will discuss each theme in turn.

Kōrerorero – Discussion

The statutory framework in a nutshell

It is important to start with a very brief foray into the statutory framework underpinning the Act. More in-depth analysis is set out at [22]-[77] of [Re Edwards](#).

The Marine and Coastal Area (Takutai Moana) Act was enacted in 2011 to repeal and replace the controversial Foreshore and Seabed Act 2004, following the recommendations of a Waitangi Tribunal report,^[2] and a Ministerial Review Panel.^[3] In essence, the Act is designed to provide for and acknowledge the customary rights and interests of Māori in the takutai moana/foreshore and seabed, referred to as the “common marine and coastal area”.^[4] The Act allows for this in two ways. A whānau, hapū, or iwi (referred to as “applicant groups” in the Act) can seek:

- a. “Protected customary rights” (which essentially amounts to protection of particular activities or uses of the takutai moana); and/or
- b. “Customary marine title” (which gives a group limited title/rights over a specified area of the takutai moana).

An applicant group can either apply to the Court for a recognition order for protected customary rights (PCRs) and customary marine title (CMT), or directly engage with the Crown for these rights. This article focuses on the former approach.

The threshold that an applicant group must reach in order to succeed in an application for PCRs and/or CMT is ostensibly a high one. For a PCR, the applicant group must prove on the balance of probabilities that the particular right/activity:^[5]

- a. has been exercised since 1840;
- b. continues to be exercised; and
- c. is exercised in accordance with tikanga.

The right/activity also cannot have been extinguished as a matter of law, and s 51(2) sets out a range of activities that cannot be classified as PCRs, including regulated activities under the Fisheries Act 1996 or commercial aquaculture activities (precluding almost all fishing activities).

For a CMT, the applicant group must prove on the balance of probabilities that they:^[6]

- a. hold the specified area in accordance with tikanga;
- b. have, in relation to that specified area, exclusively used and occupied it from 1840 to the present day without substantial interruption, or received it, at any time after 1840, through a customary transfer.

As with PCRs, CMT cannot exist if it has previously been extinguished by law.

For the purposes of the article, it is important to note that under s 99 of the Act, a Court may obtain the advice of a pūkenga, or expert, to assist with questions of tikanga.

The three cases

As at 1 December 2021, four substantive cases concerning applications under the Act have been published.^[7] Three of these cases were released this year – they are:

- a. [*Re Edwards \(Whakatōhea \(No 2\)\)*](#); ^[8]
- b. [*Re Clarkson & Ors*](#); ^[9] and
- c. [*Ngā Pōtiki & Ors – Stage 1 – Te Tāhuna o Rangataua*](#). ^[10]

High Court hearings in Ahuriri and Tauranga for *Re Ngāti Pāhauwera* and *Ngā Pōtiki & Ors – Stage 2* respectively also occurred in 2021.

The detailed background to these cases are set out in other articles in the December issue of this journal (see links above) and so I will only briefly summarise what is necessary for context.

Re Edwards

Re Edwards concerned a number of applications under the Act in and around the rohe of Te Whakatōhea in the Eastern Bay of Plenty. There were a number of overlapping applicants, who, by the time the hearing had commenced, had formed into three broad groupings: Whakatōhea Kotahitanga Waka, Te Kāhui Takutai Moana o Ngā Whānui Me Ngā Hapū, and “other applicants”, which included Te Ūpokorehe and Ngāi Tai. Te Rūnanga o Ngāti Awa and Te Rūnanga a Te Whānau (for Te Whānau-ā-Apanui) appeared as applicant groups participating as interested parties, while the Attorney-General also appeared as an interested party.

His Honour Churchman J ultimately found that a number of the applicants had satisfied the test for CMT from Maraetotara in the east, to Tarakeha in the west. The successful applicants consisted of the “Te Kāhui” grouping and Te Ūpokorehe, with CMT being shared with Ngāti Awa in the western part of the area, and with Ngāi Tai in the eastern part. His Honour also granted PCR orders over a number of activities for the aforementioned hapū, as well as Ngāti Muriwai. These included non-commercial whitebaiting, gathering natural resources and rongoā, carrying out traditional practices such as burying whenua and holding tangihanga, and kaitiakitanga-based practices.

The Court made a number of important findings and observations in the case, both in relation to the Act, and on the application of tikanga. I will discuss a number of these in more detail below, but a non-exhaustive list of some of the most important aspects of the decision includes:

- a. a detailed discussion of customary title in the foreshore and seabed, which affirmed the approach of the Court of Appeal in *Attorney-General v Ngāti Apa* that Māori customary title was not necessarily extinguished; ^[11]
- b. a summary of the standard and burden of proof for the statutory tests under the Act; ^[12]
- c. a detailed discussion of tikanga, including an acknowledgment of tikanga as the first law of Aotearoa New Zealand, ^[13] and an assessment of important tikanga values applicable to the case, particularly whanaungatanga; ^[14]
- d. a ruling that raupatu did not amount to “substantial interruption” to the use and occupation of the takutai moana for the applicant groups; ^[15] and

- e. an adoption of the Canadian concept of “joint” or “shared” exclusivity (discussed in detail in the following section).^[16]

Re Clarkson

Re Clarkson concerned an application by the Clarkson Whānau, specifically Ketepunga Matana Clarkson, Ketepunga Kaylene Clarkson, and Catherine Clarkson over an area stretching from the north of Whangaehu (in Central Hawke’s Bay) to the south side of Cape Turnagain (in the Tararua District), covering approximately 14.6 km of coastline. This application overlapped with four others, and those four overlapping claimants appeared as interested parties opposing the application. They were: Ngāti Kere, Ngāti Kahungunu, Rangitāne, and Te Hika o Pāpāmua.

Her Honour Mallon J ultimately dismissed the application, but delayed that dismissal for six months to allow the Clarkson whānau to amend their application to a PCR application over the gathering of karengo seaweed. A critical issue in the case was mandate – the interested parties argued that the Clarkson Whānau did not have the mandate to bring the application on behalf of the hapū who had mana whenua rights over the area, and did not hold the area in accordance with tikanga. Mallon J agreed, finding that on the evidence and despite their enduring connection to the coast, it was not the Clarkson Whānau who held the application area in accordance with tikanga, but rather the hapū of that area.^[17] Other important aspects of the judgment included:

- a. an important discussion of the mandate of applicant groups more broadly;^[18] and
- b. a finding that land ownership of the area is only a relevant factor to be considered when determining whether CMT exists, rather than being a mandatory consideration or the only relevant factor.^[19]

Ngā Potiki

Ngā Potiki concerned the first stage of an application for a single CMT by seven applicant groups over Te Tāhuna o Rangataua, the eastern-most part of the Tauranga Harbour. Powell J granted CMT to five of the applicant groups (collectively referred to as the Rangataua Working Party applicants), who sought to hold that CMT jointly through a new legal entity called Ngā Pāpaka o Rangataua.

His Honour Powell J held that the hapū of the Rangataua Working Party clearly satisfied the statutory requirements for CMT, having maintained a strong physical and cultural uninterrupted connection and occupation over Te Tāhuna o Rangataua since well before 1840. However, his Honour was not convinced that there was sufficient evidence to find that the two other applicant hapū, Ngāti Ruahine and Ngāi Te Ahi (both physically located further away from the harbour, but with the latter having strong whakapapa links to the successful hapū), had met the test for CMT.

Again, a non-exhaustive list of some of the most important aspects of the decision includes:

- a. a firm affirmation of Churchman J’s tikanga-centred approach to the phrase “holds in accordance with tikanga”,^[20]

- b. a definition of exclusivity that is also tikanga-centred, and determines that use and occupation do not have to be continuous or constant;^[241]
- c. an approach which essentially encouraged a joint, unified application for a single CMT to be shared amongst the applicant hapū;^[22] and
- d. an important shift in the approach to extinguishment of customary rights, whereby Powell J characterised the orthodox position as “customary rights, once extinguished, cannot revive *unless legislation specifically provides otherwise*”.^[23]

The first theme: application of tikanga as law and evidence

The three cases under the Act this year have reflected two aspects of the Courts’ evolving approach to assessing and applying tikanga Māori.

The first aspect is in relation to how the Courts have treated tikanga in fact. In all three of the cases, the Judges heavily engaged with evidence in relation to tikanga practices and processes when considering applications for PCR and CMT. On one hand, this is unsurprising, given that the statutory tests require the applicant groups to prove that PCRs have been exercised in accordance with tikanga, and CMT has been held in accordance with tikanga. The Courts therefore are practically required to engage with evidence of tikanga practices as part of the proceedings.

On the other hand, this does give rise to the relatively novel situation whereby the Courts are carrying out often in-depth analysis of lengthy tikanga-based evidence by a number of applicant groups and witnesses. Outside of certain specific areas such as resource management law,^[24] this level of engagement with tikanga-based evidence is arguably not a common occurrence in the Senior Courts. For example, in each of the three cases, the Judges closely considered the practice of collecting resources (including kaimoana, plants for rongoā, and wai tai or wai tapu),^[25] as well as more intangible practices such as karakia and wānanga,^[26] and the issuing of rāhui both as possible PCRs, and in assessing whether an applicant group held an area in accordance with tikanga.

What this might mean for the future is that mere assertion of principles such as kaitiakitanga and manaakitanga will be insufficient for success in the Court system. As the Courts, for better or worse, become more comfortable with the principles and assessing tikanga-based evidence, applicant groups may have to provide more detailed evidence of specific practices grounded within those principles in order to succeed in an application for PCRs or CMT. A statement that an applicant group practices kaitiakitanga or are kaitiaki does not appear to be enough; applicant groups will need to show that they have carried specific activities evidencing their role as kaitiaki. For example, in *Re Edwards*, when considering an application by Te Uri o Whakatōhea Rangatira Mokomoko for a PCR over activities relating to their role as “protectors of the western boundary of Whakatōhea and protectors of the natural resources...”, Churchman J found that a PCR could be granted only over the activities specified and detailed in the witness evidence (which related to planting

on the dunes of the takutai moana to preserve their health) rather than a broader PCR encompassing kaitiakitanga more generally.

The willingness of the Courts to substantially engage in this evidence is a positive sign, but also brings its own challenges. Evidence of these particular activities may be difficult to articulate in detail, either because the kaumatua who are practiced in carrying them out may have passed away (given that some applicant groups, such as those in the *Re Edwards* hearing, waited close to two decades for their day in court), and because of the tapu nature of certain activities and the mātauranga related to those activities, meaning that some witnesses may be unwilling to share details of the activities in court.

The second aspect is the role of tikanga as law. It is apparent from the three judgments this year that the Courts have been willing to apply principles of tikanga and/or a tikanga-based approach, in tandem with western legal concepts found within the Act. This is arguably a reflection of the growing application of tikanga as part of Aotearoa New Zealand's law more generally, evident in a range of cases occurring over the past several years,^[27] as the Courts push New Zealand's law closer towards Williams J's conception of "Lex Aotearoa" or the "Third Law". There are two compelling examples of this approach. The first is the interpretation of the phrase "holds in accordance with tikanga". In *Re Edwards*, counsel for the Attorney-General, as well as counsel for the Landowners Coalition, submitted that the term needed to be interpreted with reference to Western proprietary, or proprietary-like concepts, such as intention to control the area, or intent to exclude others.

His Honour Churchman J held differently. The Judge engaged in an analysis of tikanga as at 1840, and stressed that the Western concepts of Dominium and Imperium had no counterpart in tikanga Māori. Instead:^[28]

In the Māori view of creation, the central figures are Papatūānuku (the earth mother) and Ranginui (the sky father) with the earth being created when these two were thrust apart by their children. They are regarded in tikanga as ancestors and one does not own one's ancestors. Ancestors are the source of whakapapa and whakapapa is a tikanga that dictates Māori societal norms and relationships. In tikanga rather than there being an emphasis on exclusive individual or collective title to any part of land, the focus was on the use of and relationship with resources of the land and sea including manaakitanga. Perhaps most importantly for this litigation the concept of exclusion was fundamentally inconsistent with the tikanga values of manaakitanga and whakapapa.

