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Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Ngā whakahaere rauemi – natural resource management

Māori interests in natural resource management: 2021 in review

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Whakataunga – Overview

Ngā mihi nui ki a koutou katoa – the team at Buddle Findlay feels privileged to have the opportunity to present this overview of legal developments in the resource management field that are of particular relevance to Māori rights and interests.

2021 was a busy year, with many cases of note and other legal developments. In the past year, the courts have addressed, amongst other matters, the role of tikanga in Aotearoa's legal system and legislative Treaty provisions, the approach to the assessment and consideration of cultural effects for RMA projects, the extent to which proprietary interests in fresh water can be considered in the RMA context and a number of other matters. In addition, there have been a number of decisions of note under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act) and the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPT Act).

More generally, it has been a busy year for RMA practitioners with significant legislative reform pressing ahead, and continuing jurisprudence following on from the *NZ King Salmon*[1] and *RJ Davidson Family Trust* decisions.[2]

This article discusses all of these matters as well as briefly summarising Treaty settlement milestones in 2021. Finally, we offer some thoughts on developments to watch for in the year ahead.

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Role of tikanga and legislative Treaty provisions

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] NZSC 127

In this decision, the Supreme Court confirmed that tikanga plays a formal and important role in Aotearoa's legal system, and that when interpreting Treaty of Waitangi provisions in statute (also known as 'Treaty clauses') a broad and generous approach should be taken.

The case related to an application by Trans-Tasman Resources Ltd (TTR) for marine consents and marine discharge consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act), seeking to enable seabed mining in the South Taranaki Bight.

As discussed in our previous articles, the decision-making committee (DMC) of the Environmental Protection Authority had decided to grant the consents. However, the High Court quashed the DMC's decision and referred the matter back for reconsideration. TTR then appealed to the Court of Appeal, which dismissed the appeal and upheld the High Court's decision. The Court of Appeal emphasised that all customary rights and interests in taonga, referred to in the Treaty, are "existing interests" (as defined in the EEZ Act), regardless of whether they have been expressly recognised in a Treaty settlement.

TTR appealed the Court of Appeal decision to the Supreme Court, which unanimously dismissed the appeal. The Supreme Court found that tikanga must be taken into account as "other applicable law" under s 59(2)(1) of the EEZ Act, where its recognition and application is appropriate to the particular circumstances of the consent application at hand. In reaching this conclusion, the Court drew on the approach to tikanga in its earlier decisions such as *Takamore v Clarke*, which recognised that tikanga is "part of the values of the New Zealand common law".[3] Thus, the Supreme Court has again explicitly affirmed that tikanga is a part of the law of New Zealand.

The decision also considered s 12 of the EEZ Act, which sets out the ways in which the EEZ Act recognises and respects "the Crown's responsibility to give effect to the principles of the Treaty of Waitangi". The Court commented that s 12 "illustrates the trend in more recent statutes to give a greater degree of definition as to the way in which the Treaty principles are to be given effect and a departure from the more general, free standing Treaty clauses like that in s 4 of the Conservation Act".[4]

The Supreme Court found that s 12 provided a "strong direction", requiring the DMC to "take into account the effects of the activity on existing interests in a manner that recognises and respects the Crown's obligation to give effect to the principles of the Treaty".[5]

Overall, the Court concluded that "Treaty clauses should not be narrowly construed. Rather they must be given a broad and generous construction".[6] As such, the Supreme Court found that "an intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear."[7] Williams J stated that "I would merely add that this question must not only be viewed through a Pākehā lens".[8]

The decision is significant in other respects, including the finding by the majority that s 10(1)(b) of the EEZ Act imposes an 'environmental bottom line', in the sense that where the discharge of a harmful substance will cause pollution from which the environment cannot be protected by regulation, then consent should not be granted.

Assessment of cultural effects

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

This case was an appeal to the High Court of the Environment Court's decision (*Tauranga Environmental Protection Society Inc v Tauranga City Council* [2019] NZEnvC 1) to uphold consents granted by the Tauranga City Council to Transpower for the realignment of transmissions line – including the location of a large power pole next to the Maungatapu Marae of Ngāti Hē.

The decision reiterates that cultural effects need to be given careful and serious consideration by decision-makers, and that the planning framework can set cultural 'bottom lines' that mean alternatives to options that would have adverse effects on cultural values need to be very carefully considered. As such, the decision is a useful precedent for Māori groups opposing projects on cultural grounds.

The Environment Court had held that the removal of the existing line would have positive effects, which were significantly greater than the adverse effects, including on the Marae and the kōhanga reo. The Environment Court had also held that the alternatives were not practicable due to the costs associated with them.

Tauranga Environmental Protection Society appealed the Environment Court's decision and the Marae Trustees supported the appeal as an interested party.

The effects on Ngāti Hē, and how those effects should be dealt with, were an important consideration for the Environment Court, and the High Court. However, in considering those effects, the High Court found that "the Environment Court's conclusions … did not reflect the evidence before it" noting that:[9]

> Having set out in 67 paragraphs the extent and depth of Ngāti Hē's firm opposition to the proposal, in one paragraph the Court effectively found that the adverse cultural effects would be outweighed by the beneficial effects. That involved the Court saying explicitly that it did not find that the proposed realignment would have cumulative adverse cultural effects on Ngāti Hē, even though it had found Ngāti Hē clearly considers it would.
>
> …

> [65] The effect of the Court's decision was to substitute its view of the cultural effects on Ngāti Hē for Ngāti Hē's own view. The Court is entitled to, and must, assess the credibility and reliability of the evidence for Ngāti Hē. But when the considered, consistent, and genuine view of Ngāti Hē is that the proposal would have a significant and adverse impact on an area of cultural significance to them and on Māori values of the [Outstanding Natural Feature / Landscape], it is not open to the Court to decide it would not. Ngāti Hē's view is determinative of those findings.

The High Court also found that the Bay of Plenty Regional Coastal Environment Plan (RCEP) imposed 'bottom lines' in terms of effects on cultural values. The High Court found that the Environment Court erred in not considering whether alternative options would avoid those types of effects.

In reaching this conclusion, the Court stated that *"*the emphasis on the Treaty of Waitangi and cultural values, and potential for cultural bottom lines in the RMA and planning instruments suggests that cultural values should not be underestimated*"*.[10] Further, the Court noted that:[11]

> [147] It is always difficult to put a price on culture, which is what is implied in a finding that the cost of an alternative is "too" high. That conclusion should not be too readily reached. And a conclusion has to be that of the Court, not of the applicant.

Finally, while the Court did not directly rule on the submission of the Marae that Transpower has an obligation to address the location of the pole as a breach of the Treaty of Waitangi, it noted that "there is no doubt that further discussion between Transpower and Ngāti Hē over these issues would be consistent with the principles of the Treaty of Waitangi, given the unhappy history of the transmission lines at issue".[12]

Having found that the Environment Court had made errors of law, the High Court remitted the decision to the Environment Court. Transpower applied for leave to appeal the High Court decision. However, in *Transpower New Zealand Ltd v Tauranga Environmental Protection Society Inc* [2022] NZCA 9, the Court of Appeal declined the application for leave.

Proprietary interests in fresh water in the context of the RMA

Te Whanau a Kai Trust v Gisborne District Council [2021] NZEnvC 115

The Environment Court considered whether planning instruments can recognise and give force to proprietary interests in fresh water, and in particular customary or native title. Te Whānau a Kai Trust sought provisions to that effect in the proposed Gisborne Regional Freshwater Plan.

By way of background, the Waitangi Tribunal's Stage 2 Report on the National Freshwater and Geothermal Resources Claims (Stage 2 Report) concluded that the issue of Māori ownership of natural and physical resources was (deliberately) excluded from the RMA.

In contrast, the MACA Act has introduced a specific framework and process for considering claims of customary interests in the marine and coastal area, and for subsequent recognition of those interests in RMA instruments, as discussed later in this article. However, no equivalent framework exists for fresh water.

In the Stage 2 Report, the Waitangi Tribunal expressly encouraged a test case be taken to consider Māori customary interests in fresh water (along the lines of the seminal *Ngāti Apa* case[13] in respect of the foreshore and seabed).[14] Ngāi Tahu has subsequently lodged a claim in the High Court, seeking a declaration of its rangatiratanga over fresh water in its rohe, and additional declarations related to the design of a new regime for the governance of fresh water.

In the meantime, Te Whānau a Kai's appeal, in the context of an appeal against an RMA planning instrument, has progressed through the Environment Court and to the High Court.

Te Whānau a Kai claimed that the Council's decisions and version of the Freshwater Plan failed to properly recognise and provide for its relationship with freshwater resources, "including [their] proprietary interest therein" and an alleged failure to recognise their kaitiakitanga over fresh water.[15] As part of the relief sought, Te Whānau a Kai proposed various amendments to the Plan, including changes which they considered would better recognise their customary rights.[16]

Te Whānau a Kai's position was that:

a. it had a range of customary rights and interests, including of native title, over the freshwater resources in its rohe; and

b. the Freshwater Plan should include provisions recognising and giving force to those rights and interests, including to ensure that it recognised and provided for the relationship of Te Whānau a Kai with its freshwater resources, and its kaitiakitanga role, in terms of section 6(e) and 7(a) of the RMA.

The Environment Court found that it did not have the jurisdiction to recognise proprietary interests, including native title, in fresh water. The RMA regulates the management and use of resources, rather than its ownership. Rather than including the provisions sought by Te Whānau a Kai, the Environment Court amended the Freshwater Plan to include provisions that it considered would address the concerns of Te Whānau a Kai to the extent permissible and appropriate under the RMA framework. Those provisions did not extend to directly recognising or confirming Te Whānau a Kai customary or proprietary interests in fresh water.

The Court stated that "the statutory framework under the RMA would not enable this Court, or the Council, to recognise and provide for a proprietary right in freshwater of the kind claimed by Te Whānau a Kai. To the extent that the Council must engage with the nature of Te Whānau a Kai's relationship with freshwater as part of its consideration of the Part 2 RMA provisions, the weight of authority clearly tells against recognition of proprietary rights and interests".[17]

Te Whānau a Kai appealed this decision to the High Court. The High Court hearing took place in April 2022 and its decision is expected later this year.

In the meantime, and in advance of a substantive hearing on the Ngāi Tahu claim or any legislative or policy progress in addressing Māori claims to fresh water, the question of whether, and if so how, Māori customary and in particular proprietary interests in fresh water should be considered remains unresolved.

Wāhi tapu status

Maungaharuru-Tangitū Trust v Hastings District Council [2021] NZEnvC 98

As discussed in our previous articles, there is now a line of *Maungaharuru-Tangitū Trust* decisions concerning the provisions relating to sites of wāhi tapu and wāhi taonga in Hastings District Council's Proposed District Plan. The Environment Court initially determined that all the sites in issue were wāhi tapu and what rules should apply to each, but did not determine the extent of the sites. On appeal, the High Court remitted the matter to the Environment Court for reconsideration. The "key difficulty" with the Environment Court's decision was that it "proceeded straight to a question of balancing the rights and interests of the private landowners and tangata whenua without clearly identifying the precise nature of the wāhi tapu/wāhi taonga interest, the potential adverse effect of particular activities, and how the proposed provisions of the District Plan address this".[18]

In light of the High Court's views and further submissions, the Environment Court has now revised its previous decision. Eight sites in the Proposed District Plan were at issue, seven of which are on privately owned pastoral farming properties and the other on privately owned land.

The Court analysed each of the eight sites at issue and ultimately held "that the evidence suggests that the level of protection and control sought by MTT overreaches what is needed to provide for the relationship of the MTT hapū with the site, and that their rules would be an unreasonable interference with the rights of the land owners".[19] The Court held that the rules proposed by the Council, which sought to protect the sites while avoiding blanket restrictions on farming activities, were more appropriate.

Report and decision of the Board of Inquiry into the Watercare Waikato River Water Take Proposal (*Watercare Decision*)

The Board of Inquiry's *Watercare Decision* was issued in January 2022. The decision relates to Watercare Services Limited's (Watercare) application for resource consents to take water from the Waikato River. The majority of the Board, in a finely balanced decision, granted all consents which were applied for, subject to further amendments and conditions.

