

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Te Kōti Matua – High Court

Declarations – ahi kā and mana whenua

Ngāti Whātua Ōrākei Trust v Attorney-General

[2022] NZHC 843
28 April 2022

Report by Rhianna Morar

Whakataunga – Overview

The High Court declined to make declarations sought by Ngāti Whātua Ōrākei about its ahi kā and mana whenua in central Tāmaki Makaurau and the impact of those rights on Crown decision-making. The Court proposed possible alternative declarations and invited further submissions from parties.

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Date	28 April 2022
Case	Ngāti Whātua Ōrākei Trust v Attorney-General (2.77 MB PDF)
Citation	[2022] NZHC 843
Court	Te Kōti Matua – High Court
Judge(s)	Palmer J
Earlier/later decisions	Ngāti Whātua Ōrākei Trust v Attorney-General [2017] NZHC 389, [2017] 3 NZLR 516; Ngāti Whātua Ōrākei Trust v Attorney-General [2017] NZCA 554, [2018] 2 NZLR 648; Ngāti Whātua Ōrākei Trust v Attorney-General [2018] NZSC 84, [2019] 1 NZLR 116; Ngāti Whātua Ōrākei Trust v Attorney-General No 1 [2020] NZHC 3120.
Legislation cited	Native Land Acts Amendment Act 1882 46 Vict No 27, s 4; Te Ture Whenua Māori Act 1993, s 4; Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, s 6; Resource Management Act 1991, s 2; Public Records Act 2005, s 4; Fisheries Act 1996, s 2; Walking Access Act 2008, ss 8, and 13; Environmental Protection Authority Act 2011, s 9; Family Violence Act 2018, s 18; Housing Accords and Special Housing Areas Act 2013, s 89(2); and Marine and Coastal Area (Takutai Moana) Act 2011, s 9; Oranga Tamariki Act 1989, s 2; Local Government Act 2002, s 33(5); Climate Change Response (Zero Carbon) Amendment Act 2019, s 5H(2); Heritage New Zealand Pouhere Taonga Act 2014, s 10(3); Native Rights Act 1965, s 4.
Cases cited	<i>R v Symonds</i> (1847) NZPCC 387 (SC); <i>R v Ratea</i> SC Wellington, 1 September 1849; <i>Tāmaki v Baker</i> (1901) NZPCC; <i>Public Trustee v Loasby</i> (1908) 27 NZLR 801 (SC); <i>Baldick v Jackson</i> (1910) 30 NZLR 343 (SC); <i>Tamihana Korokai v Solicitor-General</i> (1912) 32 NZLR 321; <i>Arani v Public Trustee</i> [1920] AC 198 (PC); <i>Pahoro v Cuff</i> (1890) 8 NZLR 751 (SC); <i>Te Weehi v Regional Fisheries Officer</i> [1986] 1 NZLR 680 (HC); <i>Attorney-General v Ngāti Apa</i> [2003] 3 NZLR 643 (CA); <i>Amodu Tijani v Secretary, Southern Nigeria</i> [1921] 2 AC 399; Takamore v Clarke [2012] NZSC 116, [2013] 2 NZLR 733; Paki v Attorney-General [2012] NZSC 50, [2012] 3 NZLR 277; <i>Manktelow v Public Trustee</i> [2001] WASC 290, (2001) 25 WLR 126; <i>Port Nicholson Block Settlement Trust v Attorney-General</i> [2012] NZHC 3181; Ngāti Hurungaterangi v Ngāti Wahiao [2016] NZHC 1486, [2016] 3 NZLR 378; Kamo v Minister of Conservation [2020] NZCA 1, [2020] 2 NZLR 746; Ririnui v Landcorp Farming Ltd [2016] NZSC 62, [2016] 1 NZLR 1056; <i>Gillick v West Norfolk and Wisbech Area Health Authority</i> [1986] AC 112 (HL); <i>Attorney-General v Refugee Council of New Zealand</i> [2003] 2

	<p>NZLR 577 (CA); <i>Burt v Governor-General</i> [1992] 3 NZLR 672 (CA); <i>R v Ngan</i> [2007] NZSC 105, [2008] 2 NZLR 48; <i>Case of Proclamations</i> [1610] EWHC KB J22, (1611) 12 Co Rep 74; <i>R v Ngan</i> [2007] NZSC 105, [2008] 2 NZLR 48; <i>Television New Zealand Ltd v Rogers</i> [2007] NZSC 91, [2008] 2 NZLR 277; <i>New Zealand Māori Council v Attorney-General</i> [1994] 1 NZLR 513 (PC); <i>New Zealand Māori Council v Attorney-General</i> [1989] 2 NZLR 142 (CA); <i>Tainui Māori Trust Board v Attorney-General</i> [1989] 2 NZLR 513 (CA); <i>Attorney-General v New Zealand Māori Council</i> [1991] 2 NZLR 129 (CA); <i>New Zealand Māori Council v Attorney-General</i> [2013] NZSC 6, [2013] 3 NZLR 31; <i>Te Heuheu Tūkino v Aotea District Māori Land Board</i> [1939] NZLR 107 (SC and CA); <i>Huakina Development Trust v Waikato Valley Authority</i> [1987] 2 NZLR 188 (HC); <i>Barton-Prescott v Director-General of Social Welfare</i> [1997] 3 NZLR 179 (HC); Ngaronoa v Attorney-General [2017] NZCA 351, [2017] 3 NZLR 643; Tukaki v Commonwealth of Australia [2018] NZCA 324, [2018] NZAR 1597; <i>New Zealand Māori Council v Attorney-General</i> HC Wellington, CP 785/90, 21 September 1990; <i>Associated Provincial Picture Houses Ltd v Wednesbury Corp</i> [1948] 1 KB 223 (CA); <i>Wolf v Minister of Immigration</i> [2004] NZAR 414 (HC); <i>Hu v Immigration and Protection Tribunal</i> [2017] NZHC 41, [2017] NZAR 508.</p>
Overview and result	<p>Ngāti Whātua Ōrākei brought proceedings challenging the impact of decision-making by the Crown, in reaching settlements with other groups, on its ahi kā and mana whenua in central Tāmaki Makaurau. In 2018 the Supreme Court reversed strike out decisions by the High Court and Court of Appeal and decided that most of the case could proceed to a hearing.</p> <p>The High Court conducted an 11 week hearing from February to April 2021 and has now issued a judgment of 652 paragraphs determining a number of legal issues and declining the declaratory relief Ngāti Whātua Ōrākei sought and inviting further submissions on alternative declarations by way of relief.</p> <p>Held, The Court's declaratory jurisdiction includes making formal declarations of legal status and rights, including customary rights, and of corresponding obligations.</p> <p>Tikanga-consistent dispute resolution processes must be preferred to non-tikanga consistent court resolution of disputes about tikanga.</p> <p>Tikanga is a free-standing legal framework recognised by New Zealand law. Different iwi and hapū validly hold differing views about how tikanga applies in a particular context. Tikanga is recognised</p>

	<p>by courts based on the evidence before the court for the purpose of that case.</p> <p>The Crown is not bound to follow or develop tikanga. The Crown is not an iwi or hapū and tikanga is developed by and for iwi and hapū. However, the Crown has a duty to actively protect the operation of tikanga as determined by iwi and hapū.</p> <p>While tikanga does not directly modify the common law or statutes which bind the Crown, its legal effects can be provided for in New Zealand's legal system.</p>
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Kōrero whānui – Background

In 2018, the Supreme Court allowed an appeal by Ngāti Whātua Ōrākei against decisions of the lower courts striking out its claim. The claim challenged the lawfulness of decisions about proposed Treaty of Waitangi settlements and the impact of those decisions on iwi.

The High Court (the Court) has released its decision on how the mana whenua and ahi kā interests of Ngāti Whātua Ōrākei affect the Crown's ability to lawfully negotiate the settlements of historical claims under the Treaty in accordance with iwi tikanga. The case is not yet concluded, and the Court reserved leave for the parties to make further submissions.

Kupu iho – Executive summary

The Court held that its declaratory jurisdiction includes making formal declarations of legal status and rights, including customary rights, and of corresponding obligations. However, it cautioned that tikanga-consistent dispute resolution processes must be preferred to non-tikanga consistent court resolution of disputes about tikanga.

The Court held that tikanga is a free-standing legal framework recognised by New Zealand law. The Court found that it is valid for different iwi and hapū to hold differing views about how tikanga applies in a particular context. The Court recognised that tikanga must be recognised by the courts based on the evidence before it for the purpose of that case.