The Court determined the term "holds in accordance with tikanga" was *different* to be a proprietor of the area. The exercise involved looking outward from the applicant's perspective rather than around European legal concepts.^[29] That is, the *starting point* for that part of the statutory test entailed identifying the relevant tikanga of the area, and determining who holds the area based on tikanga evidence and the lived experience of the applicant groups.^[30] This was an affirmation of the Māori Land Court's approach to the term, which is also used to determine whether land is customary Māori land under the Te Ture Whenua Māori Act 1993.^[31]

Their Honours Powell J and Mallon J supported this approach. In *Re Clarkson*, Mallon J cited with approval the Māori Land Court case of *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* (which Churchman J referred to when making his ruling in the paragraph above), where the Court held that “in relation to the word “held” that “there is no connotation of ownership but rather that it is retained or kept in accordance with tikanga Māori”.^[32] Mallon J went on to state that “holds the specified area in accordance with tikanga” is something different to being the proprietor of the area – It is a factual assessment and one that will be heavily influenced by those who are experts in tikanga.^[33]

In *Ngā Pōtiki*, Powell J described Churchman J’s approach to the term as “clearly correct”, as the more territorial-like rights for CMT (as opposed to usufructuary-like rights under PCR) Act did not require or imply any requirement for reading into tikanga a legal concept like “proprietary” – it was neither a prerequisite to the issue of a CMT, nor a component of the test to be applied.^[34]

What is perhaps more important than these acknowledgements by the Court, was the application of those principles within the statutory test. Both Mallon and Churchman JJ engaged in a detailed assessment of whakapapa and whanaungatanga relationships between the applicant groups, to consider who in fact held the application area in accordance with tikanga, or in the words of the pūkenga in *Re Clarkson*, who were the people with the “sand between their toes”.^[35] In both cases, the Judges appeared to be aware of the interconnection between mana moana/mana whenua, and whakapapa and whanaungatanga – described above by Williams J as a “unifying principle” within tikanga Māori. Similarly, Powell J detailed and affirmed evidence given by Dr Kahautu Maxwell, who stated that mana over the takutai moana was through whakapapa, which afforded an individual or hapū entitlement to the takutai moana. This whakapapa (and subsequently) mana connection was an important part of Powell J’s conclusion that the Rangataua Working Party held the area in accordance with tikanga.^[36]

The second example is the concept of “substantial interruption”. This was a particularly important issue in *Re Edwards*, where the hapū of Whakatōhea had been subject to a significant raupatu over their whenua in 1866, when the Crown confiscated some 448,000 acres of land in the eastern Bay of Plenty, including all of the land abutting the coastline under the New Zealand Settlements Act 1863, as “punishment” for participating in the land wars, and in response to the killing of missionary C S Völkner.^[37] Alongside the confiscation, extensive looting and destruction of Māori assets resulted in significant economic, spiritual and physical hardship for the hapū of Whakatōhea. Churchman J acknowledged this, but importantly, stressed that this did *not* substantially disrupt the relationship that the applicant groups had with the takutai moana.^[38] His Honour referred to an acknowledgement by the Crown historian that Whakatōhea hapū continued to use and rely on the takutai moana for sustenance, and maintain their relationship and connection with the area. Referring to the experience of Moriori on Rekohu, Churchman J held that the confiscation of lands and destruction of property (the outcome of raupatu across the country) would not necessarily sever the connection of a group to an area

if they continued to exercise their rights over it, which occurred here with Whakatōhea hapū and the takutai moana.

This is a critical part of the decision, both for the applicant groups in that case, and for applicants with future hearings. Despite certain academics and the Waitangi Tribunal suggesting that application of the New Zealand Settlements Act 1863 in confiscating land in certain regions was legally tenuous at best and wholly unlawful at worst,^[39] it would be a significant challenge to argue that all confiscatory actions by the Crown in all cases under the Act were ultra vires or unlawful, particularly given Fitzgerald J's recent decision in *Te Ara Rangatū o te iwi o Ngāti Te Ata Waiohua Inc v Attorney-General*, where it was held that confiscation of land on the Āwhitu Peninsula in 1864 under this particular Act was lawful.^[40]

Therefore, the Court in *Re Edwards* has signalled that the better approach is not to take the legal route, but to consider substantial interruption on a foundation of tikanga. That is, the key question is not:

Was the raupatu which confiscated land (including land abutting the takutai moana) legal?; but

Did the raupatu sever the applicant group's connection with the takutai moana, or do they still exercise their rights under tikanga over the area?.

This assessment will likely entail consideration of whether the applicant group continues to exercise ahi kaa, their role as kaitiaki over the area, and other customary rights such as the gathering of kaimoana.

Substantial interruption may obviously still be made out in other circumstances, and Churchman J signalled as such in *Re Edwards*.^[41] However, without this approach, it is likely that the prospect of success for many applicant groups across Aotearoa could be severely inhibited under the Act. Given the number of iwi who have been subject to historical raupatu/confiscation, a strictly legalistic approach to raupatu which automatically presumes substantial interruption would make the statutory test even harder to satisfy.

The second theme: exclusivity

A large number of the applications under the Act overlap each other. A critical issue for the courts therefore, is how multiple applicant groups can be awarded CMT when each one needs to prove "exclusive use and occupation" over an area. This is where the concept of "shared exclusivity" is important.

At first glance, the concept "shared exclusivity" may appear oxymoronic. However, to understand the importance of the concept to the cases heard under the Act, as well as its potentially critical role in future cases, the statutory language and text needs to be considered. As discussed above, for an applicant group to succeed in being granted a CMT order, they need to prove *exclusive* use and occupation from 1840 to the present day without substantial interruption.^[42] There is an awkward juxtaposition between this requirement, and the requirement under s 58(1)(a) that the applicant group hold the specific area in accordance with tikanga. This is

because the common law concept of exclusivity in possession or ownership in relation to land, coasts, lakes, and rivers differs greatly from the complex web of whakapapa-based collective rights within tikanga and te ao Māori – with whanaungatanga being described extrajudicially by Williams J as the “unifying idea” underlying tikanga.^[43]

Relationships are not contractual or proprietary. They are not freely entered into. They are blood relationships in which the relationship itself dictates its terms and conditions. Other values such as mana, tapu, utu and kaitiakitanga should really be seen as effects or consequences of whanaungatanga. This is important to understand.

Both Churchman and Mallon JJ have acknowledged this tension in decisions under the Act, citing the Waitangi Tribunal’s 2003 *Te Whanganui a Tara Report*, where it described such rights under tikanga as:^[44]

Māori customary rights to land and associated waterways and to the sea were complex, fluid, and multilayered. Physical occupation and cultivation created only one layer of rights, albeit an important one.

The tension between these systems of law comes to a head through s 58. A significant challenge for the courts posed by the Act is how to avoid perpetuating further injustice whereby an applicant group is denied CMT under the principles of the common law, for not using and occupying and using an area exclusively, but instead sharing it with other groups (such as other whānau, hapū or iwi) – an approach that can be entirely consistent with tikanga Māori.

This is where the concept of “joint” or “shared” exclusivity provides some sort of middle ground. The concept arises from Canadian jurisprudence concerning native title, particularly the Canadian Supreme Court case of *Delgamuukw v British Columbia*.^[45]

In that case, two First Nations groups (the Gitksan and Wet’suwet’en peoples) sought a declaration of ownership from the Courts over their traditional lands. The case, which had a lengthy procedural history, eventually came before the Supreme Court, who considered the concept of native or “Aboriginal” title, and determined that it was based on exclusive use and occupation of lands, in accordance with customary laws prior to the assertion of British sovereignty.^[46]

A majority of the Court (with reasons given by Lamer CJ) suggested that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognising that joint title could arise from shared exclusivity. That concept was described by the judges as follows:^[47]

The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other’s entitlement to that land but nobody else’s.

Given the similarity in language between the statutory test under s 58, and the language of “exclusive use and occupation” in the test for Aboriginal

title, it was always likely that the concept of shared exclusivity would arise in cases under the Act. This occurred in *Re Edwards*, where both counsel for a number of the applicant groups, as well as counsel for the Attorney-General, suggested that the concept of “shared exclusivity” could be applied in relation to the s 58 test for CMT. Churchman J accepted that it could, and concluded that the structure of the Act was consistent with a jointly held CMT between applicant groups, rather than two overlapping CMTs for the same area each held by different parties (as multiple CMTs would give rise to practical problems with the exercise of rights flowing from those CMTs).^[48] An award of CMT, jointly held between a number of the applicant groups, was awarded, with Churchman J expressing that while there clearly needed to be co-operation and agreement between the holders of joint CMT, these were not insurmountable issues, because:^[49]

Tikanga has in the past provided for the exercise of a complex web of overlapping rights. It should be able to assist in parties holding CMT on a joint or shared exclusive basis working out how to jointly exercise the rights conferred by a grant of CMT.

A similar approach was taken by Powell J in *Ngā Pōtiki*. His Honour awarded a single CMT to be held jointly between five applicant groups as part of the Rangataua Working Party, who Powell J found had provided clear evidence of a “deep and abiding connection” on a practical, cultural, historical and spiritual level with the application area, and had used and occupied the application area, with very little third party interference, since well before 1840.^[50]

It is also worth noting that Powell J affirmed the approach to exclusivity in *Re Edwards*, and then arguably advanced it slightly further – acknowledging that “there is no indication that [the Act] has set out a test that cannot possibly be met”.^[51] Instead, noting that s 7 of the Act confirms that it was intended to acknowledge Te Tiriti o Waitangi, Powell J held that it was quite clear that the requirement for exclusive use and occupation in s 58(1)(b)(i) “does not in fact require exclusivity” nor indeed occupation that is either continuous or constant.^[52] Instead, interpretation of the concept needed to be informed by tikanga. For example, when considering whether third party access was consistent with exclusive use and occupation, Powell J referred to *Delgamuukw* (and the more recent Canadian Supreme Court case of *Tsilhqot’in Nation v British Columbia*), and noted that the applicant’s own customs would need to be applied in making this assessment.^[53] Therefore, exclusive use and occupation, when reconciled with the rest of the Act, clearly sets a much lower threshold than the wording of the section would otherwise suggest. What is required, according to Powell J, is evidence of authority giving rise to an ability or intention to exclude others, noting that tikanga may not in fact require the actual exclusion of third parties at any point.^[54]

While the issue of shared exclusivity did not explicitly arise in *Re Clarkson*, Mallon J appeared to support its approach, noting:^[55]

Shared exclusivity is not what is envisaged by this applicant group. It might be appropriate where there are overlapping claims, as is the case with Ngāti Kere, Rangitāne, Te Hika o Pāpāuma and Ngāti Kahungunu, if each of these groups met the statutory test for a CMT.

The concept of “shared exclusivity” and its application so far should be approached with cautious optimism. It is apparent that the Courts have sought to utilise a concept which allows them to (hopefully) avoid some potential injustices arising from Parliament’s somewhat contradictory requirements under s 58. The concept essentially applies principles from both the common law and tikanga Māori, by incorporating an approach where “exclusivity” can at least partly accommodate principles of whanaungatanga, in which applicant groups can provide evidence of “sharing” their exclusivity and thus jointly hold CMT. While still not necessarily easy to satisfy, the statutory threshold has been interpreted in a manner which is fairer and more practical than what appears from the text at face value. The Courts, particularly Powell J in *Ngā Pōtiki*, have been clear that exclusivity, shared or otherwise, should be centred around tikanga Māori, rather than the strict ownership-based rules of property law.