Despite the eventual grant of consents, the Board found, in relation to cultural effects, that:

a. there had been a lack of meaningful engagement with local tangata whenua;[20]

b. it would have expected some form of dialogue to have occurred with the Waikato River Authority, given the context of the co-governance arrangements provided for by the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, however, that had not occurred;[21] and

c. the lack of cultural impact assessment by Watercare in its application was "a significant shortfall".[22]

The Board also found that there had been inadequate assessment of Te Ture Whaimana, which is the Vision and Strategy developed under the Waikato River Settlement.[23] Further, Watercare had not fully achieved Policy 2 of the NPSFM which requires that tangata whenua are actively involved in freshwater management.[24]

Despite these issues, the majority of the Board granted the resource consents, holding that the failures could be addressed through the imposition of a further condition of consent to require Watercare to invite tangata whenua to join a committee or board.[25] One Board member took a different view and would have declined the applications.

The decision demonstrates some of the risks and opportunities that persist in the RMA system for Māori, even where bespoke arrangements are in place (such as is the case for the Waikato River). On the one hand, the Board of Inquiry confirmed the importance of consultation with tangata whenua, and the respect to be given to co-governance arrangements provided for by Treaty settlement and statute. However, on the other hand, the Board held that deficiencies in the consultation process can be remedied late in the process by imposition of appropriate conditions.

Te Whakakitenga o Waikato has appealed the Board's decision to the High Court.

Marine and Coastal Area (Takutai Moana) Act 2011 (MACA Act)

2021 was a significant year for the development of case law under the MACA Act, with the High Court issuing its first substantive decision under the Act.

In *Re Edwards (No 2)* [2021] NZHC 1025, the High Court issued a 215-page judgment,[26] which addressed issues under the Act that had not previously been addressed by the Courts. As acknowledged by the Court, the decision will have implications for the 200 odd other claims under the MACA Act currently before the Court; and its effects are already being felt in other proceedings.

Some of the key rulings of the Court are set out below:

- **Standard and burden of proof:** The Court held that the burden is on applicants for recognition orders to prove the positive elements of the tests for PCRs (under s 51) and CMT (under s 58). However, applicants do not have the obligation to prove that their customary rights have not been extinguished. That burden lies with any party opposing recognition orders. The standard of proof is the civil burden of proof – that is, on the balance of probabilities but s 106(3) creates a presumption in favour of non-extinguishment.[27]

- **Holds the specified area in accordance with tikanga:** One of the positive elements for applicants to establish in order to make out a claim of CMT under s 58 is that the applicant group *"*holds the specified area in accordance with tikanga*"*. The Court held that "holds" does not incorporate proprietorial interests from common law or other statutes dealing with land. Instead, the focus is on whether the applicant group exercised tikanga.[28] The Court observed that because the types of recognition orders available under the Act relate to sui generis property interests that are very different, and much more limited than the fee simple type of property rights, it would be wrong to import into s 58 a requirement that applicants demonstrate something in the nature of a proprietorial interest.[29]

- **Exclusivity and "shared exclusivity":** Section 58 also requires the applicant group to demonstrate "exclusive use and occupation" of the specified area from 1840 to the present day "without substantial interruption". The concept of "substantial interruption" is discussed further below. In terms of "exclusive use and occupation", the Court held that the concept of "shared exclusivity" is available under the Act.[30] This enables applicant groups with overlapping interests to together assert exclusive use and occupation of a specified area of CMCA on the basis of "shared exclusivity". In such cases, the Court may decide that the CMT is jointly held by the different applicant groups. However, the Act does not permit more than one CMT to be recognised in the same area.[31]

- **Substantial interruption:** The Court also considered whether raupatu, resource consents, permanent structures and third party use and occupation could amount to "substantial interruption" such that CMT should not be granted. The Court held:

    - *Raupatu* did not amount to substantial interruption.[32]

    - The physical activities authorised by a *grant of resource consent* may have the practical effect of amounting to substantial interruption, however, the fact that a resource consent has been issued does not automatically have that effect.[33] The activity itself therefore needs to be examined, including its nature, scale and intensity. The Court commented that activities relating to port infrastructure such as wharves, jetties or slip ways may well amount to substantial interruption; as might sewerage or other outfall pipelines. However, whether they do must be examined on the facts of each case, and not by applying a presumption.[34]

    - Where a *reclamation* has led to the issue of a certificate of title on the basis that the land involved is above the line of mean high water springs, that area will be outside the CMCA and outside the application area. Other structures such as breakwaters, moles, groynes or seawalls fall outside the definition of reclaimed land and will need to be considered on the same basis as other third-party structures.[35]

- Whether a *third-party structure* has the effect of amounting to a substantial interruption is a question of fact.[36]
- Whether *third-party activities* amount to a substantial interruption is also a question of fact.[37] The Court noted that navigation and fishing will not of themselves amount to substantial interruption. Other activities, such as operation of a marine farm, may amount to substantial interruption, however, this must be determined on a case-by-case basis on the facts.

The cumulative effect of these rulings is to make it significantly more likely than may have previously been expected that applicant groups will be able to meet the statutory tests for CMT. As noted, the Court found that CMT could be recognised in *Re Edwards (No 2)*. Since then, the Court has also recognised CMT in a number of other cases, including *Re Reeder* [2021] NZHC 2726 and *Re Ngati Pahauwera* [2021] NZHC 3599.

In terms of PCRs, the Court in *Re Edwards (No 2)* also considered the ambit of activities capable of recognition under s 51. The Court found that "a general and intangible exercise of maintaining rangatiratanga, or acting as kaitiaki, without manifestation of any physical activity or relation to any natural or physical resource, is precluded from being recognised as a PCR".[38] However, where the exercise of those practices is connected to a physical activity, that may be the subject of a PCR. This will have implications for a number of applications for PCRs before the Court that currently are framed very broadly and without reference to specific physical activities.

Another decision released in 2021 is *Re Clarkson* [2021] NZHC 1968. In this decision, the Court declined to grant CMT. This application was by a whānau group and related to a remote area on the eastern coast of the central North Island. Although the Court found that the applicant group had a connection to the application area, it also found that the applicant group did not have the support of other whānau / hapū with interests and/or applications. This decision raises some interesting issues in terms of an application by a whānau group, and also reflects the strength in applicants joining together under the banner of "shared exclusivity" when seeking recognition of CMT, as was the case in *Re Edwards (No 2), Re Reeder* and (to some extent) *Re Ngāti Pāhauwera.*

Heritage New Zealand Pouhere Taonga Act 2014 update

Ngāti Paoa Trust Board v Heritage New Zealand Pouhere Taonga [2021] NZEnvC 75

In our 2019 and 2020 reviews we discussed the *SKP v Auckland Council* line of cases which related in part to a mandate dispute between the Ngāti Paoa Trust Board (Trust Board) and the Ngāti Paoa Iwi Trust (Iwi Trust) and consultation requirements in the context of a resource consent application. In *Ngāti Paoa Trust Board v Heritage New Zealand Pouhere Taonga* [2021] NZEnvC 75 the issue of consultation regarding the Trust

Board and Iwi Trust was considered in respect of the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPT Act).

The archaeological authorities granted under the HNZPT Act that were the subject of the appeals related to Mokoia Pā, which is a site of particular cultural, historical and spiritual significance to Ngāti Paoa.[39] There were two authorities in question:

- Auckland Transport had plans to construct a busway bridge crossing the Tamaki River between the Mokoia headland and Pakuranga as part of a wider public transport improvement project. Part of the alignment traverses Mokoia Pā. Auckland Transport therefore proposed a commemorative park to mark the location of Mokoia Pā with five mahi toi to serve as monuments to Ngāti Pāoa tūpuna. Auckland Transport was granted an authority under section 56(1)(b) of the HZNPT Act to carry out an exploratory archaeological investigation in respect of the proposed mahi toi installation sites.
- Mr Jones and Ms Ndukwe were also granted an archaeology authority under sections 44(a) and 48 of the HNZPT Act in respect of works associated with building their house. Their section on nearby Bridge Street was within the outer defensive ditch of Mokoia Pā.

The Trust Board considered that the wāhi tapu at Mokoia Pā should not be further disturbed due to the special significance of the site and the likelihood that the ground contained koiwi. It opposed both of the archaeological authorities granted and brought appeals to the Environment Court which were heard jointly. The Iwi Trust did not oppose the grant of either archaeological authority.

Of relevance more broadly was the Court's discussion of consultation requirements. The Trust Board submitted that it was uncontested that it was not consulted in relation to either application.[40] Auckland Transport and Mr Jones and Ms Ndukwe respectively had engaged with the Iwi Trust. Auckland Transport had also invited the Trust Board to be part of its consultation, but that invitation had not been taken up.[41]

The Court accepted that persons who hold mana whenua are best placed to identify the potential cultural effects on Māori of a proposal and that there was no duty of consultation in relation to either application. After outlining the legal principles underpinning consultation, as set out by the senior courts, the Court observed that appeals under the HNZPT Act are not an appropriate forum to raise issues between the Trust Board and Iwi Trust as to mandate or relative standing or priority, and no party had contended that was so. The Court therefore concluded that:[42]

> Ultimately, the law does not preclude any applicant for an authority from consulting with any person who may be able to give an informed response about any effect that a proposal may have on Māori cultural and other interest.

Ultimately the Court preferred the evidence of the Iwi Trust witnesses as to the effects on Māori cultural values and dismissed the appeals.

This case therefore demonstrates that the Environment Court will take a similar approach to mandate disputes when considering archaeological authority appeals as it has taken in the RMA context. That is, where there is conflicting evidence on who holds mana whenua or on the cultural effects of granting an archaeological authority, the Court will assess the matter on the evidence.

Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga [2021] NZEnvC 165

In our previous articles we have discussed decisions under the RMA which considered whether the Poutama Kaitiaki Charitable Trust (Poutama) has status as mana whenua under that Act.

Similarly, the Environment Court has also considered whether Poutama come within the meaning of tangata whenua under the HNZPT Act such that they should have been consulted by HNZPT in deciding whether to grant archaeological authority to First Gas Limited to remove 270 metres of redundant and unsafe pipeline from the Kapuni gas line in North Taranaki.

The Court agreed with the Heritage New Zealand Pouhere Taonga (HNZPT) position that the term "tangata whenua" in the context of the HNZPT Act means more than simply identifying as Māori. It requires a whakapapa connection to the land.[43] The Court also rejected an argument by Poutama that Ngāti Tama derive authority from their Treaty settlement,[44] endorsing the Court's comments on this point in *Director-General of Conservation v Taranaki Regional Council* [2019] EnvC 203.[45]

The Court concluded that Poutama are not tangata whenua as that term is used in the HNZPT Act.[46] The Court also held that there was a lack of clarity about potential impacts on a grave site and therefore that Poutama were not a "directly affected person" for the purposes of section 58.[47]

As such, the appeal was dismissed.

Other reforms and developments

Proposed RMA reform

Following the release of the Report of the Resource Management Review Panel in July 2020, the Government announced in early 2021 its intention to replace the RMA with three new pieces of legislation as follows:

- The Natural and Built Environments Act (NBA);
- The Strategic Planning Act (SPA); and
- The Climate Adaptation Act (CAA).

The 'Exposure Draft' of the NBA was released in June 2021. The NBA is intended to improve recognition of te ao Māori and to that end the draft:

- includes *"Te Oranga o te Taiao"* in the Act's purpose. This concept is intended to encapsulate the intergenerational importance of the health and well-being of the natural environment; and
- requires decision-makers to "give effect to" the principles of Te Tiriti, replacing the current RMA requirement to "take into account" those principles.

The Select Committee released its report in November 2021. The Select Committee supported the inclusion of Te Oranga o te Taiao in the Bill's purpose but recommended that further work be undertaken to better define and support this concept in the legislation including through engagement with iwi and Māori groups.

The Select Committee also recommended the inclusion of further direction in the NBA on how the principles of Te Tiriti o Waitangi are to be given effect to, including local government's role in the Treaty partnership. The Select Committee further recommended that consideration be given to what role the new proposed National Planning Framework could have in giving additional expression to the principles of Te Tiriti o Waitangi.

The Government released its response to the Select Committee's report in February 2022 and has committed to introduce the Natural and Built Environments Bill to the House this year alongside the Strategic Planning Bill.

One of the key intended features of the new legislative regime is a stronger focus on planning for development. That will likely make it even more important that Māori focus on plan making processes (like the process addressed in the *Port Otago* case below), in order to influence the type of development that will ultimately be permitted. The exact nature of the planning regime under the new legislative regime is yet to be determined, and is keenly anticipated.