The Court indicated that it is possible for mana whenua to be exclusive in accordance with one iwi's tikanga and shared in accordance with the tikanga of another iwi. It is possible that even exclusive mana whenua will confer responsibilities to look after the customary interests of other iwi.

The Court concluded that the Crown is not bound to follow or develop tikanga. The Crown is not an iwi or hapū and tikanga is developed by and for iwi and hapū. However, the Crown has a duty to actively protect the operation of tikanga as determined by iwi and hapū under Article II of the Treaty. In saying that, tikanga is increasingly referred to and recognised by legislation and the common law. Therefore, the Court considered that while tikanga does not directly modify the common law or statutes which bind the Crown, its legal effects can be provided for in New Zealand's legal system.

Ultimately, the Court declined to make the declarations sought by Ngāti Whātua Ōrākei and reserved leave for the parties to make submissions on whether alternative declarations should be granted.

The parties were also invited to consider making a joint application for the Court to assist in facilitating a tikanga-based settlement or alternatively seek a declaration on a joint-position reached by the parties in accordance with tikanga.

Ngā take – Issues

Ngāti Whātua Ōrākei sought a declaration of their mana whenua in terms of tikanga in relation to specified land in central Tāmaki Makaurau. The claim is based on several take, or rights and responsibilities to land (see [14]):

- take raupatu from raupatu;
- take tupuna from intermarriage;
- followed by ahi kā roa (keeping the fires lit, or intergenerational occupation, use and permanent control).

Ngāti Whātua Ōrākei evidence is that their mana whenua is exclusive and cannot be shared with other iwi. At the heart of the dispute is how the Crown should approach overlapping interests in the area claimed exclusively by Ngāti Whātua Ōrākei in settling the claims of other iwi. Ngāti Whātua Ōrākei acknowledge their exclusive mana whenua gives rise to obligations to recognise and look after historical and customary interests held by other iwi in certain parts of the area. However, Ngāti Whātua Ōrākei submit that no other group has a credible basis for an equivalent claim to mana whenua in this area in accordance with tikanga (at [14]).

Marutūāhu Rōpū (excluding Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua oppose the declarations sought by Ngāti Whātua Ōrākei. (See Marutūāhu at [15]-[17]; Ngāi Tai ki Tāmaki at [21]-[22] and Te Ākitai Waiohua at [24]-[25].)

Ngāti Pāoa support the rights declarations sought by Ngāti Whātua Ōrākei to the extent they are consistent with the Kawenata Tapu and Conciliation Agreement which Ngāti Pāoa and Ngāti Whātua entered at Ōkahu Bay in January 2017 (at [20]). Ngāti Kuri and Ngāti Te Rangi have intervened in these proceedings due to the impact a decision will have on the Crown's potential recognition of other iwi's rights and interests in their rohe (at [27]).

The Crown opposes the declarations sought by Ngāti Whātua Ōrākei (at [26]). The Crown argues that Ngāti Whātua Ōrākei's asserted tikanga rights lack specificity, querying what is meant by Ngāti Whātua Ōrākei. The Crown submits that, due to the contested nature of these concepts, Ngāti Whātua Ōrākei's claim to exclusive mana whenua and ahi kā roa cannot be sustained.

Kōrerorero – Discussion

Recognition of tikanga Māori by New Zealand law

The Court described tikanga as fundamental to “constituting” an iwi or hapū. As a result, tikanga is developed by each iwi and hapū in the exercise of rangatiratanga (at [30]). In that sense, the Court accepted that there are different versions of which principles are regarded as “core” to tikanga (at [30]). It is therefore not a novel approach to recognise that tikanga differs between different iwi and hapū and the extent to which tikanga is common across all iwi and hapū (at [31]).

The Court observed that there were fundamental philosophical underpinnings (“tāhuhu he aratohu”) that help guide iwi approaches to tikanga and allow for some shared understandings and mutual interactions. However, the tikanga of an iwi or hapū is shaped by the group’s own histories and traditions (at [31]).

Notably, the Court confirmed that the law that accompanied Māori to Aotearoa was constituted by tikanga. It recognised that many aspects of tikanga are now law in New Zealand called “Māori customary law”. Māori customary law is said to be made by iwi and hapū to govern the behaviour of iwi and hapū (at [32]).

As such, the Court considered tikanga is a “free-standing” legal framework recognised by New Zealand law and that it will continue to apply to iwi and hapū even if the courts or Parliament suggest otherwise (at [32]). However, the Court did acknowledge that the “legal effects” of tikanga can be overridden by legislation and common law but tikanga itself cannot be changed unless it is by iwi exercising rangatiratanga (at [33]).

The Court confirmed that tikanga, as the governing values for iwi and hapū, informs the development of the common law. Beyond this, the Court recognised that tikanga can be stronger in legal effect and can determine the outcome of a court’s application of statute or common law or be the source of legal rights enforced by the courts (at [33]).

Notably, the Court found that tikanga must be considered on its own terms as a distinct legal framework. It must not be seen in terms of the English law heritage of the New Zealand common law (at [37]). It necessarily follows that proof of tikanga should be established by a dynamic consensus, evidenced by the ongoing practice of an iwi or hapū. This is consistent with how courts approach the recognition of other forms of law, such as foreign law (at [38]). Recognition of tikanga by other iwi is not a pre-requisite for proof – specific iwi tikanga is valid so long as it is consistent with their own historical and tradition narratives (at [42], [46]).

Tikanga-consistent dispute resolution

The Court held that, as a matter of tikanga, tikanga-consistent dispute resolution processes must be preferred to non-tikanga consistent court resolution of disputes *about* tikanga (emphasis added). It went further to say that tikanga-consistent resolutions may be more enduring than a ruling by a court (at [34]).

If a tikanga-consistent resolution of a dispute about tikanga is not feasible, then recourse to a court may be appropriate as a matter of law (at [36]). The Court found that its declaratory jurisdiction includes the making of formal declarations of legal status and rights, including customary rights, and of corresponding obligations (at [35]). However, whether such a decision is tika, and consistent with tikanga, is another matter (at [36]).

The Court cautioned against resolving disputes about tikanga because “legal precedents in case law will not be authoritative as to the content of tikanga” (at [37]). As a result, the Court held that courts must recognise tikanga on the basis of the evidence before the court for the purpose of that case. The Court found that such judicial caution is heightened where the content of tikanga is disputed within an iwi or hapū or between iwi or hapū (at [37]).

Mana whenua in Tāmaki Makaurau

The Court recognised it is valid at law for different iwi to hold differing views on tikanga and its application in accordance with their own tribal histories. The Court held that the evidence in these proceedings showed mana whenua can be exclusively held by one iwi or hapū and that it can be shared (at [47]).

The evidence of Ngāti Whātua Ōrākei tikanga was described as “clear and consistent” in saying that mana whenua is generally exclusive (except in fringe or contested areas or by agreement). The Court therefore accepted that mana whenua is not shared according to the tikanga of Ngāti Whātua Ōrākei (at [44]). Although other iwi may not agree with Ngāti Whātua Ōrākei tikanga, the Court found it difficult to see how recognition by other iwi is a pre-requisite for the claim of mana whenua by one group (at [46]).

The Court considered that existence of one group’s mana whenua does not obviate the customary interests of other iwi at tikanga. The Court held that Ngāti Whātua Ōrākei may have exclusive mana whenua according to their own tikanga, while also owing responsibilities to look after the customary interests of other iwi (at [48]).

As a result, the Court was only prepared to make declarations that speak of the tikanga of Ngāti Whātua Ōrākei. The Court reserved leave (at [52]) for the parties to make further submissions on whether the Court should exercise its discretion to make a declaration in the following (or similar) terms:

Ngāti Whātua Ōrākei currently have ahi kā and mana whenua in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau, with all the obligations at tikanga that go with that, according to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei.

However, the Court also accepted that Marutūāhu Rōpū (excluding Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohūa do not agree that their interests in Tāmaki Makaurau are subject or inferior to the mana whenua of Ngāti Whātua Ōrākei. The Court reserved leave (at [54]) for the parties to make submissions on whether the Court should make a declaration in the following (or similar) terms:

The tikanga and historical tribal narratives and traditions of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohua do not currently recognise that Ngāti Whātua Ōrākei have ahi kā and mana whenua, as those concepts are conceived of by Ngāti Whātua Ōrākei, in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau.

In addition, the Court reserved leave (at [55]) for the parties to consider making a joint application for:

- the Court to assist in facilitating a tikanga-based settlement with any of the disputed issues in these proceedings; or
- a declaration by the Court to reflect a joint position about any of these disputed issues reached by a tikanga-consistent process.