This is important. One of the biggest risks in adopting the concept of “shared exclusivity” – and this risk is still present – is the possible overreliance of counsel or the Courts on Canadian or Australian case law. I do not purport to be an expert in any way on either of these jurisdictions, but the Act is New Zealand law, and New Zealand law is currently in an arguably unparalleled situation. It is currently in the process of an evolution where tikanga Māori and the common law are increasingly applied and acknowledged together – as two parts of a unique legal system. It is not, in Churchman J’s words in *Re Edwards*, particularly helpful to attempt to strictly apply the Canadian and Australian jurisprudence on Aboriginal title, or traditional Western proprietary concepts, and in fact doing so could result in unjust outcomes whereby the statutory threshold is rendered almost impossibly high if the applicants have to prove exclusivity based on Western proprietary concepts alone. The critical focus in considering exclusivity, or shared exclusivity, must be on tikanga. This perhaps reflects the courts approach to embracing an emerging common law of Aotearoa, or “Lex Aotearoa”, whereby western legal concepts and tikanga Māori are both applied together.

The third theme: the mandate of the applicants

The issue of who can, and/or should, hold the mandate to represent whānau, hapū or iwi groups who have mana whenua over the takutai moana is one faced by both the courts and applicants in cases under the Act so far, particularly where applications overlap.

The difficulty of an appropriate mandate is not a new one in Māori-Crown relations. The Treaty Settlement Process has been encumbered by a number of mandate-related issues, and there has been considerable criticism of how the mandate structure has been applied in that context.^[56] Dalton-Mill identifies three discrete issues with the Crown’s approach to overlapping claims and mandate in relation to tikanga Māori:^[57]

- a. The Crown adopts a Western approach, and imposes Western concepts of time on Māori claimants, when for those claimants, reaching a state of ea (settlement or resolution) may take a long time under tikanga, particularly where intergenerational mamae and raruraru are involved;

- b. The Crown utilises a “predominance of interests” approach that is individualistic and runs counter to tikanga;
- c. The Crown does not require overlapping claims to be dealt with according to tikanga, or through a tikanga-based process.

Therefore, a significant challenge for the Courts in cases under the Act is how to avoid the injustices and difficulties that arise from mandate requirements present in a statutory framework arguably even more inflexible than the Treaty Settlement process.

The answer ultimately lies with Dalton-Mill’s third identified issue. That is, the application of a tikanga-based process whereby whānau, hapū and iwi can consider who has the mandate to represent them, and if successful, to hold CMT and PCR for them, based on their own tikanga. Autonomy and sovereignty, mana and rangatiratanga, need to be placed back with these groups for a successful process to occur. This is difficult in a highly-westernised legal framework, and in a court system dictated by strict time constraints. But, the Courts so far appear to be cognisant of this issue, and have taken certain steps arguably in the right direction to resolve it.

Take, for example, *Re Edwards*. In that case, the court adjourned for a week during the hearing in order to allow the applicant groups to engage in a tikanga-based process of kōrero between each other, facilitated by the two pūkenga appointed in that case, Mr Doug Hauraki and Dr Hiria Hape.^[58] Following the process, and after the evidence had been presented, the pūkenga were able to devise a tikanga-based poutarawhare as a construct whereby they considered the parties who held the application area in accordance with tikanga could jointly hold a single CMT together. This was adopted by the Court, who accepted the approach and used it to help determine its conclusion as to who held the area in accordance with tikanga.^[59]

The rohe of Whakatōhea has previously faced challenges with mandate in relation to Crown policy and practice. A Waitangi Tribunal inquiry (with the report issued in 2018) found that the Crown’s recognition of the mandate of the Whakatōhea Pre-settlement Claims Trust) to negotiate settlement of historical Treaty of Waitangi claims breached the Treaty principles of partnership and active protection by prioritising its political objective of concluding settlements by mid-2020 over a process that was fair to Whakatōhea.^[60]

The Court appeared keen to avoid similar issues arising here. This is where the benefit of appointing pūkenga, and allowing where possible for a tikanga-facilitated process, is evident. As Dr Carwyn Jones has noted, if the Crown is going to get the often-raised issue of mandate right, it needs to seriously engage with tikanga Māori and Māori legal traditions in the settlement process.^[61] Similarly, the Courts appear to be aware that in order to both avoid future injustices, and provide for a durable scheme for the takutai moana in Aotearoa New Zealand, they must at least provide some support for the applicant groups to engage in a tikanga-based process of determining mandate. Sections 99 and 107 of the Act will be important provisions if a tikanga-based process is to succeed going forward. Section 99 allows the Court to appoint a pūkenga or refer a question of tikanga to the Māori Appellate Court, while s 107 allows the

Court flexibility in dealing with an application, and preserves its inherent jurisdiction. This allows the Court some flexibility to work with the pūkenga or the Māori Appellate Court to develop its own bespoke rules and processes for hearings that are tikanga-compliant, and to hopefully circumvent the sometimes-rigid nature of the Act and traditional court proceedings. As discussed above, *Re Edwards* provides a useful template for the role of pūkenga that can hopefully evolve further in future hearings.

It is important to reiterate here that this is far from an easy task. The Act and the Court system are inflexible; courts will likely be unwilling to continually adjourn or postpone hearings, and the adversarial nature of the Courts themselves do not easily allow for a consensus-building, tikanga-based process. This inflexibility, and the issue of mandate has also arguably further been augmented by the somewhat arbitrary cut-off date in the Act, which required whānau, hapū, and iwi to have determined their application area and resolved a mandate for representation, in order to file an application within six years of the Act passing (the statutory cut-off date for filing was April 2017).^[62] However, where the Courts have been able to provide the applicant groups with some support, such as through pūkenga, tikanga-based processes and encouraging consensus-building before and during the hearing, those applicant groups have been able to take those opportunities offered, and effectively utilise them to formulate a clearer mandate.

Similarly, in *Ngā Potiki*, the parties appeared to present a relatively consistent and complementary approach to the application. The seven applicant groups, particularly the five groups within the Rangataua Working Party, sought a single CMT, and by presenting evidence as a united front (such as expert evidence on tikanga and mātauranga Māori), this appeared to make it easier for the Court to determine who held the area in accordance with tikanga. It can be inferred from this judgment that the consensus reached between the parties before the hearing started, made the issue of mandate, as well as the overall statutory assessment, easier of the Court to consider.

Re Clarkson also evidenced the importance of this approach, but in different circumstances which led to a different result. A critical issue in that case was whether the Clarkson whānau group, or the broader hapū (Ngāti Kere), held the mandate to bring an application over the specified area. Mallon J concluded that on the evidence, particularly the tikanga evidence in this case, a hapū mandate was necessary and tika in these circumstances.^[63] The Clarkson Whānau was only one of a number who had a deep and abiding connection with the takutai moana in the application area, but they did not have the mandate to represent those other whānau.^[64]

This determination (as it arguably was also in *Re Edwards*) was informed by an assessment of who held the application area in accordance with tikanga – which included detailed consideration of the tikanga evidence. Mallon J held:^[65]

To put it another way, if any group holds the area in accordance with tikanga and has exclusively used and occupied it since 1840, I am not satisfied the applicant group advanced here is the group

that does so. They may be some of such a group but the evidence is that others would be included in that group. This means that a mandate to represent those others must be shown.

Her Honour stressed that the process of applying under the Act was not sufficient to demonstrate mandate in itself. Instead, there needed to be consideration of the 'tika' approach – that is, who on the evidence, had the right and ability under tikanga, to represent the whānau and or hapū of the area.^[66]

Ngā kupu whakatepe – Conclusion

Where to from here – concluding and looking toward the future

As discussed above, the three cases released so far give cause for cautious optimism about the Act and how it may apply in the future. Caution is required, given that the statutory tests under the Act have a high threshold, and will be difficult to apply in some situations, such as where there are a large number of overlapping applicants. However, applicants can also be optimistic in noting that the Courts have sought to remedy these challenges through a willingness to engage with and apply tikanga, and find novel means to deal with issues such as exclusivity and substantial interruption. In my view, an analysis of the decisions so far suggests that there are three factors useful to bear in mind for future cases:

- a. First, it appears critical that a unified mandate is sought *before* a hearing. The success of this is clear from *Ngā Pōtiki* and *Re Edwards*, and in the dismissal of the application in *Re Clarkson*. While this is not necessarily easy to reach agreement and mandate in a system governed by western law, a benefit of reaching a mandate *before* the hearing is that the parties are less constrained by the law, and can carry it out on a tikanga-governed basis, and then take that tikanga approach to the Court, rather than the other way round.^[67]
- b. Second, the increased use and application of tikanga gives rise to the risk that it may be misapplied and misinterpreted in correlation with Western legal concepts. Annette Sykes has aptly commented on this risk, and noted the huge strain upon the Courts to deal with over 200 applications under the Act.^[68] This is where use and appointment of pūkenga (the practice of the Courts so far is to appoint a pūkenga nominated by the parties) and expert witnesses will be absolutely critical in ensuring the local tikanga, and more general principles, are carefully articulated and applied.
- c. Third, there are a number of issues in relation to the statutory tests under the Act that will require further clarification and development. Churchman J's decision in *Re Edwards* has been appealed to the Court of Appeal on both questions of law and on factual findings. It is likely that the critical concepts guiding Churchman J's decision, including joint exclusivity, the effect of the dual pathway (i.e. ensuring that those groups directly negotiating with the Crown will not be prejudiced by awards of CMT or PCR granted by the Courts), and the interpretation of exclusive use and occupation, "held in accordance with tikanga", and substantial interruption will all be considered on appeal. Appellate court guidance on these concepts by the highest courts will be useful, and is needed. Clarification on discrete issues will also be needed

– for example the appellate courts may need to reconsider the Supreme Court decision of *Paki v Attorney-General (No 1)*,^[69] given the issue of CMT over river mouths leading into the moana being extinguished by law in light of that case has arisen, and likely will continue to arise.^[70]

If applied in a zealously strict manner, the Act has the potential to perpetuate injustice, rendering many claims nearly impossible to succeed. The Waitangi Tribunal has already criticised the procedural aspects of the Act as falling well short of Treaty compliance.^[71] But the Courts have not yet taken that approach, and appear conscious of their role, both in dealing with applicant groups who have waited many years for their claims to be heard, and their position in Aotearoa New Zealand's evolving legal system. Hence, a promising start.

Ngā kupu āpiti – Notes

* The author worked as a Judges' Clerk for Justice Churchman during the time *Re Edwards* was heard, written and released. Views expressed are the author's own.

[1] See Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 12 Waikato Law Review 1; and Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) 10 New Zealand Yearbook of Jurisprudence 24.

[2] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (WAI 1071, 2004).

[3] *Pākia ki uta pākia ki tai | Report of the Ministerial Review Panel: Ministerial Review of the Foreshore and Seabed Act 2004* (30 June 2009).

[4] Marine and Coastal Area (Takutai Moana) Act 2011, s 4. I acknowledge that the Act has a number of other objectives as set out in s 4, but for the purposes of this article, this is the most important one.

[5] Marine and Coastal Area Act 2011, s 51(1).

[6] Marine and Coastal Area Act 2011, s 58.

[7] The first substantive case under the Act, *Re Tipene* [2016] NZHC 3199, was released nearly five years ago, and concerned an application over a small marine and coastal area to the south west of Rakiura. Although analysis of *Re Tipene* is outside the scope of this current article, which focuses on the key jurisprudential themes arising from the 2021 Takutai Moana cases, the decision is of importance because it provided a template for how the Act might be applied, and is referred to and affirmed in all three of the 2021 cases. For analysis of that decision, see: <https://maorilawreview.co.nz/2017/03/takutai-moana-customary-marine-title-recognised-rakiura-status-of-applicant-tipene/>.

[8] *Re Edwards (Whakatōhea (No 2))* [2021] NZHC 1025 ("Re Edwards").