Port Otago Limited v Environmental Defence Society Incorporated [2021] NZCA 638

In our 2017, 2018 and 2019 reviews, we discussed the heightened importance of directive policies in RMA planning instruments, including following the High Court's decision in *Environmental Defence Society v Otago Regional Council* [2019] NZHC 2278 (*Port Otago*). This is an important line of cases in terms of addressing tikanga and other issues of interest for Māori, because RMA planning instruments and in particular directive policies can have a determinative influence on what type of development will be allowed in any given location.

The Court of Appeal dismissed *Port Otago's* appeal. The Court held that the proposed regional policy statement (PRSP) did not give effect to the NZCPS in the manner required by *King Salmon* as "a bottom line requiring adverse effects be "avoid[ed]" cannot be substituted with "avoid, remedy or mitigate"".[48] The Court considered the parties had "overcomplicate[d] a simpler enquiry" that had an "obvious" answer.[49] 'Avoid, remedy or mitigate' dilutes the requirement to avoid and "invites a decision-maker instead to reach a broad judgment".[50] This could permit, rather than avoid, adverse effects on natural character in areas of the coastal environment with outstanding character (and significant adverse effects on natural character in other areas of the coastal environment).[51]

The Court of Appeal concluded that:[52]

> The short answer in this appeal is that a regional policy statement fails to give effect to an NZCPS policy requiring adverse effects in an area of outstanding natural character to be avoided, by instead

> providing for adverse effects in such areas to be avoided, remedied or mitigated. Correct application of the principles laid down in *King Salmon* compel that conclusion.

Of interest, the Court also observed:

- Policies 7 and 9 are not in conflict with the avoidance polices. Instead, the NZCPS contains a directive hierarchy: the avoidance policies have relatively clear environmental bottom lines and policies 7 and 9 contain lower level degrees of direction. The avoidance policies should not be diluted to reconcile them with other policies in the NZCPS. There is no fundamental ambiguity and context does not require an artificial approach to be taken to construction.[53]
- The High Court erred in inferring that an inevitable effect of *King Salmon* is that implementing avoidance policies in the NZCPS results in creating prohibited activities that cannot obtain resource consent. Activity status is set in regional and district plans, not regional policy statements. The avoidance policies require adverse effects to be avoided, not activities to be avoided. Whether an activity's adverse effect can be avoided will depend on the facts and context of a specific proposal.[54]
- The environment has been shaped by the effects of activities that have been taking place and the avoidance policies apply to the environment as it exists now.[55]

The Supreme Court has granted leave to *Port Otago* to appeal the Court of Appeal's decision. Parties to a Supreme Court appeal regarding the East West Link Road in Auckland have also been invited to make submissions to the Court given that appeal also deals with the meaning of 'avoid' in the NZCPS. The outcome of the appeal in 2022 will be awaited with interest by resource management practitioners.

Treaty settlement milestones

Since our last update, progress on a number of Treaty of Waitangi Deeds of Settlements has been made, namely between the Crown and:

- Whakatōhea, initialled on 23 December 2021;
- Te Ākitai Waiohua, initialled on 23 December 2021;
- Maniapoto, signed on 11 November 2021;
- Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua, signed on 29 October 2021; and
- Mōkai Pātea Nui Tonu, signed Terms of Negotiation on 20 September 2021.

The Moriori Claims Settlement Act 2021 has also come into effect since 25 November 2021.

Developments to watch for in 2022

As mentioned throughout this article, there are a number of significant developments to watch out for during the remainder of this year, notably:

- High Court / Court of Appeal decisions in *Te Whānau a Kai Trust v Gisborne District Council*; the *Watercare Decision*; and *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*;
- The Supreme Court's decision in *Port Otago Limited v Environmental Defence Society Incorporated*;
- Possible progress in the Ngāi Tahu High Court claim in respect of fresh water; and
- The introduction and progress of the Natural and Built Environments and Strategic Planning Bills.

Ngā kupu āpiti – Notes:

[1] *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38.

[2] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

[3] *Takamore v Clarke* [2012] NZSC 116 at [94]. Cited in the *TTR Decision* at [165].

[4] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 per Ellen France and William Young JJ at [150].

[5] At [149].

[6] At [151].

[7] At [151].

[8] At [297].

[9] *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201 at [59](a).

[10] At [147].

[11] At [147].

[12] *Te Whānau a Kai Trust v Gisborne District Coun*cil [2021] NZEnvC 115 at [153].

[13] *Ngati Apa Ki Te Waipounamu Trust v Attorney-General [2004]* 1 NZLR 462.

[14] Waitangi Tribunal, The Stage 2 Report into the National Freshwater and Geothermal Resources Claim (Wai 2358, 2019) at 103-115, and in relation to the test case, at 564.

[15] At [10].

[16] At [11]-[12].

[17] At [84].

[18] *Maungaharuru-Tangitū Trust v Hastings District Council* [2021] NZEnvC 98 at [3].

[19] At [148].

[20] *Watercare Decision* at [236].

[21] At [238].

[22] At [240].

[23] At [251].

[24] At [256].

[25] At [298].

[26] The decision itself is 168 pages, with the remaining pages being appendices.

[27] *Re Edwards (No 2)* [2021] NZHC 1025 at [99] – [100].

[28] At [119] – [120].

[29] At [128].

[30] At [168].

[31] At [169].

[32] At [204].

[33] At [224].

[34] At [230].

[35] At [250].

[36] At [251].

[37] At [256].

[38] At [379].

[39] It is also recorded on the New Zealand Archaeological Association archaeological site register.

[40] At [36].

[41] At [38].

[42] At [41].

[43] At [49].

[44] At [51].

[45] We discussed this case in our 2019 review.

[46] At [101].

[47] At [110] – [111].

[48] *Port Otago Limited v Environmental Defence Society Incorporated* [2021] NZCA 638 at [79].

[49] At [78].

[50] At [79].

[51] At [79].

[52] At [87].

[53] At [82].

[54] At [84]-[84].

[55] At [86].

Follow the links below for the previous reviews of Māori interests in natural resource management (2013) March Māori LR 9-13; (2014) March Māori LR; (2015) March Māori LR; (2016) April Māori LR; (2017) April Māori LR; (2018) March Māori LR; (2019) April Māori LR; (2020) October Māori LR; and (2021) March Māori LR.

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Te Kōti Matua – High Court

Judicial review – health information – refusal to share Māori vaccination data

Te Pou Matakana Limited v Attorney-General

[2021] NZHC 2942
1 November 2021

Report by Craig Linkhorn

Whakataunga – Overview and result

Successful judicial review of the Ministry of Health's decision not to provide individual data of unvaccinated Māori to Te Pou Matakana Whānau Ora Commissioning Agency to enable targeted delivery of COVID-19 vaccination services. The decision was set aside and the Ministry directed to reconsider the matter.

Judicial review – health information – refusal of Ministry of Health to share Māori vaccination data – error of law – legitimate expectation – principles of Te Tiriti o Waitangi	
Date	1 November 2021
Case	*Te Pou Matakana Limited and others v Attorney-General* (367 KB PDF)
Citation	[2021] NZHC 2942
Court	Te Kōti Matua – High Court
Judge(s)	Gwyn J
Earlier/later decisions	*Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2833; *Te Pou Matakana Limited v Attorney-General* [2021] NZHC 3319.
Legislation cited	High Court Rules 2016, Part 30; Judicial Review Procedure Act 2016; Privacy Act 2020, ss 3(a) and 7(1); Health Information Privacy Code 2020, cl 4(1)(a).
Cases cited	*Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019); *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127; *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513; *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609.
Overview and result	Māori health provider Te Pou Matakana/Whānau Ora Commissioning Agency applied to the High Court for judicial review of the Ministry of Health's decision not to provide individual data of unvaccinated Māori to enable targeted delivery of COVID-19 vaccination services. Three grounds were advanced: error of law, on the basis that the Ministry incorrectly applied the relevant legal test for disclosing health information; the Ministry has acted inconsistently, having provided similar data to another health service provider; and the applicants had a legitimate expectation that the Ministry's decision would be made in accordance with the principles of Te Tiriti o Waitangi, but the decision was inconsistent with those principles and with tikanga. **Held**, the Court granted judicial review, set aside the decision and directed reconsideration. There was an error of law and the decision was inconsistent with the principles of Te Tiriti and with tikanga. The Court found it unnecessary to reach a conclusion about whether the Ministry had acted inconsistently.

Kōrero whānui – Background

The case concerns implementation by the New Zealand government of its COVID-19 immunisation programme as part of its response to the COVID-19 pandemic. The programme involves two doses of the Pfizer-BioNTech vaccine (at [2]). It can be seen from the Ministry of Health's publicly available information that "the percentage of the eligible Māori population who have received COVID-19 vaccinations is materially lower than the percentage of other eligible populations." (At [3].)

The applicants brought these judicial review proceedings relating to "the decision of the Ministry of Health (the Ministry) not to provide the applicants with individual data to enable them to direct their services to Māori not vaccinated against COVID-19, for the purpose of providing targeted and appropriate vaccine delivery to those people and thereby preventing or lessening the serious threat posed to Māori by the COVID-19 pandemic." (At [4].) The applicants' grounds for review are outlined later in the summary.

Whānau Ora is a "government funded, Māori delivered, whānau-centred approach to supporting whānau wellbeing and development", the funding for which is primarily delivered through Te Puni Kōkiri (Ministry of Māori Development) (at [6]). The first applicant, Te Pou Matakana Limited (trading as Whānau Ora Commissioning Agency (WOCA)) is one of three Whānau Ora commissioning agencies with a contract with Te Puni Kōkiri. WOCA works with whānau and families in Te Ika-a-Māui/North Island (at [6]). The second applicant, Whānau Tahi Limited, is WOCA's information systems provider (at [7]).

WOCA was contracted by Te Puni Kōkiri to provide assistance and support to whānau to address the impacts of COVID-19 restrictions. This included providing vaccination related services. WOCA has an extensive network of providers across Te Ika-a-Māui/North Island who have been providing vaccination services which are designed to overcome the barriers Māori traditionally face in accessing healthcare services. In particular, the mobile vaccination clinics (at [11]):

> (a) are a by-Māori, for-Māori programme;
>
> (b) allow whānau to be vaccinated close to their homes, at a time that suits them;
>
> (c) allow for a range of other COVID-19 related services to be offered in conjunction with vaccination, including COVID-19 saliva testing, hygiene packs and kai packs;
>
> (d) travel to whānau (the daily location of the campervans is widely publicised in the local community using mail drops, social media, radio, and announcements from cars driving around the location of the campervans).

To support their work, the applicants asked the Ministry to share personal information with them about unvaccinated Māori in Te Ika-a-Māui/North Island – "their personal details, contact details, vaccination status and vaccination booking status." (At [13].) The applicants said that this information would enable them to target Māori who either have not received any dose of the vaccine or who have received only one dose of the vaccine.

In September, the applicants and the Ministry entered into a data sharing agreement, which included a range of privacy protection mechanisms such as that "data provided may 'only be used ... to identify and engage unvaccinated or unbooked individuals to encourage them to access vaccinations'", and that "the data supplied will be securely destroyed no later than 31 January 2022." (At [14].) The Ministry confirmed soon afterwards that it would provide the applicants with data for individuals who had previously been provided services by one of WOCA's Whānau Ora partners. However, it declined to share data for Māori who have not previously been provided a service by one of these partners.

The Ministry's final decision (in relation to unvaccinated Māori who had not previously been provided with WOCA services) accepted the two recommendations made in the Decision Paper (from the COVID-19 Vaccine and Immunisation Programme), that the Ministry (at [16]):

> a. **agree** to authorise the sharing with WOCA of anonymised (to street level) mapping representations that show areas with unvaccinated communities (SA1 or similar, in accordance with WOCA's 'Targeted vaccination resources' request), subject to the resolution of technical issues, and the execution of a data sharing agreement that meets the Ministry's due diligence requirements as set out above.
>
> b. **decline** to authorise the sharing of individual identifiable data for individuals who are not vaccinated (ie, the 'Direct contact with WOCA' request).

The second aspect of the decision was the specific focus of this application for judicial review.