Tikanga obligations in settling Treaty claims in Tāmaki Makaurau

The disputes between iwi and hapū in these proceedings concern how the Crown should approach the overlapping interests of other iwi in negotiating the settlement of historical claims under the Treaty of Waitangi (at [66]).

The Court considered the extent of its jurisdiction to determine the Crown's legal obligations in relation to tikanga. However, the Court also noted that in doing so it was following the Supreme Court's earlier ruling that Ngāti Whātua Ōrākei may pursue a claim for declarations as to its rights, but cannot challenge the proposed transfers of specific properties to other iwi where these would be implemented by legislation (at [61]).

The Court found that the nature of Treaty settlements will be relevant in considering what relief should be granted but that nature should not prevent those decisions from being subject to claims of judicial review or from courts' declaratory jurisdiction (at [62]). As a result, the Court considered it has the jurisdiction to correct errors of law in Crown guidance materials (such as the so-called *Red Book* guide to Treaty settlement negotiations for historical claims) and to correct manifestly unreasonable decisions (at [62]).

The Court recognised that the Crown exercises a power that cannot override rights and liberties prescribed by law, whether they be conferred by statute, common law or tikanga. However, tikanga and the Crown's powers are described as "systems of internal self-regulation" and therefore do not interfere with the legal effect of one another (at [65]). Despite this, the Court acknowledged that tikanga is referred to and recognised by legislation and the common law (at [33]). Therefore, while tikanga does not directly modify the common law or statutes which bind the Crown, the common law and statutes can provide for tikanga to have legal effect in New Zealand's legal system (at [64]).

This is underpinned by the Court's view that tikanga is developed by iwi and hapū to govern the behaviours of iwi and hapū. The Crown is not an iwi or hapū and should not be bound to follow or develop tikanga itself (at [64]).

Nevertheless, the Court held that the Crown's undertaking to protect rangatira, hapū and tāngata katoa in the exercise of tino rangatanga under Article II of the Treaty of Waitangi includes the operation of tikanga (at [66]). The Crown's legal obligations in relation to tikanga are those held by the Courts since the *Lands* case and those accepted and endorsed by Parliament (relevantly):

- to act reasonably and in good faith;
- with mutual cooperation and trust;
- to actively protect tikanga; and
- to provide redress for breaches of the Treaty (at [66]-[67]).

To give effect to obligations arising out of the Treaty, the Crown will need to take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and the Crown will need to actively protect the ability of iwi and hapū to exercise their tikanga (at [69]). In relation to Treaty settlements, the Crown may be required to make a decision that is inconsistent with the tikanga of one iwi or another (at [67]).

Moreover, the Court held that iwi and hapū can owe obligations under the Treaty and that such obligations may require iwi and hapū to assist the Crown to discharge its duty to other iwi and hapū by engaging in tikanga-consistent processes with those iwi and hapū (at [70]). The Crown is obliged to allow reasonable time for disputes regarding overlapping tikanga interests in Treaty settlement negotiations to be resolved (at [75]).

The Court considered that the Crown's approach to settling claims in Tāmaki Makaurau failed to adopt a practice or policy of assigning anyone with expertise to understand and advise it on the tikanga implications of its decisions (specifically in relation to overlapping interests) (at [72]).

The Court found that the *Red Book* (2018) avoided references to tikanga or tikanga interests. However, the *Red Book* (2021) does not acknowledge the legal obligations of the Crown to consider tikanga or tikanga interests and that the Crown may not act unreasonably having regard to tikanga in accordance with the Treaty of Waitangi (at [74]).

Despite this, the Court declined to make the declarations sought by Ngāti Whātua Ōrākei regarding the obligations of the Crown on the basis that tikanga itself does not legally bind the Crown (at [78]).

Instead, the Court reserved leave (at [79]) and invited the parties to consider whether the Court should make any alternative declarations about the Crown's legal obligations in relation to tikanga in the following (or similar) terms:

The duties of active protection of tikanga and of acting reasonably and in good faith, with mutual cooperation and trust in relation to tikanga, will bear on Crown decisions affecting tikanga interests in a Treaty settlement context.

Accordingly, depending on the context, the Crown will need to take reasonable steps to understand, recognise and respect the

tikanga of iwi or hapū, and the Crown will need to actively protect the ability of iwi and hapū to exercise their tikanga.

Depending on the context, the Treaty of Waitangi may also require iwi and hapū to engage in tikanga-consistent processes with other iwi and hapū about the status of relevant properties at tikanga.

Kupu whakatau – Result

Ultimately, the Court declined to make the declarations as sought by Ngāti Whātua Ōrākei (at [648]).

The case is not concluded yet. The Court reserved leave for the parties and interested parties to make submissions on whether the Court should make declarations on the following (or similar) terms (at [649]):

Ngāti Whātua Ōrākei interests in accordance with their own tikanga

Ngāti Whātua Ōrākei currently have ahi kā and mana whenua in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau, with all the obligations at tikanga that go with that, according to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei.

No recognition of Ngāti Whātua Ōrākei interests by the tikanga of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki and Te Ākitai Waiohū

The tikanga and historical tribal narratives and traditions of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohū do not currently recognise that Ngāti Whātua Ōrākei have ahi kā and mana whenua, as those concepts are conceived of by Ngāti Whātua Ōrākei, in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau.

The Crown's legal obligations in relation to tikanga and tikanga interests in negotiating the settlement of historical claims under the Treaty of Waitangi

The duties of active protection of tikanga and of acting reasonably and in good faith, with mutual cooperation and trust in relation to tikanga, will bear on Crown decisions affecting tikanga interests in a Treaty settlement context.

Accordingly, depending on the context, the Crown will need to take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and the Crown will need to actively protect the ability of iwi and hapū to exercise their tikanga.

Depending on the context, the Treaty of Waitangi may also require iwi and hapū to engage in tikanga-consistent processes with other iwi and hapū about the status of relevant properties at tikanga.

In addition to the possible proposed declarations, the Court reserved leave (see [649], subparagraph (c)) for the parties to consider making a joint application for:

- the Court to assist in facilitating a tikanga-based settlement with any of the disputed issues in these proceedings; or

- a declaration by the Court to reflect a joint position about any of these disputed issues reached by a tikanga-consistent process.

Ngāti Whātua Ōrākei (No. 4): insights into the complexities of recognising tikanga as part of New Zealand law

Ngāti Whātua Ōrākei Trust v Attorney-General

[2022] NZHC 843

28 April 2022

Commentary by Dr Sarah Down

Hei tīmatatanga – Introduction

The much-anticipated High Court *Ngāti Whātua Ōrākei Trust (No.4)* decision illustrates the complexities of recognising tikanga as part of New Zealand law and the tensions that can arise.^[1] The decision from Palmer J runs to almost 300-pages and covers numerous points relevant to the legal recognition of tikanga. There is much that can be said about the decision, and undoubtedly it will receive great scrutiny. Ngāti Whātua Ōrākei have indicated that they will appeal, so the findings of the higher courts will be of keen interest.

This article comments on two key issues:

- the implications and nuances of the findings on tikanga and what this means for our understanding of tikanga as part of New Zealand law; and
- the approach to history in the judgment and the complexities that deserve further consideration.

Kōrero whānui – Background

These proceedings began when Ngāti Whātua Ōrākei sought judicial review of the Crown's decision to offer Ngāti Pāoa properties for their Treaty settlement within the area over which Ngāti Whātua Ōrākei claim mana whenua. The Crown applied to strike out the application. That application went all the way to the Supreme Court which found that, while it would impinge upon parliamentary proceedings for Ngāti Whātua Ōrākei to challenge the proposed transfer of specified properties to Ngāti Pāoa, they could seek to clarify their rights over the claimed area.^[2] Ngāti Whātua Ōrākei amended their claim accordingly and sought declarations that:

- they have ahi kā and mana whenua in relation to central Tāmaki Makaurau (central Auckland) at tikanga; and
- as a consequence, in relation to the claimed area, the Crown in applying the Overlapping Claims Policy must act in accordance with Ngāti Whātua Ōrākei tikanga when settling the Treaty of Waitangi claims of other iwi.

These declarations were opposed by a number of hapū and iwi (in whole, or part)^[3] and the Crown.