- [9] *Re Clarkson & Ors* [2021] NZHC 1968 (“*Re Clarkson*”).
- [10] *Ngā Pōtiki & Ors – Stage 1 – Te Tāhuna o Rangataua* [2021] NZHC 2726 (“*Ngā Pōtiki*”).
- [11] See [57]-[76], particularly [73]-[76].
- [12] See [78]-[103].
- [13] At [69] and [110].
- [14] At [272]-[308].
- [15] At [200] and [204]-[206].
- [16] At [145]-[168].
- [17] See [226]-[227].
- [18] At [158]-[172] and [218]-[228].
- [19] At [173]-[195].
- [20] At [24]-[28].
- [21] At [29]-[45].
- [22] At [9].
- [23] At [147].
- [24] See for example, cases involving wāhi tapu under the Resource Management Act 1991, such as *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496, and *Taueki v McMillan – Horowhenua 11 (Lake) Block* (2014) 324 Aotea MB 144.
- [25] See, for example, *Re Edwards*, above n 8, at [175]-[176] and [550]-[552]; *Ngā Potiki*, above n 10, at [82]-[83]; and *Re Clarkson*, above n 9, at [81]-[90], [118] and [146].
- [26] It is important to note that under s 51(2)(e), intangible practices may only be recognised as PCR if it is manifested by the relevant group in a physical activity or use related to a natural or physical resource. In *Re Edwards* at [381] Churchman J held that this could include practices such as karakia and wānanga, if there was evidence applicant group going down to the takutai moana to perform a karakia or going to the takutai moana for the purpose of wānanga, tangihanga or sharing mātauranga Māori.
- [27] See for example *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127; *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291; *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654; *Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].
- [28] At [111].

[29] At [130].

[30] At [130]-[131].

[31] Te Ture Whenua Māori Act 1993, s 129(2)(a). See also *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* (1998) 25 Tai Tokerau MB 212.

[32] *Re Clarkson*, above n 10, at [181].

[33] At [204].

[34] At [25].

[35] *Re Clarkson*, above n 9, at [202] and [204]; and *Re Edwards*, above n 8, at [306]-[307].

[36] See [78]-[79].

[37] For a detailed discussion of the history of this raupatu, see Ranginui Walker *Ōpōtiki-Mai-Tawhiti: Capital of Whakatōhea* (Penguin Books, Auckland, 2007). The killing of Volkner of course led to a further injustice for Whakatōhea Māori – the trial and execution of Mokomoko. See s 3 of the Mokomoko (Restoration of Character Mana and Reputation) Act 2013, Te Ture mō Mokomoko o Hei Whakahoki i te Ihi, te Mana, me te Rangatiranga; and Craig Coxhead “Bring them Justice” (2000) 4 New Zealand Yearbook of Jurisprudence 43.

[38] At [202].

[39] See Richard Boast “An Expensive Mistake: Law, Courts and Confiscation on the New Zealand Colonial Frontier” in Richard Boast and Richard Hill (eds) *Raupatu: The Confiscation of Māori Land* (Victoria University Press, Wellington, 2010); and Waitangi Tribunal *Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996) at 128-129.

[40] *Te Ara Rangatū o te iwi o Ngāti Te Ata Waiohua Inc v Attorney-General* [2020] NZHC 1882. See David Williams’ Māori Law Review Article for further commentary on the matter: [Raupatu – declarations of unlawfulness and breach of fiduciary duties refused – Ngāti Te Ata](#).

[41] See [230].

[42] Section 58(1)(b)(i).

[43] See Joseph Williams “He Pukenga Wai” (lecture delivered at the Resource Management Law Association’s Annual Salmon Lecture, September 2019) at 7-8.

[44] *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Waitangi Tribunal Report Wai 145, 2003) at [2.2]. See *Re Tipene*, above n 7, at [15]; and *Re Edwards*, above n 8, at [122].

[45] *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

[46] See [112]-[115].

[47] At [158].

[48] At [169].

[49] At [170] (footnote omitted).

[50] See [79] and [83]-[84].

[51] At [32].

[52] At [34]-[35].

[53] At [38]-[40].

[54] At [41].

[55] At [225].

[56] See for example, Waitangi Tribunal *Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018).

[57] Morgan Dalton-Mill “Te Ara Tika: Towards Tikanga-centric Processes for Māori Claimants to Resolve Overlapping Claims of Mana Whenua Status over Rohe in Aotearoa’s Treaty Settlement Process” (LLB (Hons) Dissertation, University of Auckland, 2021) at 19-20.

[58] For some background to this, see *Re Edwards – Minute no.22 of Churchman J* (13 August 2020). All of the minutes and judgments concerning the Act are available at: <http://www.courtsofnz.govt.nz/the-courts/high-court/high-court-lists/marine-and-coastal-area-takutai-moana-act-2011-applications-for-recognition-orders/>.

[59] *Re Edwards*, above n 8, at [331].

[60] Waitangi Tribunal *Whakatōhea Mandate Inquiry Report*, above n 38.

[61] <https://maorilawreview.co.nz/2018/05/whakatohea-mandate-inquiry-report-recognising-a-mandate-to-negotiate-a-settlement/>.

[62] See s 100(2) of the Act.

[63] At [227].

[64] At [220].

[65] At [226].

[66] At [227].

[67] For a detailed discussion of the issue of mandate in overlapping claims disputes, see Rhianna Morar *Kia Whakatōmuri Haere Whakamua: Implementing Tikanga Māori as the Jurisdictional Framework for Overlapping Claims Disputes* (2021) 52 VUWLR 197; and Morgan Dalton-Mill *Te Ara Tika: Towards Tikanga-centric Processes for Māori Claimants to Resolve Overlapping Claims of Mana Whenua Status over Rohe in Aotearoa’s Treaty Settlement Process*, above n 39.

[68] See Annette Sykes “The Myth of Tikanga Māori in the Pākehā Law” (Nin Thomas Memorial Lecture 2020, Auckland Law School, 5 December 2020).

[69] *Paki v Attorney-General* [2012] NZSC 50; [2012] 3 NZLR 277.

[70] See the discussion of this in *Re Edwards*, above n 8, at [342]-[361].

[71] See Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020).

Takutai moana – customary marine title – joint application

Re Reeder & Ors (Ngā Pōtiki Stage 1 – Te Tāhuna o Rangataua)

[2021] NZHC 2726
12 October 2021

Report by Zoe Rose-Curnow

Whakataunga – Overview and result

Seven applicant groups located around Te Tāhuna o Rangataua (at Tauranga Harbour) applied for a customary marine title (“CMT”). A CMT over Te Tāhuna o Rangataua was jointly awarded to the five applicants who form the Rangataua Working Party. The remaining two applications were dismissed.

Takutai moana – customary marine title recognised – extinguishment – Te Tāhuna o Rangataua	
Date	12 October 2021
Case	Re Reeder & Ors (1.7 MB PDF)
Citation	[2021] NZHC 2726
Court	Te Kōti Matua – High Court
Judge(s)	Powell J
Earlier/later decisions	
Legislation cited	Marine and Coastal Area (Takutai Moana) Act 2011, ss 2, 4, 6, 7, 9, 27, 28, 51, 52-55, 58, 59, 60-82, 78, 79, 104, 106, 107, 109, 125; Foreshore and Seabed Act 2004, s 13; Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977; Te Ture Whenua Māori Act 1993, ss 4, 129; Land Transfer Act 2017; Native Land Court Act 1909, s 91; Native Land Court Act 1931, s 119; Māori Affairs Act 1953; Tauranga Foreshore Vesting and Endowment Act 1915, ss 3, 6; Foreshore and Seabed Endowment Revesting Act 1991, ss 4, 5; Whangarei Foreshore Vesting Act

	1913; Public Works Act 1981, s 47; Conservation Act 1987, s 60F.
Cases cited	Re Tipene [2016] NZHC 3199; Re Edwards (No 2) [2021] NZHC 1025; <i>John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board</i> (1998) 25 Tai Tokerau MB 212; <i>Attorney-General v Ngāti Apa</i> [2003] 3 NZLR 643 (CA); Bell v Churton (2019) 410 Aotea MB 244; <i>Delgamuukw v British Columbia</i> [1997] 3 SCR 1010; <i>Tsilhqot'in Nation v British Columbia</i> [2014] 2 SCR 256; <i>Members of the Yorta Yorta Aboriginal Community v Victoria</i> (2002) HCA 58, (2002) 214 CLR 422; <i>Mabo v Queensland (No 2)</i> (1992) 175 CLR 1; Tauranga Environmental Protection Society Inc v Tauranga City Council [2021] NZHC 1201; <i>Faulkner v Tauranga District Council</i> [1996] 1 NZLR 357 (HC); <i>R v Saxton</i> [2009] NZCA 498.
Overview and result	An application for customary marine title (CMT) was brought by seven groups representing all of the marae located around the Tauranga harbour and in the wider vicinity. The five hapu directly situated around the harbour ("the Rangataua Working Party applicants") applied to consolidate their applications and hold any resulting CMT jointly. All seven applicant groups sought to be included in a single CMT encompassing Te Tāhuna o Rangataua. The application area – Te Tāhuna o Rangataua – is the eastern-most arm of Tauranga Moana (also known as Tauranga Harbour). There was no opposition to a CMT being granted. Held, the Court granted a CMT to the Rangataua Working Party applicants over Te Tāhuna o Rangataua. The two other applications were dismissed, although one applicant was given the opportunity to have their application considered as an application for protected customary rights (PCR).

Kōrero whānui – Background

Te Tāhuna o Rangataua is part of an estuary and the "use and management of the estuary largely remains with a group of active Māori communities affiliating to no less than six marae." (At [2].)

The five hapū directly situated around the harbour are Ngā Pōtiki, Ngāti Pūkenga, Ngāi Tukairangi Ngāti Tapū and Ngāti Hē. Hapū of Ngāti Ranginui iwi, Ngāi Te Ahi and Ngāti Ruahine are not directly located on Te Tāhuna o Rangataua, although Ngāi Te Ahi have close links to Ngāti Hē.

All seven applicant groups sought to be included in a single CMT encompassing Te Tāhuna o Rangataua. Ngā Pōtiki, Ngāi Tukairangi, Ngāti Tapū, Ngāti Hē and Ngāti Pūkenga ("the Rangataua Working Party applicants") applied (without opposition) to "consolidate their individual

overlapping applications into a single joint application, with any resulting CMT to be held jointly by the five parties in a new legal entity to be known as Ngā Pāpaka o Rangataua." (At [9].) The applicant Ngāti Ranginui hapū seek to be included in this CMT.

Ngā Pōtiki applied for recognition of their customary rights under the earlier Foreshore and Seabed Act 2004. The claims of Ngā Pōtiki have been split into two stages – Stage 1 regards their claims and the claims of the other applicants in respect of Te Tāhuna o Rangataua (the present case), and Stage 2 includes the area to seaward of Pāpāmoa including adjacent islands (this commenced hearing in September 2021).

There was no opposition to a CMT order being recognised over Te Tāhuna o Rangataua. The Crown, Tauranga City Council and Bay of Plenty Regional Council participated in Stage 1 as interested parties.

Kōrerorero – Discussion

The criteria for the issue of CMT are set out in ss 58 and 59 of the Marine and Coastal Area (Takutai Moana) Act 2011 (the Act). The key elements of the test, as outlined in s 58(1), are that the applicant group holds the specified area in accordance with tikanga; and has exclusively used and occupied it from 1840 to the present day without substantial interruption; or has received it, at any time after 1840, through a customary transfer. Section 106(2) provides that it is for an applicant to prove the requirements in s 58(1).

Under s 58(4) a CMT “does not exist if that title is extinguished as a matter of law”, however the burden of proof is on the party seeking to rely on the extinguishment.

On holding an area in “accordance with tikanga”, Powell J supported the interpretation provided by Churchman J in *Re Edwards* (No 2) [2021] NZHC 1025, where his Honour said: (at [129]-[130] of that decision)

Holding an area of the takutai moana in accordance with tikanga is something different to being the proprietor of that area. Whether or not an applicant group has established that they held an area in accordance with tikanga is to be determined by focusing on the evidence of tikanga, and the lived experience of that applicant group. The exercise involves looking outward from the applicant’s perspective rather than inward from the European perspective and trying to fit the applicant’s entitlements around European legal concepts.