The geographical unit SA1 used by Statistics New Zealand was described as having "an ideal size range of 100-200 residents and a maximum population of approximately 500 residents." (At [21].) Mr Daymon Nin, Chief Product and Consulting Officer of Whānau Tahi Limited, giving evidence for the applicants, said that the provision of SA1 data alone would not allow the applicants to readily connect with all unvaccinated individuals (at [22]). This would be due to difficulties like not knowing who was vaccinated or unvaccinated within the SA1, not knowing when people would be home, not knowing who had opted out of vaccination services and thus did not wish to be contacted, and not knowing who had been recently deceased (at [22]). Mr Nin's conclusion was that SA1 data would only really provide assistance in areas of high-density need, which are the areas where the applicants have already concentrated their efforts (at [25]).

All parties agreed that the COVID-19 immunisation programme had not so far achieved equitable coverage between Māori and other ethnic groups. The underlying reasons for this situation were also agreed as being the barriers to Māori accessing primary healthcare services, including "cost, access to services, poor service delivery, cultural barriers, poor communication by health providers, and different approaches and models to wellbeing." (At [28].) It was also accepted that a lack of trust by Māori in government institutions was one of the reasons why the Māori vaccination rate was lower than other groups (at [29]).

Kōrerorero – Discussion

Relevant privacy law

The purpose of the Privacy Act 2020 (the Act) is to "promote and protect individual privacy by providing a framework for protecting an individual's right to privacy of personal information, while recognising that other rights and interests may at times also need to be taken into account." (At [31].) Where that information relates to the health of an individual or health services that are being, or have been, provided to an individual, the Health Information Privacy Code 2020 (the Code) applies (at [32]). The Code applies to any person or entity that provides health or disability services. This includes the applicants, the providers they work with, and the Ministry of Health.

Rule 11 of the Code, which places limits on the disclosure of health information, was relevant to the applicants' request. According to the rule, generally, "information can be shared where it was a purpose of collection, or where the disclosure is authorised by the individual concerned" (at [37]). There are a number of exceptions as set out in r 11(2) (at [37]):

> (2) Compliance with subrule 1(b) is not necessary if the health agency believes, on reasonable grounds, that it is either not desirable or not practicable to obtain authorisation from the individual concerned and-
>
> ...
>
> > (d) that the disclosure of the information is necessary to prevent or lessen a serious threat to-
> >
> > > (i) public health or public safety; or
> > >
> > > (ii) the life or health of the individual concerned or another individual; or
>
> ...

The decision under review was taken under r 11(2)(d).

The Act and the Code are not displaced by the exception in r 11(2)(d). This meant that if the Ministry were to provide the applicants with the data they sought, they would remain subject to the requirements of the Code and would be "obliged to treat the data in confidence, to use it only for the purpose permitted, and to retain it securely and for no longer than required." (At [38].)

It was also noted that there was no concern about the applicants' ability to keep any data provided appropriately secure.

Grounds of review

The three grounds of review advanced by the applicants were (at [40]):

(a) error of law, on the basis the Ministry incorrectly applied the relevant legal test for disclosing health information in r 11(2)(d) of the Code;

(b) the Ministry acted inconsistently, having provided similar data to another health service provider, Healthline (a non-Māori telehealth company); and

(c) the applicants had a legitimate expectation the Ministry's decision would be made in accordance with the principles of Te Tiriti, but the decision is inconsistent with the principles and tikanga.

Error of law: r 11(2)(d) of the Code

The applicants' first claim was that "the Ministry erred in law in the way it applied r 11(2)(d) of the Code when deciding whether to release the information sought." (At [41].)

The parties agreed that the rule grants an agency the discretion to disclose information without authorisation, where the conditions of the rule have been satisfied (at [43]). This does not give the right to requestors to access such information, nor does it impose a duty on agencies to disclose the information.

There was also no dispute that the first two requirements of r 11(2)(d) were met. The Ministry concluded itself that it was not practicable to obtain individual authorisation, and that the COVID-19 pandemic constituted a serious threat to public health and safety.

Thus, it was only the third condition under r 11(2)(d) (whether disclosure of the information sought is necessary to prevent or lessen the acknowledged serious threat to public health) that was left to be satisfied (at [49]).

The Ministry declined to approve the sharing of individual level data on the basis that it was not satisfied that such disclosure was necessary or appropriate at that time. In reaching this decision, the possibility of other, less invasive, approaches which could reduce the threat to public health were taken into account (at [50]). This led to the conclusion that the provision of anonymised mapping-level data to WOCA and other providers would be sufficient for the time being.

The applicants' submissions were as follows:

(a) The Ministry applied a 'least privacy invasive' spin on the necessity test in r 11(2)(d), with the effect that "what was authorised was disclosure of the least information possible without reference to whether that information is sufficient to address the extent of the acknowledged threat." (At [51].)

(b) It was not sufficient for the Ministry to decline the data on the basis that it was possible that other solutions might work, given the acknowledged seriousness and urgency of the threat (at [52]). This timeframe did not give sufficient regard to the urgency of the situation.

> (c) The Ministry had no evidential basis on which to conclude that the provision of mapping-level data would allow the applicants to effectively reach unvaccinated Māori.
>
> (d) The Ministry increased the requirements for 'necessity' in r 11(2)(d) by imposing a threshold of 'indispensible' or 'essential', rather than only 'needed' or 'required' (at [54]).
>
> (e) COVID-19 vaccination status no longer has the same privacy concerns attached to other health information. This is because vaccination status increasingly has a public quality to it (due to vaccinations frequently being given in public spaces, and the introduction of vaccine mandates) (at [55]).
>
> (f) The decision was influenced by the views of District Health Board Chairs, who expressed concerns that the provision of individual level data could produce a risk of vilification and bullying of unvaccinated individuals (at [56]). The applicants said that the provision of the data to the applicants would actually reduce the risk of bullying or vilification as it would contribute to increasing vaccination rates.

The Ministry emphasised in its submissions that r 11(2)(d) does not impose a duty to disclose the information sought, or a right in the requestor to receive it, even if the disclosure is found to be necessary (at [57]). However, the Ministry maintained that it did not find the disclosure to be necessary. It was also noted that, since the decision was made, vaccination rates (including for Māori) had continued to rise, which the Ministry believed provided support for its position that release of the data was not necessary.

Rule 11(2)(d) had not previously been considered by New Zealand courts. The Court considered it in the wider context of United Nations and other official statements about data privacy and COVID-19 response. The Privacy Commissioner submitted that, in relation to rights to privacy and to health, "the actions and decisions of public bodies must be proportionate and evidence-based; both in relation to whether it is necessary to disclose and use the individuals' information, and whether that disclosure and use of that information presents a realistic prospect of preventing or lessening the health risk." (At [61].)

In the context of the risks posed by COVID-19, an objective and evidence-based assessment was required of (at [63]):

> (a) The anticipated effectiveness of disclosure and use of the requested information.
>
> (b) The anticipated adverse consequences, in terms of the protection of life and health, or other material and relevant harms, of that same disclosure and use.
>
> (c) Whether there are other options to address the health risk that lessen the privacy intrusion and resulting harms, but are nonetheless effective to address the risk (including in light of the urgency of that risk), and so whether it is possible to await the outcome of lesser measures.

As to (a), the Decision Paper did not specifically address the anticipated effectiveness of the disclosure of the data sought by the applicants (at [64]). As to (b), the Decision Paper noted that there were a range of views among Māori and others about the appropriateness of sharing data (at [65]). Some had suggested that only the provision of individual level data would suffice to achieve effective outreach activities, while others felt that the provision of individual level data would only serve to erode trust and confidence in the health system and thus reduce the efficacy of the vaccination effort (at [65]). As to (c), the Decision Paper noted a preference for the applicants to try and reach the unvaccinated using the mapping-level data provided and that, after trying this, the Ministry might be prepared to revisit this approach (at [69]). The applicants contended that this approach and timeframe did not match the level of risk associated with COVID-19. There was also "no proper basis for the Ministry's conclusion that the provision of anonymised mapping-level data would allow the applicants to make considerable headway", as there was "no analysis of how that might be so." (At [71].)

The Court found that it was not sufficient to say that, since COVID-19 vaccination rates have been steadily increasing since the Decision, the Court could conclude that the limited release of data that was approved would be effective (at [73]). This was particularly because the most recent statistics at the time of the hearing still showed that the differential between Māori vaccination rates and the rest of the population remained about the same (at [73]).

The applicants also argued that the Ministry's decision was inconsistent as it had determined that it was not practicable to obtain individual consent to disclose the affected individuals' information (with the contact details of those individuals), while suggesting that it would be sufficiently effective for the applicants to make individual contact with the unvaccinated, without the benefit of their contact details (at [75]). The Court agreed with this.

The Court concluded that "the Ministry erred in its application of r 11(2)(d) of the Code in its consideration of whether disclosure of the information to the applicant was necessary" because it "did not conduct the necessary, objective, evidence-based assessment, either of the disclosure and use of the individual identifiable data requested by WOCA, or of what it concluded was an adequate alternative by way of disclosure of the anonymised street-level mapping data." (At [77].)

Inconsistency

The applicants argued that the decision not to disclose individual level data was inconsistent with the Ministry's decision to share such data with Healthline/Whakarongorau, and the Crown's approach under the Outreach Immunisation Service of sharing such data with community organisations (including WOCA) for the purpose of vaccinating tamariki who have missed childhood immunisations (at [78]). The applicants' evidence showed a number of outbound vaccination information campaigns conducted by Healthline, which are detailed in the judgment (at [79]).

While the Ministry agreed that its discretion must be exercised consistently, it maintained that Healthline was in a different position to the applicants as it is the Ministry's direct agent (using the data to achieve the Ministry's purposes) and so disclosure of information to it is one of the purposes for which the information is obtained (at [81]).

The Court did not find it necessary to reach a conclusion on the inconsistency ground of review given its findings in relation to the other two grounds. However, it was noted that the arguments on this ground of review reinforced the Court's finding in relation to the error of law ground of review, "that the Ministry erred in its approach to r 11(2)(d) in considering whether disclosure is necessary." (At 83].)

Legitimate expectation: the principles of Te Tiriti

The applicants submitted that the government's "commitments to uphold Te Tiriti in the COVID-19 vaccination rollout created a legitimate expectation that the Ministry would have regard to Te Tiriti and its principles in making the Decision." (At [84].) They said the Ministry did not have regard to these principles when making the Decision. They further submitted that "the Crown's express commitment to uphold Te Tiriti and its principles in the implementation of the COVID-19 vaccination programme limits the scope of its discretion under r 11(2)(d) of the Code, and that the principles of partnership and tino rangatiratanga require the Crown to share the information sought by the applicants." (At [86].)

The applicants advanced this argument first, on the basis of "the general principle of administrative law that where a public authority promises to follow a certain course it is in the interests of good administration that it should do so, so long as it does not interfere with its statutory duty." (At [87].) The applicants said that, while the Decision Paper did contain general references to Te Tiriti, Te Tiriti and its principles were not a factor that was considered in reaching the final decision. The three key principles relied on by the applicants were the principle of options, the principle of active protection, and the principle of tino rangatiratanga or partnership (at [90]).

Options

The principle of options, in these circumstances, meant "enabling Māori to have the genuine choice of kaupapa Māori providers and actively supporting and resourcing those providers." (At [91].) In creating Whānau Ora, the Crown recognised that it was not the best provider of social services for Māori, and the Crown also accepted that one of the reasons for low vaccination rates among Māori was a lack of trust by some Māori in government institutions (at [91]).

In order for Māori to have genuine choices, kaupapa Māori organisations (such as the applicants) would have to be sufficiently empowered and resourced, and in this case the key resource is information (at [92]). The applicants said that the Ministry's decision failed to provide appropriate resources to the applicants to allow unvaccinated Māori to have the genuine option of kaupapa Māori services.

Partnership and tino rangatiratanga

The applicants submitted that the principle of tino rangatiratanga requires the Crown to give Māori the space to exert their tino rangatiratanga in the primary healthcare system (at [93]). The applicants said that it was not the Crown's duty to dictate who the applicants should provide their services to, and that what is required under the principles of tino rangatiratanga and partnership is availability of resources to enable the applicants to provide care to any Māori across Te Ika-a-Māui/North Island (at [94]). The applicants submitted that the Decision Paper reflected the Ministry's failure to grasp the importance of tino rangatiratanga and partnership.