Whakataunga – Overview

Palmer J declined to make the declarations sought by Ngāti Whātua Ōrākei on the basis that:

- The applicable tikanga, including the nature and extent of mana whenua, was contested. Granting the declarations would make “a misleading impression of what the Court considers is a proper understanding of tikanga in Tāmaki Makaurau.”^[4]
- While tikanga interests do bear on the Crown’s legal obligations in dealing with overlapping interests for Treaty settlement, tikanga does not, of itself, legally bind the Crown. The Crown is not necessarily required to act in accordance or comply with the tikanga of one iwi when the tikanga of other iwi may bear differently on the Crown.^[5]

However, as detailed below, leave was granted to the parties to seek alternative declarations.

Tikanga

Background

As the Supreme Court observed in *Trans-Tasman Resources*, “tikanga is a body of Māori customs and practices, part of which is properly described as custom law.”^[6] Recent years have seen a number of cases in which the New Zealand courts have considered or recognised tikanga as part of the common law. The contexts for tikanga cases have been wide-ranging, including equity and trust law,^[7] judicial review,^[8] criminal law,^[9] company law,^[10] employment law,^[11] family law,^[12] and environmental law.^[13] That tikanga has been seen as relevant (if not always determinative) illustrates the impact that the recognition of tikanga in New Zealand law may have.

Yet, to date, there has been very little judicial guidance on *how* and *when* tikanga is part of the common law – and whether it could be more than this. Tests for recognition of tikanga were first set out in the 1908 *Loasby* case which focused on whether the customs were general to Māori, not contrary to any statute law, and reasonable, taking the whole of the circumstances into consideration.^[14] In *Takamore*, the leading modern tikanga case to date, the Supreme Court did not make findings on the tests for recognition.^[15] Most recently, the Supreme Court in the *Trans-Tasman Resources* decision found that tikanga was an “applicable law” which flowed from the guarantee of rangatiratanga in article two of Te Tiriti o Waitangi.^[16] However, that Court was also explicit that it was setting to one side the question of the tests for the recognition of tikanga: “We leave open for determination the questions of whether or not tikanga is a separate or third source of law and whether or not there should be any change to the tests for the recognition of customary law as law set out in *Loasby*.”^[17]

The *Ngāti Whātua* case provides some very important guidance (albeit from the High Court) on the nature of tikanga and the extent to which the Courts will recognise it, but there remain key unanswered complexities,

including whether *Loasby* provides the test for recognition. Furthermore, aspects of the decision may be subject to challenge on appeal.

Key findings on tikanga

The Court began by establishing definitions and key characteristics of tikanga. It was affirmed that tikanga is largely unwritten and values-based, and its application is situation dependent. The Court stressed that tikanga is essential to iwi and hapū identity and is developed by them as an exercise of rangatiratanga and that tikanga can evolve as circumstances change over time.^[18]

With respect to the status of tikanga under New Zealand law, Palmer J surveyed the history of case law and legislation recognising tikanga and reached several key conclusions. First, he held that the case law established that tikanga was recognised by the English common law that accompanied the Crown to New Zealand.^[19] In reaching this conclusion, he relied upon historical cases such as *Baldick*, *Loasby* and *Arani*.^[20] Whether these historical cases are reliable precedent for the position that the New Zealand common law has always been amenable to recognising tikanga is moot. While Palmer J recognised some of the nuances of the historical recognition of tikanga (drawing for example, on the work of Ned Fletcher and Mark Hickford),^[21] that these cases are historical exceptions and the findings made for the benefit of Pākehā and not Māori was not remarked upon. The Supreme Court will likely need to confront this reality in the *Ellis* proceedings, given that case involves the extent to which tikanga can apply to a Pākehā man.^[22] This makes reference to the fact that those historical cases all had Pākehā as their subject matter inevitable.^[23] As discussed in a forthcoming article with David V Williams, whether these cases should continue to be relied upon as the basis for recognising tikanga in the present is questionable.^[24] That is not to argue that tikanga should not be recognised – rather that it needs stable foundations to develop in a principled way.

Secondly, Palmer J established that “[t]ikanga was the first law of Aotearoa...It arose “as a necessary and inevitable expression of self-determination”.^[25] It is a “‘free-standing’ legal framework recognised by New Zealand law”.^[26] It does “not cease governing an iwi or hapū just because the courts or Parliament or even other iwi suggest otherwise.”^[27] While the legal effects of tikanga can be overridden by legislation, even Parliament cannot change tikanga itself – only iwi can do that, exercising their rangatiratanga.^[28] Combined with Palmer J’s findings that tikanga is essential to iwi and hapū identity and can evolve over time, this affirms an important point that had been present but sometimes implicit or underdeveloped in tikanga jurisprudence to date.^[29] That is, tikanga arises from the authority held by iwi and hapū established prior to 1840 and continuing to the present. It is recognition of a sphere of authority under which iwi and hapū continue to develop law.

In the 1970s, self-determination was the major overarching theme of Māori claims to rights (as it was in Canada).^[30] However, over the last four decades, claims to Māori self-determination has often been seen as radical and separatist, while challenges to the Crown’s proclamations of sovereignty have been summarily dismissed.^[31] However, the Crown

insisted upon distinguishing issues of self-government (*imperium*) from land and related historical claims (*dominium*). As McHugh has noted, that the Crown would try to confine Māori claims to the more specific level of *dominium* is hardly surprising and reflected a view that the issue of sovereignty was inherently elusive and unresolvable.^[32] The Treaty principle of partnership was held out as the appropriate basis for understanding the relationship between Māori and the Crown while Māori claims to their lands and resources were partially addressed and diffused through the Waitangi Tribunal and direct negotiations for Treaty settlement grievances. At the same time, Māori continued to claim the existence within the state of alternative and untouchable sites of political authority.

The development of *tikanga* jurisprudence has the potential to offer a bridge between the separation of *dominium* and *imperium*. Rather than focusing on the question of whether the Crown's sovereignty rests on unstable foundations or directly challenging the Crown's sovereignty, affirmation that *tikanga* is a separate legal framework recognises the continuing authority of *iwi* and *hapū*. Simply put, it is recognition of a form of Indigenous self-determination. Recognition of that authority is not necessarily a challenge to the Crown's sovereignty – although it has implications for its exercise. Through the recognition of *tikanga* there is the potential for a more horizontal approach to Treaty partnership than has developed since the recognition of the Treaty's principles in the *Māori Council* cases.^[33] Recognition of *tikanga* therefore may allow for a better and more equitable reconciliation of *rangatiratanga* and *kāwanatanga* as provided for under Te Tiriti o Waitangi.

Thirdly, Palmer J noted that the Crown is not *iwi* or *hapū* and therefore “*tikanga* does not govern or bind the Crown without a statutory or common law basis.”^[34] Nor does it “directly modify the common law or statutes which bind the Crown”.^[35] This could be interpreted as a conservative approach to *tikanga* as binding law, however, this position arguably arises as a corollary of the notion that *tikanga* is a “free-standing” and separate legal system – the Crown does not have *tikanga*.^[36] This reflects the different spheres of *rangatiratanga* and *kāwanatanga*. To reiterate, this offers a different lens by which we can view the intersect between Māori claims to self-determination and the Crown's sovereignty.

Furthermore, as Palmer J also made clear, *tikanga* can do more than inform the values of the common law.^[37] While *tikanga* does *not of itself* bind the Crown or modify common law or statutes, *tikanga can* bind the Crown when there is a statutory or common law basis, or where the Treaty of Waitangi is relevant to Crown decisions. It can determine the outcome of a court's application of a statute or the common law,^[38] or be a direct source of legal rights enforced by the Courts.^[39] As discussed further below, while *tikanga* was not binding in this case (i.e. it only had to be considered)^[40] this was informed by Palmer J's finding that *tikanga* does not bind the Crown when there is conflicting *tikanga* that could bear on Crown decisions differently.^[41]

Finally, of importance was the way in which the Treaty of Waitangi was drawn upon to substantiate the findings on *tikanga*. It was made clear that the present case did not call for a direct challenge to the position that the

Treaty of Waitangi is not legally binding unless incorporated into statute (although it was noted that the precedent in *Te Heuheu Tukino* had been doubted).^[42] However, it was also found that tikanga is an important part of Treaty guarantees, as had been affirmed in a number of cases.^[43] Drawing on the extra-judicial writings of Williams J, it was held that while tikanga could be seen as a taonga, it was preferable to think of it as an inevitable expression of self-determination.^[44] Tikanga is integrally woven with rangatiratanga; the two dimensions give life to each other.^[45] It flows from the Treaty that, in particular statutory and factual contexts, the Crown will have legal obligations in relation to tikanga, to act reasonably and in good faith, with mutual cooperation and trust, and to actively protect tikanga.^[46] On that basis, tikanga can also be the source of legally binding obligations on the Crown where the Treaty of Waitangi is relevant to Crown decisions.^[47] This approach to Te Tiriti o Waitangi / the Treaty of Waitangi pushes the boundaries of its legal status (albeit indirectly) while affirming the developing recognition of tikanga as part of New Zealand law. The focus on rangatiratanga is a far cry from the three Treaty principles of 'partnership', 'participation' and 'protection' and supports an approach of focusing on the texts of Te Tiriti / the Treaty itself.^[48]