Regarding “exclusive use and occupation” the Court found that when properly reconciled with the rest of the Act, this “clearly sets a much lower threshold than the wording of the section would otherwise suggest.” What is required is: “evidence of authority giving rise to an ability or intention to exclude others, noting that tikanga may not in fact require the actual exclusion of third parties at any point.” (At [41].)

The Court noted that there was a clear distinction between the Rangataua Working Party applicants and the two Ngāti Ranginui hapū. The Rangataua Working Party applicants are all ultimately descendants of the victors of a battle known as Kokowai which occurred about 300 years ago.

After the battle these groups settled around the harbour. Ngāti Ruahine and Ngāi Te Ahi are hapū of Ngāti Ranginui, who were defeated and displaced as a result of Kokowai.

The Court found that “[t]he evidence is both unequivocal and overwhelming that the Rangataua Working Party applicants have met the legal test for the issue of a CMT.” (At [74].) Since occupying the area after the battle, “they have held and continue to hold Te Tāhuna o Rangataua in accordance with tikanga. In doing so, they have established exclusive use and occupation without substantial interruption” (at [75]).

The Rangataua Working Party applicants “have used and continue to use Te Tāhuna o Rangataua in every conceivable way, consistent with the nature of the environment.” (At [82].) For example, they use the area to gather kaimoana, and they act as kaitiaki. Their marae are directly situated around Te Tāhuna o Rangataua, and public access to it is limited, so “there has been little third party use of Te Tāhuna o Rangataua, and this has largely enabled the Rangataua Working Party applicants to exercise their customary authority without interference.” (At [85].)

The Court noted that, in contrast, there was little to support the applications brought on behalf of Ngāti Ruahine and Ngāi Te Ahi. No evidence was provided to support the inclusion of Ngāti Ruahine in a CMT, and this application was dismissed.

In regards to Ngāi Te Ahi, they have a strong connection to Tauranga Moana generally, and exercise customary rights in respect of Te Tāhuna o Rangataua. However, the test under the act is whether they “can be said to hold Te Tāhuna o Rangataua in accordance with tikanga in their own right, and if so, whether the rights exercised amount to any form of occupation from 1840 to the present day.” (At [102].) Ngāi Te Ahi are not based at one of the six marae situated around Te Tāhuna o Rangataua. However, they have developed a close relationship with Ngāti Hē at Opopoti marae at Maungatapu. The Court concluded that the evidence was insufficient to support their inclusion in the CMT over Te Tāhuna o Rangataua. There was no evidence about whether they held any part of Te Tāhuna o Rangataua in accordance with tikanga, and in particular, there was no evidence on what sort of connection was maintained with it after the battle of Kokowai. A named applicant and kaumatua for Ngāti He acknowledged that historically, “the kaitiaki interest [over Te Tāhuna o Rangataua] sits with Ngāti Hē” with the “benefits ... shared with Ngāi Te Ahi” (at [115]).

Although not sought by Ngāi Te Ahi, the Judge noted “that the mahinga kai rights exercised by Ngāi Te Ahi may give rise to a PCR in terms of s 51 of the MACA,” (at [117]) and leave was reserved should Ngāi Te Ahi wish to apply for a PCR.

Extinguishment?

While there was no suggestion that the customary rights of the Rangataua Working Group applicants had been finally extinguished, the Crown argued that they were temporarily extinguished by the Tauranga Foreshore Vesting and Endowment Act 1915, and then statutorily

resurrected by the Foreshore and Seabed Endowment Revesting Act 1991. The Crown did not argue that this meant there was an obstacle to the issue of a CMT in this case, so the argument was "somewhat moot" according to the Court, however, it decided to deal with the matter as an issue of the interpretation and effect of historical legislation.

The Tauranga Foreshore Vesting and Endowment Act 1915, vested the whole of the foreshore of the Tauranga Harbour in the Tauranga Harbour Board. The Crown argued that Parliament vested an estate in fee simple to the Tauranga Harbour Board, and that "[t]hat estate was inconsistent with the continuation of other legal interests in the foreshore, including Māori customary title." (At [124].) Subsequently however, the Foreshore Revesting Act 1991 "achieved a statutory revival of Māori customary interests in the foreshore of Tauranga Harbour" (at [125]).

The Court upheld the approach of Blanchard J in *Faulkner v Tauranga District Council*, where his Honour said that "customary title can be extinguished by the Crown only by means of a deliberate Act authorised by law and unambiguously directed towards that end." (At [130].) In other words, in order for customary title to the foreshore of Tauranga Moana to be extinguished, the 1915 Act would need to have expressly stated this.

The Judge noted that even if he was wrong, he "accepted the Crown's submission that the effect of ss 4 and 5 of the Foreshore Revesting Act is sufficiently explicit to enable a 'statutory revival' of any customary rights" that may have been extinguished (at [145]).

Te whakatau – Decision

The Court granted a CMT to the Rangataua Working Party applicants over the common maritime and coastal area known as Te Tāhuna o Rangataua.

The applications of Ngāti Ruahine and Ngāi Te Ahi were dismissed, although Ngāi Te Ahi has two months after the issue of the judgment to confirm whether they wish to have their application considered as an application for a PCR.

Te Kōti Pīra Māori – Māori Appellate Court

Trusts – jurisdiction of the Māori Land Court

Kruger v Nikora – Tūhoe – Te Uru Taumatua

[2021] Māori Appellate Court MB 444 (2021 APPEAL 444)
21 December 2021

Report by Elizabeth Derby

Whakataunga – Overview and result

This decision addressed two issues relating to Te Uru Taumatua Trust. The first, whether the Māori Land Court has jurisdiction over the trust. The second, whether a decision to stay orders for fresh trustee elections was correct. Both appeals were dismissed.

Trusts – jurisdiction of the Māori Land Court – stay of orders – dismissed	
Date	21 December 2021
Case	Kruger v Nikora – Tūhoe – Te Uru Taumatua (296 KB PDF)
Citation	[2021] Māori Appellate Court MB 444 (2021 APPEAL 444)
Court	Te Kōti Pīra Māori – Māori Appellate Court
Judge(s)	Judge Doogan (presiding), Judges Wainwright and Stone
Earlier/later decisions	Moke v The Trustees of Ngāti Tarāwhai Iwi [2019] Māori Appellate Court MB 265 (2019 APPEAL 265); Nikora v Trustees of Tūhoe – Te Uru Taumatua (2021) 252 Waiariki MB 157 (252 WAR 157); Trustees of Tūhoe v Nikora – Te Uru Taumatua (2021) 260 Waiariki MB 103 (260 WAR 103); Nikora v Te Uru Taumatua – Te Uru Taumatua Trust [2020] Māori Appellate Court MB 248 (2020 APPEAL 248).
Legislation cited	Te Ture Whenua Māori Act 1993, s 58.
Cases cited	<i>Kacem v Bashir</i> [2010] NZSC 112.
Overview and result	This decision addressed two issues relating to Te Uru Taumatua Trust (TUT). The first, to determine whether the case <i>Moke v Ngāti Tarāwhai Iwi Trust</i> , in which the Māori Land Court determined that TUT falls within its jurisdiction because it is a trust that holds General land owned by Māori, was wrongly decided. Having determined in the <i>Moke</i> case that TUT was within its jurisdiction, the Māori Land Court had ordered TUT to undertake fresh elections for two of its trustees. After filing an appeal to the Māori Appellate Court, TUT sought and was granted by the Māori Land Court a partial stay of these orders, which resulted in the election for one of the trustees being put on hold until this appeal was determined. Thus, the second issue for determination was whether the decision to partially stay the order for TUT to undertake fresh elections was correct.

	Each of these issues was raised in separate appeals. The first appeal was by TUT against the Māori Land Court order for elections to be held for two TUT trustees. Te Kaunihera Kaumātua o Tūhoe (TKKoT) was the respondent. This was the appeal that considered whether <i>Moke</i> was wrongly decided. The second appeal was by TKKoT against the Māori Land Court decision to partially stay its earlier orders requiring TUT to hold elections for two trustees. TUT was the respondent. This was the appeal that challenged the stay decision. Held, the appeal by TUT against the Māori Land Court decision to order it to undertake elections for two trustees was dismissed. The appeal by TKKoT against the Māori Land Court decision to partially stay the order for TUT to undertake the elections was also dismissed. A trust must have been constituted or established in respect of General land owned by Māori in order for the Court to have jurisdiction over the trust. In relation to the <i>Moke</i> decision, the Court concluded that if a Māori trust owns land from inception, or is set up to hold land that will be transferred to it in the future, it must surely be constituted in respect of that land. It said that this is the case for post-settlement governance entities, such as TUT. Thus, the Court found that the <i>Moke</i> decision is correct law. The decision to grant a stay of the orders could only be impugned on limited grounds if it was shown that the Māori Land Court erred in law or principle, took into account irrelevant considerations, failed to take account of a relevant consideration or that the decision was plainly wrong (at [46]). The Court found that there was no error of law, nor was the decision plainly wrong. The Court was also not satisfied that the Court failed to take into account a relevant consideration. Thus, the appeal on this issue was dismissed.
--	---

2021 Māori Appellate Court judgments – index

Judgment date	Citation	Minute Book	MLIS	Legislation	Subject
23.02.21	Te Maari v Hamon – Lot 5 Deposited Plan South Auckland 15580	Māori Appellate Court MB 10	2021 APPEAL 10	Te Ture Whenua Māori Act 1993, section 58	Jurisdiction – directions issued despite application dismissed.

26.03.21	Peacocks – Part Puketiti 2B2B 1	Māori Appellate Court MB 48	2021 APPEAL 48	Te Ture Whenua Māori Act 1993, sections 18 and 131	Status of land – exception to s 2(2)(f)/53.
17.05.21	Walters v Wikiriwhi – Oruanui 9 and Others	Māori Appellate Court MB 102	2021 APPEAL 102	Te Ture Whenua Māori Act 1993, section 58	Trustees – removal – conflict of interest.
25.05.21	Peihopa v Peihopa – Kaikou H	Māori Appellate Court MB 180	2021 APPEAL 180	Te Ture Whenua Māori Act 1993, section 58	Injunction – upheld – no error in lower Court.
11.06.21	Te Maari v Hamon – Lot 5 Deposited Plan South Auckland 15580 Mangakino Pouakani Marae	Māori Appellate Court MB 222	2021 APPEAL 222	Te Ture Whenua Māori Act 1993, section 58	Costs.
17.06.21	Nicholas v The Official Assignee – Lot 6 DP 34349	Māori Appellate Court MB 228	2021 APPEAL 228	Te Ture Whenua Māori Act 1993, section 58	Assets and profit forfeiture orders.
19.07.21	Nicholas v Te Amo – Te Whaiti-Nui-A-Toi Block	Māori Appellate Court MB 273	2021 APPEAL 273	Te Ture Whenua Māori Act 1993, section 58	Injunction – right of occupation based on constructive trust not established.
01.08.21	Ratana v Tihi – Ruatoki B Sections 23 and others	Māori Appellate Court MB 290	2021 APPEAL 290	Te Ture Whenua Māori Act 1993, section 58	Ownership of dwelling – fixture – succession.
24.08.21	Baker – Tatarakina C Trust	Māori Appellate Court MB 308	2021 APPEAL 308	Te Ture Whenua Māori Act 1993, section 58	Trusts – injunction – decision-making vested in trustees.
25.08.21	Nicholas v Official Assignee – Lot 6 DP 34349	Māori Appellate Court MB 312	2021 APPEAL 312	Te Ture Whenua Māori Act 1993, section 58	Costs. Use of High Court scale.
23.09.21	McLeod v Nga Uri a Maata Ngapo Charitable Trust – Harataunga West 2B 2A 1 (Te Paea O Hauraki Māori Reservation)	Māori Appellate Court MB 319	2021 APPEAL 319	Te Ture Whenua Māori Act 1993, section 58	Mediation. Change of name and purpose of reservation.