Active protection

The applicants maintained that the Crown's duties of active protection are heightened in the context of the COVID-19 pandemic, particularly since "a failure to actively protect Māori health interests will result in irreparable harm." (At [96].) These duties, the applicants said, required the urgent disclosure of the requested information to the applicants (at [96]). The applicants said that "the Crown has exercised its power in a way that stymies and delays its delivery of kaupapa Māori health services to Māori in need, in breach of its duty of active protection." (At [98].)

Tikanga

This situation, the applicants submitted, required "the application of a tikanga lens, not just a Pākehā legal lens, in assessing the rights and obligations of the applicants and the whānau they serve." (At [99].) The applicants argued that tikanga, in this case, required a focus on the applicants' kaitiaki obligations to Māori in need. In his evidence, Dr Jones established that whanaungatanga is a central principle of tikanga, as the source of obligations between individuals and the collective, and then focused on the principle of kaitiakitanga as the obligation to nurture and care for the mauri of people, resources, and taonga where there is a whanaungatanga relationship (at [100]). The applicants have these kaitiakitanga obligations to Māori in Te Ika-a-Māui/North Island. In terms of what would be consistent with tikanga in this situation, Dr Jones said (set out at [100] in the judgment):

> A pandemic is a compelling example of when tikanga would say it is necessary to disclose information. Because of the foundational principle of whanaungatanga, the relevant relationship bonds exist between those who can provide care, and those who need it. If disclosure would allow a collective with kaitiaki obligations for a rangatira role in healthcare (such as a Whānau Ora-based agency) to reach individuals who are in need of care that the collective would otherwise not be able [to] reach, and to provide those individuals with kaitiakitanga and awhina in the form of healthcare support (such as information and vaccination care), that disclosure is consistent with tikanga.

In response to this ground of review (as a whole), the Ministry submitted that, although they are an interpretive aid and should be considered in relation to Māori health and personal information, Te Tiriti principles do not by themselves create enforceable legal rights (at [102]). Te Tiriti requires that the Crown make decisions that are reasonable, which the Ministry said was "within the bounds of its own broad responsibilities and authority, in light of all the circumstances, and based on sound procedure and consideration of relevant material." (At [102].) The Ministry argued that the Decision Paper cannot be viewed in isolation from the wider Crown response to the pandemic for Māori, as this had been designed with Te Tiriti principles at its centre and so the context of the decision was directed towards the principles of active protection and partnership (at [104]).

Evidence for the Ministry agreed with Dr Jones about the relevant tikanga principles generally, but noted that tikanga may differ between iwi (at [106]). Thus, these tikanga principles would not give the Court concrete direction in this particular situation. The Ministry also noted the divergent views of Māori whom they had interacted with about the appropriateness of sharing individual-level data (at [106]).

Evidence for the Ministry also highlighted the Ministry's engagement with Māori through the Iwi Communications Collective, Te Tumu Whakarae, the Māori provider network, the Māori Health and Disability Sector, and Māori health providers across Aotearoa over the last two years (at [107]). Further, the Ministry emphasised the significant financial investment that the Crown has delivered (through the Māori Response Action Plan, a range of active partnerships with iwi leaders and organisations, and specific funding to Māori health providers) to deliver the COVID-19 vaccination programme (at [108]).

The Court had "no difficulty in concluding that there was a commitment made by the Ministry to exercise its powers in relation to the COVID-19 rollout in accordance with Te Tiriti and its principles." (At [112].) The Crown had made a specific commitment to uphold and honour Te Tiriti in the COVID-19 vaccination programme and had acknowledged its obligations that flowed from Te Tiriti partnership (at [115]). This was stated to be one of the overarching principles of the vaccine rollout and was a specific, public commitment made by the Ministry (at [115]). Thus, in the context of repeated affirmations of the Crown's commitment to Te Tiriti and its principles in the COVID-19 response, the Court concluded that the applicants' reliance on that commitment was reasonable and legitimate (at [116]).

The Court found that, although the Decision Paper noted that any proposed disclosure of health information must be assessed on a case-by-case basis, the Decision Paper did not in fact undertake that kind of assessment in relation to this request (at [130]). The Court concluded that the Ministry did not conduct a sufficiently evidence-based assessment when weighing up the factors in this request.

The Court also noted that it was difficult to see how the decision to provide only the anonymised, mapping-level data on the basis that the Ministry might, at some point in the future, review this decision, could have been informed by the principles of partnership and options (at [133]).

The Court concluded that "in exercising its discretion under r 11(2)(d) of the Code, the Ministry did not have adequate regard to Te Tiriti and its principles, as informed by tikanga." (At [134].)

Relief

The Court granted the following relief (at [135]):

> (a) The Ministry's Decision of 20 October 2021 is set aside.
>
> (b) I declare that the Ministry has erred in its interpretation and application of r 11(2)(d) of the Health Information Privacy Code 2020.
>
> (c) I declare that the Ministry's power to disclose information under r 11(2)(d) of the Health Information Privacy Code 2020 in the context of the COVID-19 vaccination programme must be exercised in accordance with Te Tiriti o Waitangi / Treaty of Waitangi and its principles.
>
> (d) I direct the Ministry to urgently retake the Decision, within three working days, in accordance with the law and having regard to the findings in this judgment. I reserve leave to the Ministry to apply to the Court if it is not able to retake the decision within three working days.

Costs

The Court noted that if the parties were not able to agree on costs the applicants were to file a memorandum within 10 working days of this decision, with the respondent having 10 working days to respond (at [136]).

Ngā kupu āpiti – Notes

The dispute was not resolved on the Ministry's further consideration of the issue and a further hearing occurred with judgment, set out below, again favouring the applicants for review, given on 6 December 2021.

Elizabeth Derby assisted with preparation of this article.

Judicial review – health information – further refusal to share Māori vaccination data

Te Pou Matakana Limited v Attorney-General

[2021] NZHC 3319
6 December 2021

Report by Craig Linkhorn

Whakataunga – Overview and result

Judicial review (a sequel to the earlier judicial review) sought by Te Pou Matakana Limited of a decision by the Ministry of Health (the Ministry), in which the Ministry declined to provide the applicants with the personal details, contact details, vaccination status, and vaccination booking status of Māori in Te Ika-a-Māui/North Island who have not yet received any dose of the COVID-19 vaccine or have only received one dose.

Judicial review – refusal of Ministry of Health to share Māori vaccination data – error of law – error of fact	
Date	6 December 2021
Case	*Te Pou Matakana Limited and others v Attorney-General* (507 KB PDF)
Citation	[2021] NZHC 3319
Court	Te Kōti Matua – High Court
Judge(s)	Gwyn J
Earlier/later decisions	*Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2833; *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942.
Legislation cited	High Court Rules 2016, Part 30; Privacy Act 2020, s 3(a); Health Information Privacy Code 2020, r 11.
Cases cited	Waitangi Tribunal *Te Whānau O Waipareira Report* (WAI 414, 1998); Waitangi Tribunal *Napier Hospital and Health Services Report* (Wai 692, 2001); *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643; *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142; *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291; *Vea v Minister of Immigration* [2002] NZAR 171 (HC); *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65; *Graeme Martin Contracting Ltd v Disputes Tribunal* [2018] NZCA 328; *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550; *Julius v Bishop of Oxford* (1880) 5 App Cas 214 (HL); *B v Waitemata District Health Board* [2017] NZSC 88; *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155; *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153; *Helu v Immigration and Protection Tribunal* [2015] NZSC 298, [2016] 1 NZLR 298; *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341; *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26; *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62.
Overview and result	Judicial review (a sequel to the earlier judicial review) of a decision by the Ministry of Health (the Ministry), sought by Te Pou Matakana Limited, trading as the Whānau Ora Commissioning Agency (WOCA), and Whānau Tahi Limited (Te Pou Matakana's information systems provider). WOCA is the commissioning agency contracted by Te Puni Kōkiri/Ministry of Māori Development to deliver Whānau Ora services for Te Ika-a-Māui/North Island. In the decision, the Ministry declined to provide the applicants with the personal details, contact details, vaccination status, and vaccination booking status of

	Māori in Te Ika-a-Māui/North Island who have not yet received any dose of the COVID-19 vaccine or have only received one dose. The applicants argued that there are exceptional circumstances that mean that, rather than remitting the issues back to the Director-General of Health to make another decision, the Court should direct the Ministry to urgently share the data with the applicants. **Held**, the Court directed the Ministry to complete its consideration of and decision on provision of the data in those areas where it has not yet agreed to provide data to the applicants, and to review its decision to provide data in relation to those Māori who have had only a first dose. The Court noted that, as a general rule, judicial review is not a procedure which allows the Court to substitute its own judgment for that of the decision-maker. However, in exceptional circumstances the courts have been prepared to substitute their decision for the decision under review where there was only one lawful decision available. In this case, the Court found that the decision-maker should retain a residual discretion.

Kōrero whānui – Background

The underlying issues remained the same in this case as in the earlier judicial review brought by the applicants against the Ministry. In the earlier case, the Court set aside the Ministry's refusal to share the data with the applicants (the first decision), and directed the Ministry to urgently retake the decision (within three working days, with leave to apply if more time was required) (at [3]).

Four days later, the Ministry made a new decision. The Director-General of Health "accepted recommendations from Ministry officials, including to 'decline the request for access to all Te Ika-a-Māui/North Island individual level Māori health information sought by the applicants'" (the second decision) (at [3]).

The applicants challenged this decision as being wrong in fact and law. The applicants, in this case, argued that, rather than remitting it back to the Director-General to make another decision, the Court should direct the Ministry to urgently share the data with the applicants.

At the date of the first judgment, the COVID-19 immunisation programme had not achieved equitable coverage between Māori and other ethnic groups, and the percentage of the eligible Māori population who had received COVID-19 vaccinations was materially lower than the percentage of other eligible populations (at [5]). The parties agreed that there were a number of underlying reasons for this, including a lack of trust by Māori in government institutions (at [5]). At the time of the second decision, while

Māori vaccination rates had quickly improved, they continued to lag behind the general population, and it was seen that Māori were being disproportionately impacted by the outbreak of the Delta variant (at [6]). The applicants submitted that, not only have the differences between vaccination rates for Māori and non-Māori for those who are double vaccinated been persistent, but they have in fact increased in the month leading up to the second decision (at [7]). The applicants further submitted that the actual vaccination coverage is lower than reported by the Ministry because the Ministry's population figures only include those who engaged with health services in 2020, which is known to undercount Māori (at [7]).

In submissions the applicants also pointed out that the inevitable result of the new COVID-19 Protection Framework (the 'traffic light system' that was implemented shortly after the hearing) would be the accelerated spread of COVID-19 around New Zealand, thus increasing the risks for the unvaccinated (at [14]). The applicants highlighted for the Court the time lags in "getting any data sharing agreements in place and then receiving and utilising the data to get individuals vaccinated, including allowing for at least three weeks between the first and second doses." (At [14].) Therefore, according to the applicants, time was fast running out for Whānau Ora and other kaupapa Māori providers to engage with the unvaccinated before COVID-19 was circulating in their communities.

Kōrerorero – Discussion

The legal framework

This section of the judgment discussed the exceptions to the limits on the disclosure of health information, as set out in rule 11 of the Health Information Privacy Code 2020 (the Code). Generally, "information can be shared where it was a purpose of collection (r 11(1)(c)), or where the disclosure is authorised by the individual concerned (r 11(1)(b))." (At [16].) The exceptions recognise that other interests may take precedence. The exceptions are as follows (at [17]):

> (2) Compliance with subrule (1)(b) is not necessary if the health agency believes, on reasonable grounds, that it is either not desirable or not practicable to obtain authorisation from the individual concerned and-
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> ...
>
> > (d) that the disclosure of the information is necessary to prevent or lessen a serious threat to-
> >
> > > (i) public health or public safety; or
> > >
> > > (ii) the life or health of the individual concerned or another individual; or
>
> ...

The first judgment noted that should the applicants be provided with the individual identifiable data sought, they would remain subject to the requirements of the Code and thus be obliged to "treat the data in confidence, to use it only for the purpose permitted, and to retain it securely and for no longer than required." (At [18].) It was also noted that there was no concern as to the applicants' ability to keep any data provided appropriately secure due to the technical capability of WOCA and Whānau Tahi's current data-handling systems and personnel.