The Court's role regarding tikanga

Having considered the place of tikanga in New Zealand law in the abstract, Palmer J then turned to consider why the courts should be cautious in applying tikanga in this case. Drawing on his own findings in *Ngawaka*,^[49] he noted that tikanga governs matters of process as well as substance: "recourse to courts without agreement between the parties is not obviously tikanga-consistent."^[50] If a tikanga-consistent resolution is not feasible it may be appropriate for the courts to determine the dispute. However, "[j]ust because a Court can do something does not mean it should."^[51] As far as possible, matters of tikanga should be settled outside the courts.^[52] He found that when the content of tikanga is disputed within or between iwi / hapū the courts' caution in approaching tikanga must be heightened, finding that "[i]t would be a brave court that attempts to reconcile or prioritise tikanga that truly differs between iwi or hapū, if that reconciliation is not tikanga-based."^[53]

The Court further noted the need for caution on the basis that tikanga evolves in response to changing circumstances. "Courts do not and cannot make, freeze or codify tikanga."^[54] As a consequence, precedent is limited in tikanga cases – the courts can only recognise tikanga on the evidence before it for the purpose of that case.^[55] Additionally, it is inherently difficult for the courts to transcend culturally-specific mindsets; the unconscious tendency to see tikanga in terms of the English common law must be held in check.^[56]

Thus, the decision made wide-ranging findings on tikanga as law – including that tikanga is a 'separate legal framework' – a point which the Supreme Court in *Trans-Tasman Resources* had deliberately stepped back from making findings on, and which the Crown had explicitly rejected in their arguments in this case.^[57] At the same time, the decision found that the courts should be cautious in making findings on tikanga. As explored

below, this informed the approach to the facts and ultimate outcome in this case.

Approach to history

In deciding whether Ngāti Whātua Ōrākei had proven their ahi kā and mana whenua status over the claimed area, Palmer J considered the evidence of historians and pūkenga (specialists / experts) on key relevant historical events including the timing and nature of the Ngāti Whātua Ōrākei raupatu over the claimed area, and the maintenance of ahi kā during the Ngāpuhi invasions. Setting out and discussing this historical evidence formed a substantial proportion of the judgment.^[58]

After surveying the evidence and submissions, the Court found that the tribal historical narrative and traditions of Ngāti Whātua Ōrākei were “clear, coherent, and consistent” in terms of their tikanga.^[59] However, there were key points of conflict with the traditions and histories of other iwi and hapū and more information would be required to reconcile some aspects of their objections.^[60]

Conclusions on history appeared to proceed from two positions. The first was that evidence of tribal traditions and histories should be weighed equally:^[61]

I do not regard the evidence of professional and tribal historians as necessarily any more or less credible or reliable than each other. As the historical experts agreed: All historical sources have limitations and should be critically analysed and examined. Particular forms of evidence should not be privileged over others. As Professor Michael Belgrave says, “[t]here is no such thing as a definitive history”.

Second, attempting to reconcile conflicting accounts of historical narratives and traditions was a task for the marae and not the courts. The Court would not attempt it.^[62]

Flowing from these positions, the decision set out at length the competing versions of history without much assessment of the strengths and weaknesses of the histories that had been presented over the course of an 11-week trial. The Court stressed that the history and traditions of the iwi and hapū involved in the case “does not have, and does not need, approval or disapproval by the Court.”^[63] The approach that it was not the role of the Courts to make such judgments was also reflected in the fact that all parties were given a chance to review draft sections on the narration of their tribal traditions and histories.^[64]

In evaluating these findings, it is important to step back and acknowledge that the approach to history in legal claims of Indigenous rights has long been a matter of debate, some of it vitriolic.^[65] Some scholars have argued that one cannot look back to a past stripped of complexities and ambiguities with a ‘presentist’ lens.^[66] However, *Paki (No 2)* and *Wakatū* were significant cases for making clear that the courts can explore Indigenous claims that have their genesis in historical events and make findings on Indigenous rights in the present.^[67] While Palmer J acknowledged history in the 18th and 19th centuries was directly relevant

to the legal questions before him, his approach of seeing tribal traditions and history as something beyond the courts arguably does not sit well with this acknowledgment.^[68] The in-depth analysis and evaluation of historical evidence by the Supreme Court in *Wakatū* stands as a particular counterpoint to this judgment.

It is surely correct that tribal traditions and histories do not need court approval or recognition. These are a matter for internal kōrero for the tribal group and are confirmed and held in sources such as whakapapa books, waiata and whaikōrero. However, for Ngāti Whātua Ōrākei, the purpose of this proceeding was vindication of their rights because it was directly relevant to the relationship that they hold with the Crown, other iwi and hapū, and the wider public. For example, the question of whether they were the primary mana whenua had a bearing on their engagement and position in resource management processes. The case was not a matter of validation for their internal membership of matters that should remain on the marae, but a question of their rights (which have legal implications) in relation to others.

Clearly, Ngāti Whātua Ōrākei were aware of and had engaged in tikanga-consistent processes but had made an informed decision to have the matter adjudicated and seek recognition of their rights in the courts. Those rights were rooted in the first law of Aotearoa – tikanga Māori – and required the court to make findings on the applicable tikanga as a matter of fact,^[69] and whether it was recognisable under State law. In the strike-out application the Supreme Court had explicitly stated that “[w]here claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them.”^[70] And further, “it must be open to Ngāti Whātua Ōrākei to seek to clarify its status in the area over which it claims rights short of a challenge to the particular decisions to transfer the specified properties”.^[71] It is arguable that this was not consistent with the High Court’s decision to step back and find that the matter should be resolved via tikanga processes. While the courts have a wide discretion as to whether to make declarations, there is a sense that Palmer J stopped short in this specific case because of the political sensitivities of a Court taking a position on tikanga where there is conflict.^[72]

It is also arguable that there was a conflation between tribal traditions, historical facts, and questions of competing definitions and understandings of tikanga. These were separate matters which required careful consideration. While tribal traditions are highly relevant to who Ngāti Whātua Ōrākei are and matters of tikanga, they are not so relevant to the specific question of whether Ngāti Whātua Ōrākei held primary mana whenua and ahi kā at 1840. Tribal traditions of origins are in some respects parallel with biblical stories or other mythic structures. Their purpose is to explain principles, morals and make sense of the surrounding world and interrelationships. While these traditions can support historical facts, that does not mean that these stories are to be taken literally.^[73] The approach to tribal traditions cannot be placed in parallel with tribal histories. Furthermore, the matter of competing historical facts and the core issues of tikanga on which there was disagreement needed to be discerned. The courts absolutely can and should weigh the respective strengths and weaknesses of historical facts. It is the ability of the courts to discern

between competing tikanga that is a more complex matter. There is strength to the argument this is not something the courts should wade into lightly. The argument that the courts should not weigh the respective strengths of competing tribal traditions and histories is not the same thing and has less merit.

Kupu whakatau – Result

The Court found that the evidence demonstrated Ngāti Whātua Ōrākei has mana whenua over the claimed area according to their tikanga and based on their tribal historical narrative and traditions. The evidence was sufficient to support granting a declaration to this effect. However, given other iwi did not accept this position, such a declaration would have to make clear “it speaks only of the tikanga and historical tribal narrative and traditions of Ngāti Whātua Ōrākei.”^[74] It was noted that other iwi may also wish to have their rights as to their tikanga declared, including their rejection of the Ngāti Whātua Ōrākei position on ahi kā and mana whenua.^[75] Alternatively, a declaration could be made about the Crown’s Treaty responsibilities and legal obligations to consider tikanga in applying its overlapping boundary policy for Treaty settlements.^[76] Leave was granted to the parties to seek such declarations.