29.09.21	McLeod v Nga Uri a Maata Ngapo Charitable Trust – Harataunga West 2B 2A 1 (Te Paea O Hauraki Māori Reservation)	Māori Appellate Court MB 379	2021 APPEAL 379	Te Ture Whenua Māori Act 1993, section 58	Mediation outcome. Appeal dismissed.
21.12.21	Kruger v Nikora – Tuhoe – Te Uru Taumatua	Māori Appellate Court MB 444	2021 APPEAL 444	Te Ture Whenua Māori Act 1993, s 58	Jurisdiction of the Court over trust holding General land. Election of trustees.

Te Kōti Whenua Māori – Māori Land Court

Chief Judge's powers – status of land – application dismissed

Kidd v Māori Owners – Whenuanui No 2B

(2021) Chief Judge's MB 1409 (2021 CJ 1409)
9 November 2021

Report by Elizabeth Derby

Whakataunga – Overview and result

Application seeking to cancel an order made determining Whenuanui No 2B Block is Māori freehold land dismissed. No error was found in the decision of the Court.

Chief Judge's powers – status of land – no error – application dismissed	
Date	9 November 2021
Case	Kidd v Māori Owners – Whenuanui No 2B (356 KB PDF)
Citation	(2021) Chief Judge's MB 1409 (2021 CJ 1409)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Chief Judge W W Isaac
Earlier/later decisions	Whenuanui 2B (2020) 222 Taitokerau MB 236-253 (222 TTK 236-253); 14 Kaipara MB 182-183 (14 K 182-183); 2021 Chief Judge's MB 1189-1211 (2021 CJ 1189-1211).
Legislation cited	Te Ture Whenua Māori Act 1993, s 45.

Cases cited	<i>Ashwell – Rawinia or Lavinia Ashwell (nee Russell)</i> [2009] Chief Judge's MB 209 (2009 CJ 209); <i>Tau v Nga Whanau O Morven & Glenavy – Waihao 903 Section IX Block</i> [2010] Māori Appellate Court MB 167 (2010 APPEAL 167); <i>Inia v Julian</i> [2020] NZCA 423.
Overview and result	Application seeking to cancel a 2007 order made determining Whenuanui No 2B Block is Māori freehold land. The applicants are the registered owners of the block and submitted that the Court made an error, mistake, or omission as they were not given the opportunity to challenge the 2007 order due to the 10-year time limit imposed by s 77 of the Act, which has deprived them of their right to natural justice. Robert McCown acquired 113 of the 160 shares in the block in 1957. These shares were transferred via a series of transfers. Some of these transfers incorrectly recorded the transfer of the whole block rather than the 113 shares, which included a transfer in 2000 to Richard Julian Kidd and Dianne Janet Kidd as the trustees of the Whenuanui Farm Trust. None of the transfers were confirmed by the Māori Land Court. There are related proceedings in the Māori Land Court and the High Court regarding the status of land and ownership of the block. These proceedings have been stayed pending the outcome of this proceeding. Held, application dismissed. The Court found that the applicants' actions in not applying for confirmation of the transfers to them places the responsibility for lack of notice with them. The Court agreed with submissions from counsel for the Māori owners and counsel for the Registrar-General of Land in that s 2 of the Māori Affairs Act 1953 does not cause the transfer of a portion of shares in Māori freehold land to convert these shares into General land, and that an undivided block of land can only have one status. The Court found that this land was clearly Māori freehold land prior to Mr McCown's purchase of shares in the land, it remained Māori freehold land when Mr McCown purchased the shares, and it has not changed since that time. Therefore, there was no error made by the Court or the Registrar in the 2007 order and the Chief Judge declined to exercise his jurisdiction under s 45.

Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal

Ngā whakataunga tiriti – unfair, unsound settlement process – Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua

Decision of the Tribunal – The Wairarapa Moana ki Pouākani Incorporation (Smiler), Ngāi Tūmupūhia-ā-Rangi hapū (Griggs and Chamberlain), and Rangitāne Tū Mai Rā Trust urgent claims

Waitangi Tribunal (Wai 3058, 2021); (Wai 429, 2021); (Wai 3068, 2021)

18 November 2021

Report by Craig Linkhorn

Whakataunga – Overview and result

The Waitangi Tribunal reported on its inquiry into the process the Crown followed to arrive at a Treaty settlement with Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua. The Tribunal found that the process was unfair, would exacerbate divisions in the claimant community, and would not be durable. It recommended a halt to allow further work.

Ngā whakataunga tiriti – Treaty of Waitangi settlement process – elements of fair process	
Date	18 November 2021
Report	Decision of the Tribunal – The Wairarapa Moana ki Pouākani Incorporation (Smiler), Ngāi Tūmupūhia-ā-Rangi hapū (Griggs and Chamberlain), and Rangitāne Tū Mai Rā Trust urgent claims (1 MB, PDF)
Citation	Wai 3058; Wai 429; Wai 3068
Tribunal	Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal
Member(s)	Judge C M Wainwright (presiding), Dr Ruakere Hond, Dame Margaret Bazley
Prior/later parts	Decision on application for urgent hearing – The Wairarapa Moana ki Pouākani Incorporation (Smiler) and MacLean Purchases claims [2021] (Wai 3058, #2.5.3; Wai 429, #2.37); Decision on application for urgent hearing – The Wairarapa Moana ki Pouākani Incorporation (Smiler) and MacLean Purchases claims [2021] (Wai 3058, #2.5.4; Wai 429, #2.44).
Overview and result	The claimants sought an urgent Tribunal inquiry following a deed of settlement signed between the Crown and Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua and the trustees of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust. The

	claimants were affected by the settlement and their claims were before the Tribunal for remedies recommendations. The claimants argued that the Crown did not incorporate elements required for a sound and Treaty-compliant settlement process. The Tribunal identified elements it said were required for the settlement process and concluded that, because of the cumulative effect of the deficiencies it had identified, the process followed by the Crown was unfair. In particular, the Tribunal found that the Settlement Trust had no mandate to enter into settlement with the Crown concerning the interests of Ngāi Tūmupūhia-ā-Rangi and the Wairarapa Moana ki Pouākani Incorporation claimants. The Tribunal recommended that the settlement not proceed further at this stage and that further work be undertaken.
--	--

Kōrero whānui – Background

The Tribunal has inquired into and reported on a number of claims of Wairarapa Māori. In 2001 claims were included in a district inquiry organised by the Tribunal. This long involvement in claims inquiry processes, the Tribunal said (at [70]), put it in "a unique position to properly assess the nature and significance of the objections of the claimants in Wai 85 and Wai 429 to the settlement process." Familiarity with the groups, their histories, and their place in te ao Māori ki Wairarapa, the Tribunal said (at [70]) "gives weight to our judgements about process."

The binding recommendations sought from the Tribunal by the claimants in Wai 429 (Griggs and Chamberlain on behalf of Ngāi Tūmupūhia-ā-Rangi) and Wai 85 (the Wairarapa Moana ki Pouākani Incorporation ('the Incorporation')) were inquired into by the Tribunal in 2019 and a preliminary determination was issued in March 2020. In essence, the Tribunal said in the preliminary determination that it "would probably issue binding recommendations returning to Māori ownership the resumable land at Pouākani (including the Maraetai dam) and the Ngāumu Forest." (Noted at [79].) The Tribunal also said that "the recipient of the redress should represent all of the claimants of Ngāti Kahungunu Wairarapa ki Tāmaki Nui-ā-Rua descent." (At [79].) The preliminary determination was then subject to judicial review, and was quashed by the High Court. Parties to the High Court litigation appealed and cross-appealed and the Supreme Court recently agreed to hear the appeals in February 2022. The Tribunal noted that "the outcomes might include the Court's finding the High Court's decision wrong, its upholding that decision in whole or in part, and its remitting to us some or all of the matters on which we expressed views in our preliminary determination." (At [3].)

Meantime, the Crown and the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Settlement Trust decided to sign a deed of settlement of historical claims on 29 October 2021 without waiting for the outcome of this litigation. The deed of settlement annexes proposed legislation to give legal effect

to the matters covered by the settlement. The Crown indicated that it proposed to move to introduce the settlement legislation to the House of Representatives from 22 November 2021. The Tribunal noted that the Bill, if enacted, will "extinguish the Tribunal's jurisdiction to make binding recommendations in favour of Wairarapa Māori, effectively rendering the Supreme Court's February hearing moot." (At [4].)

Affected claimants sought the Tribunal's urgent inquiry into these settlement processes. The Tribunal agreed to inquire and report under urgency.

Kōrerorero – Discussion

The elements of fair process

The Tribunal said that the Crown had to take into account the right matters, and to ensure that its assessment of these matters was correct, in order for its decision to proceed with the settlement to be sound. In this particular case, these are the elements that the Tribunal found the Crown needed (at [90]):

(a) to know that the Settlement Trust held a mandate to settle the claims in Wai 429 and Wai 85 with the Crown; and

i. if a mandate was given some time ago, the Settlement Trust has nevertheless engaged in processes to maintain that mandate and to inform the Crown about that; and

ii. nothing had happened to interrupt or remove the mandate, or to suggest that something might have happened which the Crown needed to investigate to reassure itself;

(b) to be fully informed about what happened in the ratification process so that [the Crown] could be confident that

i. the registered beneficiaries of the Settlement Trust understood the vote being conducted was in fact a process to ratify the deed of settlement;

ii. information provided to registered beneficiaries clearly outlined the nature of the vote and also explained any other matters that they needed to take into account;

iii. the rules laid down in the Deed of Mandate and the Settlement Trust's own deed were followed, or if those rules were not followed to the letter at least that the process was sound in substance;

iv. enough of the beneficiaries - including the groups objecting - participated in the vote, and voted in favour of the settlement; and

(c) to correctly evaluate the other factors on which its decision relied: the credentials of the groups opposing - their size, nature, and support base - and what was at stake in their choice to pursue litigation rather than support the settlement with the Crown.

In relation to another group who had already agreed to a settlement of its historical claims that involved shared redress with this group, represented by the Rangitāne Tū Mai Rā Trust, the Crown was obliged to continue to negotiate in good faith with them about redress concerning Wairarapa Moana in order to give effect to the undertakings the Crown made when it settled with them. This is to ensure fairness of process.

In relation to the Wai 429 and Wai 85 claimants, the Tribunal further explored these elements of fair process (under the headings of 'Mandate', 'Ratification', and 'Other factors the Crown relied on' explored next in this article).

Mandate

The question discussed in this section of the Tribunal's report is whether the mandate was maintained or had it been removed?

The claimants in Wai 429 and Wai 85 alleged that "the Crown has been on notice that the Settlement Trust's mandate to settle their claims is unsound." (At [93].) The Tribunal found that "when the Deed of Mandate was signed in 2012, the Settlement Trust did have a mandate to settle aspects of these claims." (At [94].) However, the Tribunal was clear that when the claimants applied to the Tribunal for binding recommendations, the Settlement Trust no longer had a mandate to negotiate on their behalf about settlement relating to either land at Pouākani or in Ngāumu Forest. The Tribunal affirms that "[w]hat the Supreme Court said about Mr Haronga in *Haronga* [[Haronga v Waitangi Tribunal](#) [2011] NZSC 53] applies equally to these claimants." (At 94.)

The Tribunal summarised the Crown submission that "issues within Ngāi Tūmapūhia-ā-Rangi about representation means that the claimants in Wai 429 cannot rely on this aspect of the *Haronga* decision" and that "Wai 429 prospects of succeeding in the litigation were bleak and this meant that the mandate to represent them in relation to Ngāumu Forest defaulted to the Settlement Trust." (See [95].) The Tribunal rejected these arguments, finding that these aspects of the Minister's assessment "expressed in letters to the claimants to justify the Crown's continuing to settlement in the face of their opposition was accordingly founded on mistaken advice, and was itself mistaken." (At [96].) The Tribunal found that this goes against the guidance provided in The Red Book. (At [97].) (The Crown-published manual of guidance for conducting settlement negotiations is colloquially known as the red book because of the colour of its cover.)