The second decision

The second decision made by the Director-General was to (at [21]):

> a. invite the Whānau Ora Commissioning Agency and Whānau Tahi Limited urgently to work in partnership with the Ministry, relevant iwi, and local service delivery providers to identify those rohe where vaccination outreach to Māori is most needed, and to identify the necessary and appropriate scope of data sharing in each case;
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> b. decline the request for access to all North Island individual level Māori health information sought by the applicants;
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> c. continue Ministry engagement with iwi, Hauora providers and other Māori organisations to enable access to both meshblock level, and, where appropriate, individual level data to support vaccination of Māori across Aotearoa in support of the data sharing agreement with the Iwi Leaders Group.

The second decision paper focused particularly on whether disclosure of the information was necessary to prevent or lessen the threat. The decision paper concluded that WOCA's proposed use of the information may be effective to address the risks associated with COVID-19 in some areas, but not in all others (at [25]). This appears to have been based on geographic areas where Whānau Ora providers were said to have more limited coverage and yet where positive progress was still being made in terms of vaccinations.

Health-related disadvantages of the disclosure required by the applicants, such as the possibility of erosion of trust and confidence in the health system, were noted in this decision. However, the decision paper concluded that these were not the greatest concerns in the current context and they could, at best, be seen as neutral factors.

Part of the question of 'necessity' included whether there could be other options to address the health risk that lessen the privacy intrusion and other harms but are, nonetheless, effective. The Ministry concluded that a less privacy-intrusive alternative could be to share smaller sets of personal information with trusted locally-based organisations (at [28]).

Since the decision, the Ministry had embarked on a consultation process with local iwi and has advised that progress has been made as follows (at [29]):

> (a) data sharing agreements with Whānau Tahi are in place, and data is being shared, in relation to Waikato, Auckland, and Taranaki;
>
> (b) decisions to share data have been made in relation to Tairāwhiti and the Wellington region and data sharing agreements were provided to the applicants on 26 November 2021;

> (c) the Ministry has just reached its decision in respect of the MidCentral area and provided a data sharing agreement to the applicants for signing;
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> (d) the Ministry anticipated reaching its decision in respect of Wairarapa by 30 November 2021;
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> (e) urgent discussions are happening with iwi and hapū in respect of the Lakes area, Te Tai Tokerau, the Bay of Plenty, and the Hawkes Bay; and
>
> (f) Whanganui iwi do not consider it necessary for data relating to their rohe to be shared with the applicants, due to access already being available to iwi and local providers. The Ministry is confirming what other support may be needed in Whanganui to increase vaccination rates, and indicated it would make a formal decision by the end of the week.

The applicants advised that they had received no further communication from the Ministry regarding the sharing of information relating to individuals who had received a first dose but not a second dose. They also confirmed their renewed application for the data relating to Whanganui (at [30]).

Grounds of review

The applicants challenged the Ministry's assessment of whether disclosure would be effective to address the risk, on several grounds (at [31]):

> (a) error of law, on the basis the Ministry applied the wrong legal test by introducing an 'imminence' threshold into r 11(2)(d);
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> (b) error of law, on the basis the Ministry applied the wrong legal test by setting the threshold for 'necessity' too high;
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> (c) error of fact, in the Ministry's conclusion about Whānau Ora's coverage; and
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> (d) a related error of law, in the Ministry's focus on the ability of Whānau Ora providers to address the COVID-19 threat with existing information, rather than carrying out an evidence-based assessment of the anticipated effectiveness of disclosure and use of the data sought by the applicants.

The applicants also challenged the Ministry's assessment of whether there are less privacy-intrusive options that would still be effective to reduce the risk, on several grounds (at [32]):

> (a) error of law, in relation to an evidence-based assessment of alternatives;
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> (b) error of law, on the basis that iwi oversight in relation to the governance of Whānau Tahi is irrelevant; and
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> (c) error of law and fact, in that the Court had already determined that the provision of mapping level data is not an equally effective alternative.

The applicants also challenged the Ministry's decision to consult with iwi before disclosing the data, on the following grounds (at [33]):

> (a) the Ministry acted inconsistently, having provided similar data to another health service provider, Healthline, and to PHOs, without consulting with iwi or Māori;
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> (b) the Ministry breached the applicants' right to natural justice, by reaching its conclusions as a result of a flawed consultation process;
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> (c) error of law, on the basis that the Ministry's approach introduced an authorisation requirement to r 11(2)(d); and
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> (d) error of law, on the basis the Ministry adopted a process that does not have regard to the urgency of the situation.

Finally, the applicants challenged the Ministry's exercise of its discretion under r 11(2)(d) (at [34]).

The applicants sought a mandatory order that the Ministry provide the data within three days or, alternatively, orders setting aside the second decision and directing the Ministry to retake the decision within three days (at [35]).

First issue: the Ministry's assessment of whether disclosure would be effective to address the risk

Counsel for the Ministry first addressed the meaning of 'necessary', submitting that the applicants were using it as a threshold of 'helpfulness' and did not intend to import a new test (at [37]). The Ministry also rejected the applicants' proposition that the Ministry's evaluation introduced an 'imminence' threshold into r 11(2)(d), saying (at [37]):

> [T]he rohe by rohe consultation process has enabled the Ministry to assess the relevant data needs. ... [B]y focusing on Auckland first, it has not misdirected itself through the reintroduction of an imminence threshold – this is more "semantic quibbling" from the applicants as the spread of Delta was plainly a relevant consideration informing how to prioritise rohe.

With regard to the anticipated effectiveness of the disclosure of the data sought by the applicants, counsel for the Ministry conceded that its assessment of Whānau Ora and other providers was constrained by urgency, and was largely impressionistic (at [38]).

The Court concluded that the Ministry did apply the wrong test by introducing an 'imminence' threshold into its assessment of whether disclosure of the data was necessary (at [43]). The Court found that the Ministry had focused on sharing data for regions where there was already a Delta outbreak before assessing the threat level for other regions (at [39]). Previous iterations of r 11(2)(d) had required a threat to be both 'serious' and 'imminent'. However, the requirement for the threat to be 'imminent' was removed in 2013, so the effect of the Ministry's approach was to incorrectly reintroduce the 'imminence' test (at [41]).

In relation to the meaning of 'necessary', the Court found it to mean 'needed or required', and thus it does not impose a threshold of 'indispensable' or 'essential' (at [44]). The Court concluded that the Ministry applied the wrong test as to 'necessity' in making its assessment of whether disclosure of the data was necessary to lessen the threat posed by COVID-19 (at [55]).

In relation to the Ministry's conclusion that Whānau Ora's reach and coverage was limited in some parts of the North Island, the Court found that the decision paper contained an error of fact. The applicants submitted, and the Court accepted, that the coverage of Whānau Ora providers cannot be assessed only by looking at the head offices, as these are in populated areas where resources are most available (at [58]). The providers service outlying communities through the establishment of satellite sites and mobile services and, in one of the areas that the Ministry used as an example of a place where Whānau Ora had limited coverage, Whānau Ora actually offers more vaccination sites than those offered by mainstream providers (if permanent sites and pop-up sites are counted) (at [58]).

The Court also found an error of law in the Ministry's "focus on the ability of Whānau Ora providers to address the COVID-19 threat with existing information, rather than carrying out an evidence-based assessment of the anticipated effectiveness of disclosure and use of the additional data sought by the applicants." (At [59]).

Second issue: the Ministry's assessment of less privacy-intrusive options

In the decision paper, the Ministry raised a concern about a lack of iwi oversight in Whānau Tahi's processes. The applicants addressed this by submitting that "the Ministry has not previously been concerned with 'iwi oversight' of Healthline, PHOs, or general practitioners, to whom individual Māori health data is also provided." (At [70].) Nor had it been expressed by the Ministry as a concern in relation to Māori who are part of WOCA's caseload and for whom the applicants have already received individual level data (at [70]). It was also noted, in evidence for the applicants, that (at [71]):

> [T]he majority of partners and providers for whom Whānau Tahi acts, as data and information systems provider, are iwi-owned or controlled. Four of Whānau Tahi's five directors are Māori and it is 100 per cent owned by Te Whānau O Waipareira Trust, the Board of which are Māori. The Waitangi Tribunal has previously found that Te Whānau O Waipareira Trust exercises rangatiratanga.

The Court found that the question of a lack of iwi governance of Whānau Tahi was irrelevant to the assessment the Ministry was required to make about whether there were other less privacy-intrusive options available (at [72]). Therefore, the Ministry erred by relying on this factor in making its assessment (at [72]).

In terms of whether mapping level data was an equally effective alternative to the provision of individual level data, the Ministry had concluded that the provision of mapping level data would suffice as an alternative. However, the Court agreed with the applicants in that it was not open to the Ministry to make this conclusion because the Court had already concluded, in the first judgment, that this was not an equally effective alternative for reaching unvaccinated Māori (at [73]).

The Court found that, in relation to an evidence-based assessment of alternatives provided by the Ministry, "the Ministry did not have sufficient evidence to conclude that its proposed alternative was both less privacy intrusive and equally effective to address the risk to Te Ika-a-Māui/North Island Māori posed by COVID-19." (At [81].) The applicants' witness giving evidence on this point came to the conclusion that, due to the unmatched technical ability (among Māori health providers) of Whānau Tahi to securely store health information, "if the Ministry wishes to share data with locally-based organisations, either it will have to share the data with organisations that lack the same security systems, posing a greater privacy risk; or the Ministry will only be able to share the data with a small sub-set of Māori providers, significantly reducing the number of unvaccinated Māori who can be reached in this way." (At [80].)

Third issue: the Ministry's consultation process

As at the date of the hearing, the Ministry had conducted 13 separate hui with iwi, essentially on a DHB by DHB basis (at [96]). Those hui were with (at [96]):

(a) Te Tai Tokerau (Northland);

(b) Tāmaki Makaurau (Counties Manukau, Auckland, Waitemata);

(c) Waikato;

(d) Te Moana-a-Toi (Bay of Plenty);

(e) Rotorua, Taupō (Lakes);

(f) Tairāwhiti;

(g) Taranaki;

(h) Whanganui;

(i) Heretaunga (Hawke's Bay);

(j) Manawatū-Horowhenua, Tararua (Mid-Central);

(k) Wairarapa;

(l) Te Awa Kairangi (Hutt); and

(m) Te Whanganui-a-Tara and Kapiti (Capital and Coast).

The Ministry's conclusions from pre-decision hui were that there was reasonably wide support for the urgent sharing of data "to ensure the Crown upholds its responsibility to protect Māori health" but that "the Crown would in effect breach its Te Tiriti obligations if it proceeded to share data without first assessing and accommodating the input of individual iwi within their own rohe." (At [92].) It was explained that this consultation approach would see access to individual data being determined in respect to different areas, "following consultation with local iwi, but the final decision on the sharing of data within a rohe does not rely on gaining iwi consent to WOCA's proposal." (At [95].) The Director-General recorded that the Ministry believed that engaging with iwi and Māori within the rohe would be more likely to produce coordinated and effective efforts to lift Māori vaccination rates (at [97]).

In terms of the Code, r 11(2)(d) "does not require consultation as a precondition to disclosure of personal health information." (At [98].) The rule also provides that "where the agency holding the health information in question believes on reasonable grounds that it is not desirable or practicable to obtain authorisation from the individual concerned, disclosure is permitted, in the absence of individual authorisation." (At [99].) In this case, the Ministry had already concluded that it was impracticable to obtain individual consent of the individuals concerned. The rule is also "premised on disclosure being necessary to prevent or lessen a serious threat to public health or safety, or the life or health of an individual." (At [100].) This factor, particularly in the context of an emergency situation such as this one, "weighs against importing a consultation requirement into the rule." (At [100].) The Director-General had concluded that consultation was a necessary part of the process in order to meet the Ministry's Te Tiriti obligations. However, the Ministry said it was "not seeking consensus or consent of iwi to the disclosure of the data to the applicants, and thus no question of adding an 'authorisation' requirement arises." (At [101].) The Court found that this gave rise to two issues (at [102]):

> [F]irst, on the facts, was the Ministry in fact seeking authorisation from iwi and thus adding an additional and inconsistent requirement to r 11(2)(d)? Second, what did tikanga require?

The Court found that, although the Ministry did not explicitly seek consent or authorisation from iwi for disclosure of the data, the process it followed meant that the Director-General's final decision was dependent on "reaching a level of comfort as a result of the consultation." (At [104].) A witness noted that the Ministry had not adopted this approach when making other decisions during the COVID-19 pandemic (for example, the 'traffic light system') (at [106]).