It is unclear what such declarations would do other than restate the conflicting positions as between the parties that were the subject of this case. It would not resolve central issues of concern such as rights of representation and consultation in resource management processes.^[77]

The Court also took the position that tikanga-based resolutions had not been exhausted.^[78] Accordingly, leave was granted for the parties to apply to the Court to facilitate a tikanga-based resolution, such as through the appointment of a pūkenga by consent.^[79]

With regard to the Crown’s obligations, the Court found that in this instance tikanga did not determine the decisions of the Crown but did infuse what was required of the Crown. While it is for the Crown to make its own decision about whether to transfer redress, tikanga must be considered.^[80] In this context, the Crown had not taken into account a fully informed understanding of the implications of its decisions for the tikanga interests of all iwi and hapū.^[81]

Overall, and with respect, the approach taken could be criticised as taking an optimistic and rather essentialising view of tikanga and the nature of the dispute as between the parties. See, for example, Palmer J’s statement that it was hoped the judgment would “now enable all parties to pursue healthier ongoing relationships with each other, which are at the heart of what was and continues to be envisaged by the Treaty of Waitangi, paying due regard to tikanga.”^[82]

Ngā kupu whakatepe – Conclusion

The recognition of tikanga as part of New Zealand law by the courts is potentially the most important development concerning Māori rights for decades which ultimately could be more significant than the revolution in Treaty jurisprudence following the *Lands* decision in 1987. The finding in

this case that tikanga is a separate legal framework is a major step forward for self-determination. However, further complexities about how and when tikanga should be recognised by the courts remain.^[83] The study on tikanga Māori and its place in Aotearoa New Zealand's legal landscape by the Law Commission, led by Justice Whata, is awaited for insights on this matter.^[84] The Court's decision here stressed that matters concerning tikanga should not be addressed lightly by the courts, particularly when there is competing tikanga. While that caution is appropriate, it seems to have also led to something of a conflation of the separate issues of tribal traditions, histories and tikanga. Undoubtedly, this was a difficult case with a number of interlinking strands. What happens next, as a result of appeals, will be followed closely.

Ngā kupu āpiti – Notes

- [1] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843.
- [2] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.
- [3] Ngāti Whātua o Kaipara and Te Rūnanga o Ngāti Whātua supported the claim. Ngāti Pāoa, Ngāti Kuri and Ngāi Te Rangi supported aspects. Iwi from the Marutūāhu Rōpū (excepting Ngāti Pāoa) Ngāi Tai ki Tāmaki and Te Ākitai Waiohua were opposed to the claim.
- [4] At [643].
- [5] At [644].
- [6] *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [169].
- [7] See *Cowan v Cowan* [2021] NZHC 208; *Mau Whenua Incorporated v Shelly Bay Investments Limited* [2019] NZHC 3222; *Estate of Berghan* [2020] NZHC 1399; [2020] 2 NZLR 585.
- [8] See *Skills Active Aotearoa Limited v Minister of Education* [2019] NZHC 2800; *Kamo v Minister of Conservation* [2020] NZCA 1; *Te Pou Matakana Limited v Attorney-General* [2021] NZHC 3319; *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181 [Sweeney].
- [9] See *Henare v R* [2020] NZCA 188; *R v Grace* [2020] NZHC 3145; *Police v Waiāra* [2019] NZDC 17641; *Police v Huber* [2020] NZDC 17361; *Booth v Tito* [2020] NZHC 1071.
- [10] See *Shearing Services Kamupene Limited v Tarahau Farming Limited* [2020] NZHC 3352.
- [11] See *GF v Comptroller of the New Zealand Customs Service (No 2)* [2022] NZEMPC 41.
- [12] See *Oranga Tamariki, Ministry for Children v AR* [2020] NZFC 4046; *Evans v Roberts* [2020] NZHC 206; *Chief Executive of Oranga Tamariki v BH* [2021] NZFC 210. Compare: *Re WH* [2021] NZFC 4090.

[13] See *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368; *Mercury NZ Limited v Waitangi Tribunal* [2021] NZHC 654 [*Mercury*].

[14] *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) at 806.

[15] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 [*Takamore SC*]. By comparison, the majority in the Court of Appeal in *Takamore* indicated that with respect to the test for the recognition of tikanga they would apply the more exacting test set in *Halsburys Laws of England. Takamore v Clarke* [2011] NZCA 587; [2011] 1 NZLR 573 at 109. See discussion in Natalie Coates “The Recognition of Tikanga in the Common Law of New Zealand” [2015] NZ L Rev 1 at 17–26.

[16] *Trans-Tasman Resources* (SC), above n 6, at [9].

[17] *Trans-Tasman Resources* (SC), above n 6, at footnote 282. For a comment on the case see: Sarah Down and David V Williams “Trans-Tasman Resources: a cautious step forward for Māori rights – [Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board](#) [2021] NZSC 127” (October 2021) Māori Law Review.

[18] At [296]-[298], [310], [371]; [312]-[313].

[19] At [358].

[20] *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Baldick v Jackson* (1910) 30 NZLR 343; *Hineiti Rirerire Arani v Public Trustee* [1920] AC 198, (1919) NZPCC 1 (PC) 6.

[21] Discussed at [326]-[336].

[22] Martin Van Beynen “The Peter Ellis case and Māori customary law” *Stuff NZ* (online ed, Wellington, 9 July 2020). The point was discussed by the Supreme Court during the hearings for the *Ellis* proceedings. See *Ellis v The Queen* SC 49/2019 [2020] NZSC Trans 19, “Tikanga Appeal”, 25 June 2020 at 9.

[23] The point was discussed by the Supreme Court in the hearings for *Ellis*. See: *Ellis v The Queen* SC 49/2019 [2020] NZSC Trans 19, “Tikanga Appeal”, 25 June 2020 at 9.

[24] See Sarah Down and David V Williams “Building the Foundations of Tikanga Jurisprudence” [2022] *Canterbury Law Review* (forthcoming).

[25] At [326] quoted from Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 *Wai L Rev* 1 at 2.

[26] At [355], [458], [570].

[27] At [355]. See also the finding that “what is recognised by a court cannot change the underlying fact or validity of tikanga in its own terms.” At [372].

[28] At [357]. See also [355].

[29] See in particular, *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 [Ngawaka]; *Mercury*, above n 13; *Trans-Tasman Resources (SC)*, above n 6.

[30] The Land March, Bastion Point and Raglan Golf Course protests are all vivid illustrations of claims to self-determination.

[31] See for example, *Berkett v Tauranga District Court* [1992] 3 NZLR 206.

[32] Paul McHugh "Sovereignty this Century – Māori and the Common Law Constitution" (2000) 31 VUWLR 1 at 17.

[33] Paul McHugh has argued that the development of the Treaty principles had resulted in a conservative jurisprudence which hindered rather than progressed the recognition of Māori rights. See PG McHugh "Treaty Principles: Constitutional Relations Inside a Conservative Jurisprudence" (2008) 39(1) VUWLR 39. Compare: McHugh "Sovereignty this Century", above n 32.

[34] At [576].

[35] At [570].

[36] At [355], [458], [570].

[37] At [358].

[38] *Ibid.* Citing as examples: *Baldick v Jackson* (1910) 30 NZLR 343 (SC); *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Mercury*, above n 13.

[39] *Ibid.* See also [368]. Citing *Ngawaka*, above n 29; *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) (*Ngāti Apa*).

[40] At [358].

[41] At [644].

[42] At [589]. See also [579], [593]-[596].

[43] At [579]-[582] drawing on *Mercury*, above n 13, and *Trans-Tasman Resources (SC)*, above n 6.

[44] At [582] citing Williams "Lex Aotearoa", above n 25, at 9.

[45] At [580].

[46] At [584]-[585].

[47] At [576].

[48] The shift towards rangatiratanga in interpreting the principles of Te Tiriti o Waitangi / the Treaty of Waitangi is evident in cases such as *Trans-Tasman Resources (SC)*, above n 6, at [154]. See also, the Court of Appeal decision *Trans-Tasman Resources (CA) Trans-Tasman Resources v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 per Goddard J at [165]-[166]. For an example of a return to the Treaty's text in policy see Cabinet Office Circular "Te Tiriti o Waitangi / Treaty of Waitangi Guidance" (22 October 2019) CO (19)5.

[49] In *Ngawaka*, Palmer J found that it was not appropriate for matters of whakapapa to go to arbitration and that disputes should be resolved on the marae. *Ngawaka*, above n 29.

[50] At [363].

[51] At [369].

[52] See also Palmer J's approval of Tamati Kruger's view that a tikanga-consistent process "cannot be exhausted" at [623].

[53] At [459]. See also the findings of Cooke J in *Mercury* that whether the tikanga is agreed may have a bearing on whether tikanga will be binding on the courts. *Mercury*, above n 13, at [103].

[54] At [370]-[371].