The Tribunal found there was evidence of the mandate not being maintained and questioned whether, if the Crown did not know enough to understand this, should it have known enough? And should it have considered its process for gaining approval in more detail?

Ratification

The Tribunal says that "[e]veryone eligible for the August 2021 vote for the revised Settlement Deed should have known whether the vote was a ratification vote on which the Crown would rely and equally, the relevance of the 'ratification' of 2018." (At [104].) The Tribunal summarised the

Crown's stance on this issue that "the true ratification came in 2018 on the settlement package that preceded the resumption proceedings rather than from the vote that the Settlement Trust conducted in August 2021 on the revised settlement." (At [105].) The Tribunal described this as a "perplexing stance" and concluded the submission was "an attempt to bat away the problem of the revised settlement package having gained the lowest level of approval ever for a comprehensive Treaty settlement." (At [105].)

The Tribunal, having examined the material that the Settlement Trust provided to voters before the vote (held over July-August 2021), found that the information was confined to advocacy material and "[i]t does not talk about what is at stake in the litigation, and the likelihood or otherwise that assets worth nearly \$800 million could potentially be returned to Wairarapa Māori." (At [110].) The Tribunal also found that the information provided was too complex and too difficult for an audience without legal training to understand.

In terms of rules for voting, the Tribunal said (at [120]):

- (a) the process prescribed in [the Settlement Trust's] three separate deeds is contradictory and arcane;
- (b) it provides little to no procedural protection to participants as a result - especially if departure from what is prescribed is regarded as permissible;
- (c) it is completely unclear to us why it should be permissible to depart from the process most recently agreed upon, namely that in the 2017 deed;
- (d) we have received no evidence to suggest that the Crown has engaged with all of this in light of the principles of the Treaty of Waitangi to decide with the Settlement Trust, in a reasoned way, that a lower level of approval than prescribed in any of the deeds is adequate under the circumstances.

The Tribunal then turned to consider whether the levels of participation and the levels of approval were adequate. This interrogated the issues of "whether the relevant ratification was the one that took place in 2018 or the one in July-August of this year, and the problems we have highlighted about the information provided to voters." (At [123].)

The Tribunal found that the 2018 vote had a 33.3 percent participation rate and a 71.7 percent support rate, and the 2021 vote had a 31 percent participation rate and a 68 percent support rate. (At [128]). This showed, the Tribunal found that the level of approval fell in 2021, even though the settlement appeared to be a better one than that voted on in 2018. In considering the stance of groups involved in the litigation, the Tribunal also found, from a hapū breakdown of the 2021 vote filed on 8 November, that there was a 41 percent turnout for Ngāi Tūmapūhia-ā-Rangi and that, of those from this group who voted, 74.8 percent voted against the settlement (at [130]).

The Settlement Trust had organised eight regional hui for the voting process. Three of these were cancelled, including one in Wellington and one in Masterton (the location closest to Ngāi Tūmapūhia-ā-Rangi), due to

the COVID-19 level four lockdown that began on 17 August. Counsel for the Wai 429 claimants suggested that the hasty continuation of the voting process under lockdown conditions "undermined tikanga and the ability for claimants to participate in the vote in a fully informed way." (At [144].) The Tribunal accepted that this tainted the voting process and questioned why the process of seeking approval could not have been put on hold until people could once again attend hui (at [145]).

Finally, under this topic, the Tribunal agreed with the Wai 85 claimants that "for the Crown to safely rely on a ratification vote, there must be a sound process leading up to the vote, a suitable number of eligible voters participating in the vote, and a suitable number of those participating voting in favour." (At [148].) The Tribunal found that none of these requirements were satisfied in this case.

Other factors the Crown relied on

The Tribunal's outline of the important procedural elements for a fair process includes, in addition to fair mandate and ratification processes, that the Crown correctly evaluates other factors it relies on for its decision to proceed to settlement (at [154]). The Tribunal found that letters from the Minister for Treaty of Waitangi Settlements to the Wai 429 and Wai 85 claimants indicated the factors that the Crown relied upon in its decision to proceed to enter into a settlement despite the objections of the claimants. The Minister's letter of 21 July 2021 outlines these factors, including (at [149]):

- (a) the long delay to this point and the likelihood that further proceedings will cause more delay;
- (b) the Tribunal's preliminary determination that it should not recommend the return of land to the Incorporation, the lack of any challenge by way of judicial review to that determination, and the High Court's expressly noting the continued relevance of the Tribunal's preliminary determinations on the Wai 85 and Wai 429 claims;
- (c) the Tribunal's own preliminary determination that any resumable assets should be transferred to an iwi representative group;
- (d) the interests of the Ngāti Kahungunu community;
- (e) the planned processes for Trustee elections and a vote by the claimant community on the settlement; and
- (f) the Crown's comprehensive settlement policy.

Another letter from the Minister on 22 October 2021 mentioned that he was also mindful that (at [151]):

- (a) The Supreme Court appeal does not bear upon the essential finding of the Waitangi Tribunal that the Wai 85 and 429 claimants are not and could not be appropriate recipients of the resumable land;
- (b) Raukawa find the involvement in resumption litigation to be an ongoing burden;

(c) No reasons accompanied the Supreme Court's decision to assume jurisdiction from the Court of Appeal nor has there been any direction to pause the settlement and the introduction of legislation and which 'leaves me able only to consider the foregoing points which formed the basis of my previous decision to proceed to settlement, and which I set out more fulsomely in my letter to you of 21 July 2021.'

The Tribunal found that the Minister's assessment of the interests of the Ngāti Kahungunu community in favour of settling implied that it would not be detrimental to that community if the settlement went ahead without the support of the claimants, or "at least not sufficiently deleterious for him to pause." (At [156].) The Tribunal then outlined its views on "the role of the Incorporation and Ngāi Tūmapūhia-ā-Rangi in the Māori community that is Ngāti Kahungunu Wairarapa ki Tāmaki Nui-ā-Rua, and the likely result of overriding their views and proceeding to settlement now." (At [156].) With regard to the Wairarapa ki Pouākani Incorporation, the Tribunal found that (at [160]):

In sum, the Incorporation is an influential player in te ao Māori ki Wairarapa, the Settlement Trust does not have a current mandate to represent its interests in Pouākani in the settlement, and its shareholders have registered with the Settlement Trust in very low numbers. This means not only that most of them are not eligible to vote, but also raises the likelihood that they the shareholders in the Incorporation do not see the Settlement Trust as representing their interests in settlement.

With regard to Ngāi Tūmapūhia-ā-Rangi, the Tribunal concluded that (at [162]):

While it is not absolutely clear from any of the evidence that the reason for their not supporting settlement is that they prefer the litigation path that the Wai 429 claimants embarked upon, it is likely that is the reason. We say that because the settlement package has improved since 2018, and only Ngāi Tūmapūhia voters can be seen to have rejected the settlement.

In answer to the Crown's questions about whether the claimants in Wai 429 really represent Ngāi Tūmapūhia, the Tribunal found that they do.

As for the Minister's assessment that the Wai 429 and Wai 85 claimants would not succeed in the litigation that they want to pursue, the Tribunal noted that the Minister's position was a reflection of the advice he had been given which, according to the Tribunal, was flawed. The Tribunal found that "the Crown cannot justify its prediction of inevitable failure" (at [167]).

With respect to the Minister's assessment that he was justified in taking steps that might have the practical effect of ending the litigation, the Tribunal finds (at [168]):

(a) The mechanism in legislation to enable claimants to seek binding recommendations was enacted as part of a promise in clause 6 of the Forests Agreement, which provided:

The Crown and Māori agree that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to

make recommendations within the shortest reasonable period.

(b) For the Crown to act to extinguish applications for binding recommendations while the process is in train is 'the antithesis of the promise it made in 1989'.

(c) If claimants choose to pursue their claims through applications for binding resumption, that is an expression of their tino rangatiratanga that the Crown should not lightly override.

(d) The Crown previously agreed, when the claimants applied to the Tribunal for binding recommendations, that it would delay settlement until those proceedings were resolved. There is no or insufficient reason for the Crown now to resile from that position.

(e) The Crown's assessment that the Wai 85 and 429 cannot succeed in the litigation they want to pursue is unsafe. We cannot know now where the Supreme Court's decision might take them.

(f) This assessment was a plank on which the Minister's decision to proceed to settlement relied, and the decision is as a result flawed.

(g) Neither the High Court nor, apparently, the Supreme Court have assessed their chances as hopeless. Indeed, Justice Cooke said very recently in *Griggs and Chamberlain v Attorney-General* that the prospects for Wai 429 may have improved as a result of the High Court's quashing our preliminary determination.

(h) In the Supreme Court, seeking to 'leapfrog' the Court of Appeal in the appeal process, the appellants advanced their application on the basis that the appeals raised significant legal issues relating to tikanga and the Treaty of Waitangi, and said that the proposed settlement would extinguish their claims in the Tribunal. The Supreme Court granted the leave sought. The approved question is whether the High Court's decision was correct.

(i) It is a necessary inference from the Supreme Court's decision that it did not regard the appeals as meritless or futile. The leave granted to leapfrog the Court of Appeal is rarely obtained. The Supreme Court must have considered that there were some important matters to be tried, consistently with the provisions of the Senior Courts Act 2016 in section 74 (1) and (2)(a).

The Tribunal then stated (at [170]):

In our judgement, knowing Ngāti Kahungunu ki Wairarapa ki Tāmaki Nui-ā-Rua as we do, a settlement that Ngāi Tūmapūhia-ā-Rangi do not support, that the leaders of the Incorporation do not support, where only 14 per cent of the shareholders in the Wairarapa Moana ki Pouākani Incorporation are registered with the Settlement Trust and entitled to vote, and which settles both Ngāumu and Pouākani interests without a mandate from the claimants in Wai 429 and 85, is not a settlement whose advancement now is in the interests of Ngāti Kahungunu. Although the long wait for settlement is certainly an important factor – and we do understand the need for assets and advancement for Māori in the Wairarapa – we are also very concerned about whanaungatanga. All of these people are closely related. They have been divided since shortly after settlement

negotiations began. There is no doubt in our minds that proceeding to settlement without properly addressing those differences first will drive the wedge deeper.

Obligation to negotiate with Rangitāne in good faith

The trustees of the Rangitāne Tū Mai Rā Trust, a post-settlement governance entity for that iwi, allege that the Crown agreed to provide additional joint redress to Rangitāne and Ngāti Kahungunu when Rangitāne settled its historical claims against the Crown in 2016 (at [172]). This would enable the two groups to share responsibility for Wairarapa Moana and the Ruamahanga River. However, the Rangitāne claimants say, the Crown has instead offered an extra \$5 million in redress directly to Ngāti Kahungunu, and has bypassed Rangitāne (at [172]). Counsel told the Tribunal that a Joint Redress Bill (giving effect to this arrangement) will be introduced into Parliament soon after the proposed settlement bill. According to the Rangitāne claimants, "the Crown's actions in respect of the Joint Redress Bill represents another breach of Treaty principles, and will significantly prejudice Rangitāne and others if it is allowed to stand.

In relation to this, the Tribunal found that, while the Crown's actions are within the scope of what the Rangitāne Deed of Settlement allows, this approach does not 'bear the hallmarks of utmost good faith' in dealing with a Treaty partner. The Tribunal pointed out that it should have been obvious to the Crown that Ngāti Kahungunu and Rangitāne were not going to agree about this, and that the Crown "ought to have been aware of the interests at play and ought to have taken steps to manage the potential for conflict." (At [174].)

The Tribunal concluded that (at [180]):

The Crown's failure to keep Rangitāne informed and its failure to apprehend the importance to Rangitāne of its decision to direct redress concerning Wairarapa Moana to Ngāti Kahungunu directly rather than to the Statutory Board means, in our view, that the Crown did not fulfil the requirement in clause 7.6 of the Rangitāne Deed of Settlement to negotiate with both iwi in good faith about joint or shared redress. These failures breached the Treaty principles of reciprocity, partnership, and active protection.