The Court next turned to consider what was required by tikanga Māori:

> As to the Crown's Te Tiriti and tikanga obligations, given the first judgment, it would be perverse for this Court to conclude that consultation with iwi about the disclosure to the applicants, in and of itself, was an error of law. Rather, the question is what did tikanga require in the particular circumstances. It is well accepted that tikanga Māori is part of New Zealand's common law. (Citations omitted.)

Although it had been recommended that the Ministry seek expert advice on what tikanga required in the particular circumstances, this did not appear to have occurred (at [108]). Dr Carwyn Jones gave evidence for the applicants as to what the requirements of tikanga were in this context. This evidence was not challenged by the Ministry. Dr Jones concluded that "iwi by iwi consultation may be appropriate, and indeed necessary to be consistent with tikanga and Te Tiriti in ordinary circumstances, 'but these are not ordinary circumstances.'" (At [108].) Dr Jones said in his evidence (cited at [108]):

> The primary objectives of tino rangatiratanga are to ensure that the community survives as a people, with both individuals and the collective thriving. The maintenance of whakapapa, whanaungatanga, and health and wellbeing of members of the community are central to those objectives, particularly in the context of a pandemic. It is not consistent with maintaining tino rangatiratanga to frustrate those primary objectives. If the health and wellbeing of tangata Māori is not maintained, tino rangatiratanga is not protected but undermined, and the ability to exercise tino rangatiratanga in relation to those tangata Māori is put at risk.

Dr Jones noted that "where certain aspects of tikanga conflict with the purpose of protecting health, there is little expectation that they will be pursued at the cost of the caring for the health and wellbeing of whakapapa." (At [109].)

The Court relied on Dr Jones' evidence that tikanga did not require that the Ministry obtain iwi by iwi consent to the disclosure (at [112]). The Court found that the Ministry inappropriately introduced an authorisation requirement to r 11(2)(d) as a consequence of its "overly detailed consultation process." (At [113].)

On the issue of whether the Ministry's consultation process did not have regard to the urgency of the situation, the applicants submitted that the effect of the Ministry's detailed approach has caused a considerable delay in the Ministry arriving at any decisions in relation to disclosure of the data (at [114]). This is "against the backdrop of the very serious and acknowledged risks of COVID-19, particularly for Māori, the rapid spread of the Delta variant through the country, and the announcement that New Zealand would move to the COVID-19 Protection Framework even without achievement of a 90 per cent vaccination rate, together with the announced opening of the Auckland border on 15 December 2021." (At [114].) The Court found that, under normal circumstances, the speed with which the Ministry had consulted iwi and made a decision while working under pressure would readily be acknowledged as reasonable. However, in the particular circumstances of this case, what is considered to be a 'reasonable' timeframe cannot be measured against usual government processes (at [119]). Thus, in the particular circumstances, and having regard to the expert evidence as to what tikanga requires, the Court concluded that the Ministry had not made a decision on the applicants' request for disclosure of the data within a reasonable period of time (at [122]).

The applicants were not involved in, or consulted about, the first two hui that informed the decision paper. The applicants submitted that this failure to adequately involve them in the consultation process was a breach of natural justice (at [123]). This breach of natural justice, according to the applicants, was that several issues arose that were adverse to the applicants' request for data, but that they could have addressed had they been present. These issues were (at [125]):

(a) Māori data sovereignty;

(b) the relationship between Whānau Ora providers and iwi;

(c) WOCA's status as a "Treaty partner"; and

(d) protection of the data.

It appeared that participants at the two pre-decision hui thought that the Ministry was being asked by the applicants to share collective iwi information. This misunderstanding did not appear to have been addressed. As evidence for the applicants identified, when it comes to data sovereignty, an individual's record of iwi or affiliation is a separate issue from an individual's contact details and vaccination status (at [128]). The key point that the applicants made was that they were not seeking information about iwi affiliation and the relevant health information held by the Ministry did not include information about the iwi affiliation of Māori (at [128]). Therefore, the information about vaccine status would not be able to be filtered by iwi affiliation. The applicants submitted that "iwi do not have an exclusive interest in Māori health data that does not include iwi affiliations." (At [129].) Lady Tureiti Moxon, giving evidence for the applicants, also raised the point that many Māori in Aotearoa live outside of their iwi boundaries and many do not know their whakapapa so are not registered with any iwi (at [131]). Thus, the Whānau Ora outreach support services are in many cases the largest support system that many Māori have, rather than their iwi (at [131]). Lady Moxon also pointed out, in relation to the Outreach Immunisation Service (the Ministry's child immunisation service), that iwi have never previously objected to the Ministry disclosing the details of unvaccinated tamariki on the grounds that the information is taonga and would require consultation with iwi (at [132]).

In relation to Whānau Ora's relationship to iwi, the decision paper reflected a concern that locally-based organisations with local relationships and the ability to engage directly with individuals would be preferable to providing the data to the applicants (at [133]). The applicants argued that this issue could have been resolved had the applicants been part of the consultation process. This is because WOCA is an "umbrella organisation that supports a large number of iwi-owned, governed, and/or affiliated Whānau Ora providers, to deliver health services on behalf of iwi." (At [134].) It was also emphasised that the networks and manaaki that Whānau Ora providers offer each other across regions is a key part of how their system works (at [136]). This is because they are able to shift resources, offer support, and assist in places where there are shortfalls – something which would be more difficult should the approach be to work with separate local providers in each area.

The Ministry's evidence contained concerns from unspecified iwi, the Data Iwi Leaders Group, the NICF Pandemic Response Group, and Ngāi Tahu that sharing data with Whānau Ora would be sharing data with a group that does not have a mandate based on Te Tiriti (at [138]). Dr Jones' evidence addressed this issue, explaining (at [140]):

> It is also incorrect to imply that Te Tiriti obligations are owed to iwi, or hapū, alone. Te Tiriti obligations are owed to all Māori – including to Māori individuals (and their whānau) who are at risk

> of contracting COVID-19 because they are not yet vaccinated. The status of the 'partner' with whom the Crown is engaging to fulfil its obligations is not the sole criterion as to whether Te Tiriti obligations are at play, or whether the Crown has greater obligations to other entities (in this case, iwi or hapū). The real question ... is whether the entity has the leadership, expertise, capacity, and capability to protect the health of tangata Māori – through which the Crown can discharge its obligations to those Māori.

The Ministry addressed this issue in the second decision paper, in which it acknowledged that the Waitangi Tribunal recognised that sometimes urban non-kin based groups can be considered Treaty partners (at [143]). Thus, the Court did not consider this issue further as it appeared not to have been a live issue at the time the second decision was made.

Related to the data sovereignty issue, the applicants said that if they had been involved in the consultation process they could have reassured the participants about the security of the data, should it be provided to them (at [145]). There was uncontested evidence available to show that Whānau Tahi systems provide a high level of protection.

The Court found that, cumulatively, the issues considered "did have a material impact on the outcome of the pre-decision hui, the second decision, and the Ministry's consultation process that followed." (At [150].) Thus, the Court found that the Ministry's failure to involve the applicants in the consultation process was a breach of natural justice.

On the matter of inconsistent treatment (disclosure of individual data to other entities), the Court concluded that the Ministry "did exercise its discretion inconsistently in requiring consultation with iwi before agreeing to disclose the data to the applicants, but not requiring such consultation in relation to the disclosure of individual level Māori health information to other entities, or in relation to the disclosure of individual level Māori health information for the purpose of enabling Whānau Ora providers to care for Māori with COVID-19 who are self-isolating at home. (At [159].)

Exercise of discretion – duty to exercise relevant power

The applicants submitted that this was "one of the rare cases in which a discretionary power is also coupled with a duty to exercise that power." (At [164].) They said that "in the very particular legal and factual circumstances of this case, where the requirements of r 11(2)(d) of the Code are satisfied, the Ministry may only decline to exercise the power for a compelling reason that is consistent with the policy and object of the rule." (At [164].) The scope of the Ministry's discretion is limited, the applicants submitted, because (at [164]):

> (a) The preconditions for the disclosure of information under r 11(2)(d) are, in themselves, demanding.
>
> (b) If the data is disclosed to the applicants, the data will continue to be protected because the applicants will be subject to the stringent requirements of the Code and other regulatory obligations. They will be required to use the data in confidence, to

> use it only for the purpose permitted, and to retain it securely and for no longer than required.
>
> (c) The purpose of r 11(2)(d) is to lessen or prevent a serious threat to public health, including in the context of the pandemic. The legislative history of the Code indicates Parliament's clear intention that the power should be available and used to save lives.
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> (d) The COVID-19 pandemic is a 'once in a century public health crisis for Māori', for which there is readily available modelling data to show the impact for Māori in terms of the scale of deaths, hospitalisations, and infections.
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> (e) Māori are at greater risk of adverse outcomes from COVID-19.
>
> (f) The overarching principles for the vaccination programme are equity and Te Tiriti. This includes the Crown's duty of active protection.
>
> (g) The vaccination programme has not achieved equitable outcomes for Māori.
>
> (h) Disclosure of the data will help support the attainment by Māori of the fundamental right to the highest attainable standard of health, which the Crown has recognised through its ratification of the Constitution of the World Health Organization and the International Covenant on Economic, Social and Cultural Rights.
>
> (i) Parliament has recognised in the New Zealand Public Health and Disability Act 2000 that Māori face historic health disparities, and that the provision of public health services should 'reduce health disparities by improving the health outcomes of Māori'.
>
> (j) The only health-related disadvantages identified by the Ministry are considered by the Ministry to be neutral factors.
>
> (k) There are no concerns about the applicants' ability to securely store, manage, and delete the data.

The respondent said that the applicants' approach would constrain the Ministry's discretion to the extent that it would transform the rule into a right in requestors to seek disclosure of information (at [165]).

Submissions from the Privacy Commissioner, intervener in the case, emphasised that "when the stringent r 11(2)(d) requirements of necessity and efficacy are met ... other obligations, such as the right to the highest attainable standard of health, may point to a requirement that disclosure occurs." (At [170].)

The Court concluded that the exercise of the discretion was not consistent with the object and policy of r 11(2)(d), saying (at [171]):

> I am satisfied that the statutory tests have been satisfied. My findings in relation to the s 11(2)(d) criteria implicitly address the basis for the exercise of the Director-General’s discretion not to disclose. I conclude that the exercise of the discretion was not consistent with the object and policy of r 11(2)(d).

Relief

Since considerable progress had been made since the second decision, in that the Ministry had agreed to provide more of the data sought by the applicants, the Court decided that the alternative orders sought by the applicants (that the Court set aside the second decision and direct the Ministry to make a final decision on the applicants' request for the data within three working days) had the "potential to undermine what has been decided in the intervening period and to waste valuable time and resources (for both the Ministry and the applicants)." (At [178].)

The Court directed the Ministry to take the following steps, within three working days, having regard to the findings in the judgment (at [179]):

> (a) Complete its consideration of and decision on provision of the data in those areas where it has not yet agreed to provide data to the applicants.
>
> (b) Review its decision to provide data in relation to those Māori in Te Ika-a-Māui/North Island who have had only a first dose, in light of the Ministry's publicly announced position in relation to the general population who have had only one dose and the finding in this judgment at [55] above [the paragraph in the judgment about the proper interpretation of the 'necessity' test].

Costs

The Court indicated an initial view that the applicants are entitled to costs (at [180]). The parties were invited to submit memoranda setting out their respective positions if they were unable to agree costs. No specific deadline was set for these submissions.

Ngā kupu āpiti – Notes

This judgment follows an earlier related decision about the same dispute, given on 1 November 2021.

Elizabeth Derby assisted with preparation of this article.

Te Kōti Whenua Māori – Māori Land Court

Trusts – trustee duties – review of trust – jurisdiction bar

Tawa v Ataria – Tuaropaki E

(2021) 267 Waiariki MB 184 (267 WAR 184)
21 December 2021

Report by Elizabeth Derby

Whakataunga – Overview and result

Applications seeking a review of the terms of trust, enforcement of trustee obligations, and seeking directions from the Court to enforce trust obligations. Jurisdictional bar to undertake a review and no breach of trust. Applications dismissed.