[55] At [371].

[56] At [374] citing *Ngāti Apa*, above n 39, at [144] (in turn citing *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 402-403. See also [373]-[377].

[57] Dr Ward for the Crown in closing argued that: "tikanga does not operate as a free-standing source of law separate from the common law and statute with the effect of displacing or superseding the application of the common law and/or statute." At [352].

[58] At [97]-[297].

[59] At [420]. See also [424].

[60] At [421].

[61] At [395]-[396]; although Palmer J noted that the historical facts on which all historians were in agreement held additional weight at [296].

[62] At [422].

[63] At [98].

[64] At [98].

[65] See for example, Bain Attwood "In the Age of Testimony: The Stolen Generations Narrative, "Distance," and Public History" (2008) 20 Public Culture 75; Jim McAloon "By Which Standards? History and the Waitangi Tribunal" (2006) 40(2) New Zealand Journal of History 194; William Oliver "The Future Behind Us: The Waitangi Tribunal's Retrospective Utopia" in Andrew Sharp and Paul McHugh (eds) *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary* (Bridget Williams Books, Wellington, 2001) 9; William Oliver *Looking for the Phoenix: A Memoir* (Bridget Williams Books, Wellington, 2002); David V Williams "Historians' Context and Lawyers' Presentism: Debating Historiography or Agreeing to Differ" (2014) 48(2) New Zealand Journal of History 136.

[66] See for example, Oliver "The Future Behind Us", above n 64.

[67] *Paki v Attorney-General* (No 2) [2014] NZSC 118, [2015] 1 NZLR 67; *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR

423. For comment see: D V Williams “The role of legal history in developing New Zealand common law following *Paki (No 2)*” (2016) (4) *New Zealand Law Review* 755.

[68] At [97].

[69] How tikanga is to be proven as a matter of fact (and the distinction between fact and law in tikanga cases) is a key complexity that is underexplored in the jurisprudence. Palmer J’s consideration of this issue deserves further consideration. See [383]-[390].

[70] *Ngāti Whātua Ōrākei SC*, above n 2, at [78].

[71] *Ngāti Whātua Ōrākei SC*, above n 2, at [53].

[72] Palmer J explored general principles of the Court’s discretionary powers to grant declarations noting that “their purpose is to vindicate rights and bind the parties by preventing them from relitigating the same issues. At [451]-[454].

[73] For a critique in response to an overly literal interpretation of tribal traditions see: Atholl Anderson et al “On the improbability of pre-European Polynesian voyages to Antarctica: a response to Priscilla Wehi and colleagues” (2021) *Journal of the Royal Society of New Zealand*. For a more general analysis of the difficulties of considering tribal accounts in terms of their origins, content and interpretation see Rawiri Te Maire Tau *Nga Pikituroa o Ngāi Tahu: The oral traditions of Ngāi Tahu* (University of Otago Press, Dunedin, 2003).

[74] At [461]-[463]. Palmer J suggested that such a declaration might be worded as:

Ngāti Whātua Ōrākei currently have ahi kā and mana whenua in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau, with all the obligations at tikanga that go with that, according to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei.

[75] Palmer J noted that such a declaration could be made along the following lines (at [465]):

The tikanga and historical tribal narratives and traditions of Marutūāhu Rōpū (other than Ngāti Pāoa), Ngāi Tai ki Tāmaki, and Te Ākitai Waiohū do not currently recognise that Ngāti Whātua Ōrākei have ahi kā and mana whenua, as those concepts are conceived of by Ngāti Whātua Ōrākei, in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau.

[76] At [646].

[77] Note also the related Ngāti Maru decision in which Ngāti Whātua Ōrākei sought primacy of mana whenua status in the Auckland CBD area with respect to Resource Management Act 1991 processes. The Environment Court refused to make such a determination and Whata J found that tikanga based rights were a matter for the High Court and the Māori Land Court, and not the Environment Court. *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2021] 3 NZLR 352.

[78] At [464].

[79] At [464], [466].

[80] At [599]-[600], [601]. See also [623] “ignoring tikanga when it is relevant in a Treaty settlement context would be unlawful.”

[81] Palmer J further found that depending on the context, where Treaty principles legally bind the Crown, the Crown will need to take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and actively protect the ability of iwi and hapū to exercise their tikanga. At [587].

[82] At [640]. See also Palmer J’s closing statement quoting the *Ngati Awa Raupatu Report*.

In seeking solutions, it is important to bear in mind that Māori society is fundamentally about relationships. It is not enough to resolve the immediate problem. The people must continue to live together, and the more important task is to rebuild the relationships based upon whakapapa and respect for the mana of each group.

[83] At [652].

[84] Thomas Coughlan “Kris Faafoi instructs Law Commission to Review tikanga Māori in our law” *The New Zealand Herald* (online ed, New Zealand, 30 July 2021).

Te Kōti Pīra Māori – Māori Appellate Court

Chief Judge’s powers – jurisdiction – no appeal from decision not to exercise

Mokaraka v Mokaraka – Waima C8

[2022] Māori Appellate Court MB 17 (2022 APPEAL 17)
22 February 2022

Report by Kaea Hudson

Whakataunga – Overview and result

This was an appeal from a refusal to exercise the special powers granted to the Chief Judge to reopen and modify earlier Court orders. The Court dismissed the appeal on the basis of a lack of jurisdiction – there was no appeal right in the circumstances. The judgment discusses the recent Court of Appeal decision in *Inia v Julian* and does not apply it.

Chief Judge’s powers – s 44(5) – appeal of a decision declining to cancel an order dismissed – no jurisdiction – no appeal right in the circumstances	
Date	22 February 2022
Case	Mokaraka v Mokaraka – Waima C8 (343 KB PDF)

Citation	[2022] Māori Appellate Court MB 17 (2022 APPEAL 17)
Court	Te Kōti Pīra Māori – Māori Appellate Court
Judge(s)	Judge Coxhead (presiding), Chief Judge Isaac, Judge Stone
Earlier/later decisions	Mokaraka – Waima C8 [2019] Chief Judge’s MB 1137.
Legislation cited	Te Ture Whenua Māori Act 1993, ss 44, 44(5), 45, 49, and 58; Māori Affairs Amendment Act 1967, s 78A; Māori Affairs Act 1953, s 30; Legislation Act 2019, s 10; Interpretation Act 1999, s 5; Māori Land Court Rules 201,1 rr 8.3, and 8.4.
Cases cited	Inia v Julian [2020] NZCA 423; <i>Estate of George Amos – Horahora 1A4B</i> [2002] Chief Judge’s MB 54 (2002 CJ 54); Rameka – Papamoa 2 Sec 2B3C3B1 [2016] Chief Judge’s MB 457 (2016 CJ 457); <i>Smith – Nikora Whānau Trust</i> [2013] Chief Judge’s MB 302 (2013 CJ 302); <i>Morell v Wairoa-Waikaremoana Trust Board – Lake Waikaremoana</i> [2017] Chief Judge’s MB 342 (2017 CJ 342); <i>Commerce Commission v Fonterra Co-operative Group Ltd</i> [2007] NZSC 36, [2007] 3 NZLR 767; <i>Investors in Industry Commercial Properties Ltd v Norwich City Council</i> [1986] AC 822; <i>R v Emmett</i> [1998] AC 773; <i>Pyx Grantie Co Ltd v Ministry of Housing and Local Government</i> [1960] AC 260; Haimona v Taiatini – Te Karaka No 1A [2016] Māori Appellate Court MB 390 (2016 APPEAL 390); <i>Raroa – Hahau B2</i> (1993) 33 Gisborne Appellate Court MB 164 (34 APGS 164); <i>Grant v Raroa – Ngamoe A1B1B</i> (1993) 33 Gisborne Appellate Court MB 35 (33 APGS 35); <i>Ratahi v Oke – Rangitaiki 28B12B2B2A</i> [2009] Chief Judges MB 410 (2009 CJ 410); <i>Bennett v Māori Land Court HC Whangarei</i> , CP5/99, 11 August 2000; <i>Terekia – Waihire 3D1A</i> (1993) Chief Judge’s MB 650 (1993 CJ 650); <i>Hayes – Estate of Pera Putete</i> (1994) Chief Judge’s MB 174 (1994 CJ 174).
Overview and result	<p>Application to appeal a decision of the Deputy Chief Judge to decline to cancel an order determining that Bessie Henare (Mokaraka) owns a house on Waima C8 (“the block”) and granting an occupation order in favour of Tahī Mokaraka (“the Order”).</p> <p>The Deputy Chief Judge declined to exercise jurisdiction under section s 44(1) of the Act to cancel the Order on the basis that it wasn’t in the interests of justice to cancel the Order as it would allow other family members to claim the benefit of the improvements made to the house by Tahī and his family.</p> <p>The issue was whether the Court had jurisdiction to proceed with the appeal, given the limit on appeals set out in s 44(5) of the Act.</p> <p>Held, appeal dismissed.</p>

The plain reading of s 44 is that there is no right of appeal whenever the Chief Judge dismisses an application under s 44(1). Importantly, this jurisdiction includes both an inquiry into whether there is an error and the discretionary decision as to whether the Chief Judge should intervene in the interests of justice. The Court considered it difficult to infer from the statutory language that s 44(5) only applied in the limited circumstances where the Chief Judge had not undertaken an inquiry into whether there had been a mistake or omission or whether to exercise their discretion.