Summary of findings

In relation to the claimants in Ngāi Tūmapūhia-ā-Rangi (Wai 429) and the Incorporation (Wai 3058/Wai 85), the Tribunal found that the overall settlement process was not fair and did not comply with the principles of the Treaty. These findings are laid out as follows (at [189]):

Mandate

(a) As to mandate, the Settlement Trust did not engage in processes to maintain its mandate for the claimants in Wai 429 and Wai 85, and any mandate it might once have had to settle on behalf of these claimants in relation to Ngāumu Forest and Pouākani was in fact removed when the claimants applied to the Waitangi Tribunal for binding recommendations in relation to these whenua;

(b) Nothing happened to enable the Settlement Trust validly to exercise a mandate in relation to Ngāumu Forest and Pouākani after that time;

(c) When the Crown and the Settlement Trust signed the deed of mandate on 29 October 2021, the Settlement Trust had no mandate to settle on behalf of Wai 429 and Wai 85;

Ratification

(a) The nature of the vote that the Settlement Trust conducted in July-August 2021 was in form and substance a ratification vote, but there was confusion right up to the time of our hearing last week about its status vis a vis the 2018 ratification vote;

(b) In context the 2021 vote was the more relevant vote, and the Crown's motives for characterising the 2018 vote as the ratification vote despite all that had happened since and the package being different in 2021 are unclear. However, it may be that the Crown wanted to rely on the 2018 vote because the numbers then were slightly better. If so, this depicts the Crown as trying to put a positive spin on levels of support about which it ought to have been genuinely concerned;

(c) The information that the Settlement Trust provided to voters at a time proximate to their exercise of their vote said that ending the litigation would allow settlement to proceed without further delay, but did not explain what was happening in the courts, the interests at play, and the potential outcomes;

(d) A pānui a year earlier did give much more information about this, but in order to properly inform voters at the time of the vote, it would have needed to be explained in the context of the vote that the Settlement Trust was asking voters to cast;

(e) The information that the Settlement Trust provided in various materials at the time of the vote, including the video that was played at hui, was more in the nature of advocacy for the settlement rather than dispassionate information for voters to assess;

(f) The process requirements set out in the 2011 and 2017 deeds establishing the Settlement Trust and the Deed of Mandate were convoluted and contradictory;

(g) It was not apparent which process was the relevant one for the Settlement Trust to follow in 2021, but it appears that - to the extent that any was followed - they followed the one in the 2011 deed that gave the Settlement Trust a let-out clause in the event that the required level of approval was not reached;

(h) The 2021 approval vote did not meet the levels of approval specified in the deeds (variously 70 per cent and 75 per cent). It is not apparent that the Crown and the Settlement Trust entered into the kind of process that the let-out clause envisaged for agreeing between them that nevertheless the level of approval was adequate;

(i) Given the other aspects of poor process, the Settlement Trust's approval vote of 2021 attracted too few eligible voters (a turnout of 31 per cent) and too few votes in support (68 per cent) for the

Crown to conclude that there was sufficient support for the settlement;

(j) Especially, the Crown should have realised that there were serious problems with the representation of the groups objecting among those supporting the settlement;

(k) As regards the claimants in Wai 85, very few shareholders of the Incorporations were registered with the Settlement Trust and so were not entitled to vote;

(l) As regards the claimants in Wai 429, the hapū-by-hapū breakdown of the vote revealed that Ngāi Tūmapūhia-ā-Rangi opposed the settlement by a good majority, but this information was not brought to the Crown's attention until last week;

(m) Although Ngāi Tūmapūhia-ā-Rangi have longstanding issues internally about representation, the hapū-by-hapū breakdown of the approval vote reveals that they are fairly united in their rejection of the settlement;

(n) An obvious reason for most rejecting the settlement is that Ngāi Tūmapūhia-ā-Rangi prefer to pursue the litigation path that Wai 429 initiated before us in 2018;

(o) These circumstances taken together probably indicate that Wai 429 claimants do have the support of most Ngāi Tūmapūhia-ā-Rangi;

Other factors on which the Crown's decision relied

(a) The size of the group objecting is important and, together, the objecting claimants comprise a good proportion (more than a third) of the population whose claims the proposed settlement will settle;

(b) Both groups are led by people of mana and are themselves groups with mana and importance in te ao Māori ki Wairarapa;

(c) Their preference to pursue litigation about Ngāumu Forest and Pouākani is an exercise of their rangatiratanga with which the Crown should interfere only for the strongest possible reasons;

(d) Its reasons for electing to end the litigation do not meet that description;

(e) Allowing the litigation to run its course may have the effect of allowing the parties to work together to resolve a number of ancillary issues, including the underlying interests at Pouākani that have been the subject of conflict and mamae;

(f) The context of the Forests Agreement, and also the settlement of the Lands case, engages the honour of the Crown in allowing claimants who choose to bring applications for resumption to pursue them as they choose;

(g) The Crown's earlier undertaking not to settle until those applications are resolved was appropriate and should not be revoked;

(h) Moreover, the Crown has not properly assessed the claimant's prospects in the litigation. The High Court recently commented that the Crown's assessment of Wai 429's prospects may be

mistaken, and the Supreme Court's granting of leave to the appellants to leapfrog the Court of Appeal implies that it considers their case has merit. We consider it unwise to forecast failure in our highest appeal court, because such a court may take its own view of matters;

(i) The harm to whanaungatanga and related mamae that will result from settling these claims in the face of the opposition of groups of the size and mana of Ngāi Tūmapūhia-ā-Rangi and the leaders and shareholders of the Incorporation outweighs the advantages of moving now to settle, especially in the context of a rushed and flawed process.

In relation to the Rangitāne Tū Mai Rā Trust, the Tribunal found that the Crown "failed in its Treaty duty of good faith to Rangitāne" and "breached the principle of whanaungatanga." (At [191].) The Tribunal said that "[k]nowing the troubles between the two groups in the past, and the historical errors of subsuming Rangitāne interests under those of Ngāti Kahungunu, the Crown should have taken active steps to ensure that the relationship between them was not harmed by its approach to shared or joint redress." (At 191.) The Tribunal found that the Crown failed to do that.

Recommendations

Having decided the claims inquired into urgently were well-founded, the Tribunal turned to consider recommendations.

In relation to the claimants in Ngāi Tūmapūhia-ā-Rangi (Wai 429) and the Incorporation (Wai 3058/Wai 85), the Tribunal recommended that the Crown (at [190]):

- (a) postpones the introduction of the settlement legislation;
- (b) allows the litigation to take its course;
- (c) supports Ngāti Kahungunu Wairarapa ki Tāmaki nui-ā-Rua to engage in processes to resolve the conflicts that have come into focus in the course of the Crown's engagements with Wairarapa Māori over settlement of their claims;
- (d) when appropriate, supports the Settlement Trust to engage in processes to renew its mandate to settle the claims in the rohe; and
- (e) pays the costs of the parties incurred in making the applications for urgency and the costs of the urgent inquiry.

In relation to the Rangitāne Tū Mai Rā Trust claim, the Tribunal recommended that the Crown (at [192]):

- (a) pauses now to take steps to rectify its Treaty breach in failing to conduct negotiations about redress concerning Wairarapa Moana in good faith in accordance with the principles of the Treaty and with clause 7.6 of the Deed of Settlement;
- (b) before any matters are concluded about redress concerning Wairarapa Moana, helps Rangitāne and Ngāti Kahungunu to work together to ensure that any such redress, and the process for agreeing upon it with the Crown, do not jeopardise their internal and external relationships;

(c) reimburses Rangitāne for the costs of this urgent claim and the related application for urgency.

Finally, the Tribunal recommended, in relation to all claimants, that "the Crown should now pause to rectify the deficiencies that have made the settlement process we heard about unsound and unfair." (At [193].)

Waitangi Tribunal Procedure – comity issues

Memorandum-Directions of the presiding officer regarding jurisdictional issues – the National Fresh Water and Geothermal Resources Inquiry

Waitangi Tribunal (2021) Wai 2358, #2.6.79
15 December 2021

Report by Elizabeth Derby

Whakataunga – Overview and result

Memorandum-directions addressing whether it is possible to hold hearings and report on the proposed issue questions in this inquiry prior to the introduction of the proposed Natural and Built Environments Bill, and how the inquiry could be framed and conducted so as to enable that to occur.

Waitangi Tribunal procedure – parliamentary privilege and comity – jurisdiction of the Tribunal	
Date	15 December 2021
Case	Memorandum-Directions of the presiding officer regarding jurisdictional issues – the National Fresh Water and Geothermal Resources Inquiry (540 KB, PDF)
Citation	Wai 2358, #2.6.79
Tribunal	Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal
Member(s)	Chief Judge W W Isaac (Presiding Officer)
Earlier/later decisions	Stage 1 Report on the National Freshwater and Geothermal Resources Claims (Wai 2358, 2012); The Stage 2 Report on the National Freshwater and Geothermal Resources Claims (Wai 2358, 2019).
Legislation cited	Treaty of Waitangi Act 1975, s 6(6), s 8, Parliamentary Privilege Act 2014.
Cases cited	<i>Attorney-General v Mair</i> [2009] NZCA 625; He Pāharakeke, he Rito Whakakīkinga Whāruarua – Report on the Oranga Tamariki Urgent Inquiry (Wai 2915); <i>The Foreshore and Seabed Urgent Inquiry</i> (Wai 1071); <i>Reform of Te Ture Whenua Māori Act 1993 Inquiry</i> (Wai 2478); Decision of the Tribunal – The Wairarapa Moana ki Pouākani Incorporation (Smiler) , Ngāi Tūmupūhia-ā-Rangi hapū (Griggs and Chamberlain) , and Rangitāne Tū Mai Rā Trust urgent

	claims (Wai 3058 & 429, 2021); Priority Report on the Whakatōhea Settlement Process (Wai 1750, 2021).
Overview and result	Memorandum-directions addressing whether it was possible to hold hearings and report on the proposed issue questions in this inquiry prior to the introduction of the proposed Natural and Built Environments Bill (the NBE Bill), and how the inquiry could be framed and conducted so as to enable that to occur. Cabinet agreed to use a special process for resource management law reform by developing an exposure draft of the NBE Bill for consideration by a select committee inquiry. Following the Parliamentary inquiry the Crown intends to introduce the NBE Bill into the House of Representatives for passage in 2022. The Crown submitted that principles of parliamentary privilege and comity prevent the Tribunal inquiring into the current law in respect of geothermal resources and its consistency with the principles of the Treaty of Waitangi, and making recommendations relating to the NBE Bill (at [2]). The Crown suggested that the safest course would be for the Tribunal to defer its inquiry until the enactment of the reforms proposed in the NBE Bill. This memorandum-directions addressed the Tribunal's jurisdiction in relation to these issues. Held, the Chairperson rejected the Crown submission that the current proposed reforms and Parliamentary inquiry prevented the Tribunal from undertaking its proposed inquiry. The situation would be different once a Bill was introduced on the proposed reforms. Further consideration would be given at that time as to any limitations placed on the Tribunal's ability to inquire into the present claims. The Tribunal's statute (s 6(6)) prevents it from examining a Bill, but not preceding conduct. The Tribunal's jurisdiction is established in the Treaty of Waitangi Act 1975 and to impose additional restrictions on that jurisdiction would go against the reasons for the establishment of the Tribunal. The Chairperson questioned whether the Crown was acting as a true Treaty partner or was attempting to place controls on the Treaty relationship and prevent Māori from being heard by the Tribunal, which might breach Māori rights as Treaty partners. Directions for the future conduct of the inquiry will be issued in 2022.

Hakihea 2021 – additional content online

Te Kōti Whenua Māori – Māori Land Court

Rehearing – granted – stay refused – *McDonald – Kai Iwi No. 1C*
(2021) 440 Aotea MB 279 (440 AOT 279) – Elizabeth Derby