Trusts – trustee duties – review of trust – enforcement of trustee obligations – jurisdictional bar – applications dismissed	
Date	21 December 2021
Case	*Tawa v Ataria – Tuaropaki E* (282 KB PDF)
Citation	(2021) 267 Waiariki 184 (267 WAR 184)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge T M Wara
Earlier/later decisions	230 Waiariki MB 208 (230 WAR 208).
Legislation cited	Te Ture Whenua Māori Act 1993, s 231; Trusts Act 2019, ss 23-27.
Cases cited	*Tito – Mangakahia 2B2 – No 2A1A* [2011] Māori Appellate Court MB 86 (2011 APPEAL 86); *Pukeroa Oruawhata Trustees v Mitchell – Pukeroa Oruawhata Trust* (2006) 11 Waiariki Appeal MB 66 (11 AP 66).
Overview and result	Applicant sought to challenge the trustees' term of office by seeking the implementation of a rotation process whereby trustees must retire following the completion of a specified term. This application required the Court to assess whether the Court had jurisdiction to undertake a review of trust, whether the trustees had breached the trust or the requirements under the Trusts Act 2019, or whether the Court should enforce the obligations of trust and convene an SGM. **Held**, applications dismissed. The Court concluded that it was jurisdictionally barred from undertaking a review of trust until the 24-month period following the previous review had expired, being 28 February 2022. The Court noted that, even if it was not jurisdictionally barred, it would not have granted the orders that were sought because the trustees have not breached their duties or the trust in relation to the rotation issue. The current trustees should not be held accountable for the decisions of the previous trustees, who voted against putting the issue of

	rotation to the meeting of owners. Further, the evidence demonstrates that the current trustees are actively addressing the issue of trustee rotation and the trustees' decision to decline a meeting with the applicant or to convene a special general meeting is not a breach of trust. The decision to have the rotation issue considered at general meeting of owners was reasonable under the circumstances. As the Court found that the trustees had acted within the proper scope of their powers, it was not prepared to enforce any obligations of the trustees and to direct the trustees to convene an SGM.

Trusts – trustee liability – trustee removal

Deputy Registrar v Moeahu – Lot 1 DP 17494 Part Section 2345 New Plymouth (Old Railway Station) and Other Blocks

(2021) 437 Aotea MB 3 (437 AOT 3)
10 September 2021

Report by Elizabeth Derby

Whakataunga – Overview and result

Applicant sought the removal of trustees and restoration of the trust fund by the trustees personally in light of fraud by a former trustee. The Court considered the former trustees should be granted relief from liability.

Trusts – trustee liability – removal of trustees – review of trust – enforcement of obligations of trust	
Date	10 September 2021
Case	*Moeahu and Others – Lot 1 DP 17494 Part Section 2345 New Plymouth (Old Railway Station) and Other Blocks* (550 KB PDF)
Citation	(2021) 437 Aotea MB 3 (437 AOT 3)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Harvey
Earlier/later decisions	*Deputy Registrar – Ngāti Te Whiti Whenua Tōpū Trust* (2017) 374 Aotea MB 81 (374 AOT 81).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 67, 231, 238, 239, and 240.
Cases cited	*Proprietors of Mangakino Township v Māori Land Court* CA 65/99; *Rātima v Sullivan – Tataraakina C Trust* (2017) 64 Tākitimu MB 121 (64 TKT 121); *Corrigan – Ngatihine H2B* (2014) 71 Taitokerau MB 72 (71 TTK 72); *Tupe Snr v Everton – Manunui No 1 4th Residue* (2015) 334 Aotea MB 227 (334 AOT 227); *Pullar – Aperahama Sullivan Whānau Trust* (2017) 61 Tākitimu MB 45 (61 TKT 45); *Hall v Opepe*

	Farm Trust (2010) 19 Waiariki MB 258 (19 WAR 258); *Clarke v Karaitiana* [2011] NZCA 154; *Rameka v Hall* [2013] NZCA; *Jones v AMP Perpetual Trustee Co NZ Ltd* [1994] 1 NZLR 690; *Re Mulligan* [1998] 1 NZLR 481; *Re Murray's Trust* [1967] NZLR 341; *Wong v Burt* [2005] 1 NZLR 91; *Hogg & Ors v Public Trust*; *Apatu v Trustees of Owhaoko C Trust – Owhaoko C1 and C* [2010] Māori Appellate Court MB 34 (2010 APPEAL 34); *re Whitely* (1886); *Learoyd v Whitely* (1887); *Cowan v Scargill* [1985]; *New v Jones* (1833); *Bray v Ford* [1896]; *Boardman v Phipps* [1967] 2 AC 134; *Re Thompson's Settlement* [1986]; *Robinson v Pett* (1734); *Barrett v Hartley* (1866); *Rochefoucauld v Boustead* [1898]; *Willis v Barron* [1902]; *Re Macadam* [1945]; *Waipapa 9* (1995) 67 Taupō MB 10 (67 TPO 10); *Tauhara Middle 4A2B2C Block – Opepe Farm Trust* (1996) 68 Taupō MB 27 (68 TPO 27); *Adlam v Savage* [2016] NZAR 1393; *Moeahu v Winitana – Waiwhetu Pā No 4* (2014) 319 Aotea MB 166 (319 AOT 166); *Tata v Martin – Waiwhakaata 3E 4C Lot 2A (Hiiona Marae)* [2020] Māori Appellate Court MB 166 (2020 APPEAL 166); *Armitage v Nurse* [1997] 2 All ER 705; *Rātima v Sullivan – Tataraakina C Trust* (2012) 18 Tākitimu MB 75 (18 TKT 75).
Overview and result	Application for review of the Ngāti Te Whiti Whenua Tōpū Trust and for the enforcement of obligations of trust. The decision centred on the theft of trust funds (an amount of $486,045.71) by a former trustee and CEO of the trust, Shaun Keenan. The applicant, a trust beneficiary, sought the removal of the trustees and restoration of the trust fund by the trustees personally. While the trustees accepted that their conduct was sometimes below the standard expected of a prudent fiduciary (and they took responsibility for this), they considered that they should be granted relief from liability and should not have to reimburse the trust for the losses that occurred as a result of Mr Keenan's fraud. The court sought to determine whether the trustees should repay the funds lost through fraud, should be granted relief from liability, would have been removed for cause, and should serve a period of ineligibility for appointment. The Court also briefly considered recipient third party liability. **Held**, the Court granted the trustees relief from liability. The Court considered that the former trustees had acted honestly and believed they were acting reasonably and responsibly. While it was unacceptable for the trustees to accept Mr Keenan's assertions beyond a two-year period that annual accounts had not been finalised and audited and for the trustees to not seek directions of the Court, a significant factor was that even if the trustees had prepared the audited accounts on time, that would

	have been insufficient to have detected Mr Keenan's fraud. However, the Court considered there was an argument that the former trustees should refund to the trust the fees they received during the relevant period of Mr Keenan's fraud when they were clearly not fulfilling their duties to the extent a prudent trustee may have done. The former trustees were invited to file submissions on this matter within one month from the date of judgment. The Court found that it would have been untenable for the former trustees to have remained in office beyond the terms that they served, had they not resigned following the revelation of the full extent of Mr Keenan's fraud. As such, the former trustees would have been removed for cause had they not resigned. However, the Court acknowledged that the former trustees had wisely accepted advice to resign from their positions. Further, while the Court acknowledged that some may consider the impact on their personal and professional standing just in the circumstances, the Court again noted that the evidence was such that even if the accounts had been audited and filed, the fraud would not have been detected. The Court did not consider its findings precluded the former trustees from standing for re-election under cl 7(b) of the trust order because the former trustees were not in reality removed for cause, they resigned. The Court also declined to impose a term of ineligibility for re-appointment in light of its conclusions on other matters. In terms of recipient third party liability, and given the allegations surrounding the claims of property purchase by Mr Keenan and his wife, the Court noted that it might be necessary for the current trustees to obtain legal advice as to what steps, if any, might be available to the trust in its efforts to seek recovery of funds that belonged to the trust and that might have found their way into the hands of third party recipients.

Trusts – trustee removal

King v Manukonga – Section 11 Oākura Town Belt (Oākura Pā)

(2021) 437 Aotea MB 124 (437 AOT 124)
15 September 2021

Report by Elizabeth Derby

Whakataunga – Overview and result

Application for a judicial conference seeking the Court's assistance regarding a former trustee's conflict of interest. Court held that the trustee would have been removed for cause had he not resigned for breach of duties of non-conflict and non-profit.

Trusts – removal of trustee – conflict of interest – pecuniary gain	
Date	15 September 2021
Case	*King v Manukonga – Section 11 Oākura Town Belt (Oākura Pā)* (303 KB PDF)
Citation	(2021) 437 Aotea MB 124 (437 AOT 124)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Harvey
Earlier/later decisions	75 Taranaki MB 255 (75 TAR 255); 422 Aotea MB 21-28 (422 AOT 21-28); 425 Aotea MB 237 (425 AOT 237); 431 Aotea MB 210-230 (431 AOT 210-230).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 67, 227A, 238, 240.
Cases cited	*Perenara v Pryor – Matata 930* (2004) 10 Waiariki Appellate MB 233 (10 AP 233); *Fenwick v Naera* [2015] NZSC 68; *Robinson v Pett* (1734) 3P Wms 249; *Rochefoucauld v Boustead* [1898] 1 Ch 550 (CA); *Willis v Barron* [1902] AC 271 (HL); *Re Macadam* [1945] 2 All ER 664; *Rameka v Hall* [2013] NZCA 203; *Naera v Fenwick* [2013] NZCA 353; *Pirini v Ure – Oākura Pā* (2020) 425 Aotea MB 237 (425 AOT 237).
Overview and result	Application for a judicial conference seeking the Court's assistance regarding a trustee dispute. The dispute arose when a former trustee and chairperson of the Oākura Pā Trust ("trustee"), facilitated the engagement of his de facto partner and now former trustee to undertake paid work on behalf of the Department of Conservation ("DOC"). The issue was whether the trustee would have been removed for cause if he had not resigned due to his breach of the marae charter regarding pecuniary gain and participating in a decision where he had a conflict of interest. While the trustee acknowledged that the actions in question took place, he maintained that the individuals were best placed to provide the services sought by DOC.

	Held, the trustee would have been removed for cause if he had not resigned. Once the trustee was aware that his de facto partner was applying for one of the roles and that this role was paid, he had a duty to exclude himself from the decision-making and disclose his conflict to the other trustees. However, he proceeded with the arrangements in breach of his duties of non-profit and non-conflict. This breach was compounded when he participated in a decision where his conflict was raised. The Court noted its concern that the trustee did not discern that it was inappropriate for him to attend and participate in these meetings. In regards to the now former trustee, the Court noted that he should not have been present at any of the meetings where these issues were discussed and had this now former trustee not resigned he also would have been removed for cause. The Court concluded that the trustee did not properly observe the rules of non-conflict and non-profit and even though he did not benefit personally, his partner was paid as a consequence of his involvement. The Court stressed that there was no dispute that the work undertaken by the two individuals was carried out to the satisfaction of DOC and as such no criticism can be made of that work.

Hui tanguru 2022 – additional content online

Te Kōti Whenua Māori – Māori Land Court

Succession – life interest – *Gardiner v Hingston – Succession to Heta Kenneth Hingston* (2021) 268 Waiariki MB 50 (268 WAR 50) – Craig Linkhorn

Trusts – termination of whānau trust – *Surnamecrown v Haig-Clarke – Kaiaua 1 and Others* (2022) 269 Waiariki MB 20 (269 WAR 20) – Elizabeth Derby

Trusts – termination of trust – review of administration of trust – *Tatere v Hauraki – Mangatainoka No 1BC No 2C No 1* (2021) 93 Tākitimu MB 135 (93 TKT 135) – Elizabeth Derby

Trusts – trustee appointment – conflict of interest – *Paerau v Bailey – Kauaeroa* (2021) 440 Aotea MB 262 (440 AOT 262) – Elizabeth Derby

Trusts – trustee removal refused – *Rihari v Auckland – Takou* (2021) 240 Taitokerau MB 42 (240 TTK 42) – Elizabeth Derby

Trusts – trustee removal – failure to disclose earlier conviction – *Murray v Murray-Halkyard – Whakakoro A Part and Another* (2021) 243 Taitokerau MB 229 (243 TTK 229) – Elizabeth Derby

Trusts – trustee removal – *Taueki v Taueki – Horowhenua No 11 B Subdivision No 14 and Other Blocks* (2021) 437 Aotea MB 134 (437 AOT 134) – Elizabeth Derby