The Court considered there were three potential junctures where the Chief Judge could decline to exercise the special powers jurisdiction:

1. Before any evaluation occurs as was contemplated in *Inia v Julian*.
2. After the evaluation exercise occurs.
3. At the discretionary stage where the Chief Judge may decline to exercise the jurisdiction to cancel, amend or make another order because the Chief Judge does not consider it necessary in the interests of justice to remedy an identified error.

As such there is no right of appeal from a decision to decline to exercise those powers, irrespective of the juncture at which the dismissal arises.

Further, the Court noted that s 44(5) is an ouster provision that removes a right of appeal. While the Court agreed that ouster provisions should be given the most limited interpretation due to the presumption that a party should not be deprived a right of appeal, it must also be read in light of its context. In this case, the context is the unique and special jurisdiction conferred by ss 44-49, the purpose of which is to strike the necessary balance between the interests of justice and finality. As such, the Court considered it is clear that s 44 is intended to provide an opportunity for an aggrieved party to seek changes to historical and erroneous court orders and that within this context is unsurprising that the Chief Judge should be able to dismiss such an application.

The Court doubted that the first juncture existed at all, because the Māori Land Court Rules required the preparation of a report by the Registrar for consideration by the Chief Judge in all cases, meaning in all cases the Chief Judge would undertake an inquiry.

In coming to its conclusion the Court noted that it was possible that the Court of Appeal in *Inia* did not have before it the analysis of the legislation and relevant

	<p>authorities previously undertaken by the Māori Appellate Court in relation to s 44(5).</p> <p>For comment on this decision and its relationship to the Court of Appeal authority in <i>Inia</i> see this commentary prepared by Andrew Irwin.</p>
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Inia, Mocaraka and the s 44 jurisdiction – comment on Mocaraka

Mocaraka v Mocaraka – Waima C8

[2022] Māori Appellate Court MB 17 (2022 APPEAL 17)
22 February 2022

Commentary by Andrew Irwin

Hei tīmatatanga – Introduction

The Māori Appellate Court in *Mocaraka v Mocaraka*^[1] has declined to follow the precedent set by the Court of Appeal in *Inia v Julian*.^[2] That is possibly unprecedented. At issue is whether the Māori Appellate Court has jurisdiction to consider appeals against decisions of the Chief Judge of the Māori Land Court to dismiss applications under s 44. Section 44(1) provides the Chief Judge with a special power to correct mistakes or omissions in orders made by Judges or Registrars. Section 44(5) provides that “no appeal shall lie to the Maori Appellate Court from the dismissal by the Chief Judge of an application under this section”. The Court of Appeal in *Inia* held that s 44(5) applies only where the Chief Judge has not entered at all upon the exercise of examining whether there was a mistake or omission or whether to exercise his or her discretion. The Māori Appellate Court in *Mocaraka* has expressly rejected that decision and has held that s 44(5) means that whenever the Chief Judge dismisses an application no appeal lies to the Māori Appellate Court.

This note:

- provides context to the 44 jurisdiction;
- examines both cases;
- makes some comments in light of the doctrine of precedent, the legislative history to the s 44 jurisdiction and the slip rule in the ordinary courts; and
- concludes that the legislative history to the development of the s 44 jurisdiction tends to support the view held by the Māori Appellate Court.

Kōrerorero – Discussion

The section 44 jurisdiction

Section 44(1) is the source of the Chief Judge's power to cancel or amend orders (and certificates of confirmation) that are erroneous in fact or law:

On any application made under section 45, the Chief Judge may, if satisfied that an order made by the court or a Registrar [...] was erroneous in fact or in law because of any mistake or omission on the part of the court or the Registrar or in the presentation of the facts of the case to the court or the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

The power to exercise the jurisdiction in s 44 arises only where an order of the court or a Registrar is erroneous in fact or in law. The finding of an error is the prerequisite to the exercise of the jurisdiction.^[3] That error of fact or law must arise in one of two situations:

- the court or Registrar made a mistake or omission that led to the error; or
- the presentation of facts to the court or Registrar led to the error.

Where the jurisdiction arises, the Chief Judge may:

- cancel the order;
- amend the order; or
- make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

Section 44(5) provides:

The Chief Judge may decline to exercise jurisdiction under this section in respect of any application, and no appeal shall lie to the Maori Appellate Court from the dismissal by the Chief Judge of an application under this section.

Section 49(1) provides:

Every order made by the Chief Judge or the Deputy Chief Judge under section 44 shall be subject to appeal to the Maori Appellate Court.

The Chief Judge's powers under s 44 are in addition to:

- any judge's power to order a rehearing;^[4]
- appeals to the Māori Appellate Court;^[5] and
- the court's power to amend any defects or errors in the proceedings.^[6]

Inia v Julian [2020] NZCA 423

The facts of *Inia v Julian* were that Mrs Inia died leaving, by will, her Māori land interests to two of her seven children. One renounced an entitlement to succeed. In 1995 Judge Hingston made a succession order vesting the interests in one child (Mr Inia) and other orders constituting a whānau trust and vesting the interests in the trustees of that trust. The beneficiaries did not include the disinherited children or their uri. One of the disinherited children (Mrs Julian) sought an order under s 45 vesting the land in all seven children and cancelling the succession and other orders. Two of the grounds advanced were that Judge Hingston was apparently biased (by virtue of once being the estate's solicitor) and the disinherited children were not notified of the 1995 hearing. The Deputy Chief Judge^[7] found the lack of notice would not have made a difference, but the Judge was apparently biased. The Deputy Chief Judge declined to cancel the order of succession, but amended the order constituting the trust to include the disinherited children and their issue.

The trustees appealed. The Māori Appellate Court upheld the appeal. It held that just because the Judge was once the solicitor of the estate did not disqualify him from hearing the case. Further, the amendment to the trust order had resulted in the in-laws of Mrs Inia becoming beneficiaries, for which there was no basis. (This occurred because in the time since the 1995 orders, Mr Inia's wife had brought her own separate land interests into the trust). The Appellate Court did, however, find that the disinherited children were entitled to be notified of the 1995 hearing. The Appellate Court directed the s 45 application to be reheard by the Deputy Chief Judge. The Appellate Court did not consider whether it had jurisdiction to hear the appeal given s 44(5).

The trustees appealed to the Court of Appeal. Amongst other things, they argued the Appellate Court had failed to distinguish between those parts of the Deputy Chief Judge's decision that were evaluative and those parts which were discretionary in nature. Further, they argued that the Deputy Chief Judge's determination regarding the notice error fell within s 44(5), precluding an appeal to the Appellate Court.

The Court of Appeal held that s 44(1) contains two powers. The first is evaluative, that is to decide whether the order was "erroneous in fact or in law because of any mistake or omission". The second involved discretion, that is the discretion to "cancel or amend the order ... or make such other order ... as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission". (At [10].) The Court held that s 44(5) applies, to preclude an appeal to the Māori Appellate Court, "only where the Chief Judge has not entered at all upon the exercise of examining whether there was a mistake or omission or whether to exercise his or her discretion": (At [12].)

While the Judge said, "I decline to exercise my jurisdiction under s 45 of the Act to cancel the succession order", that observation was remedial in nature. It did not fall within the limited scope of s 44(5). We consider that provision applies only where the Chief Judge has not entered at all upon the exercise of examining

whether there was a mistake or omission or whether to exercise his or her discretion. That is not so in this case, for either error.

There was little analysis in the Court of Appeal decision leading to this conclusion. Indeed, aside from the statement just quoted, there was no reasoning.

The ratio of *Inia* is that s 44(5) applies only where the Chief Judge:

- has not considered whether there was a mistake of fact or law; and
- has not considered whether to exercise the discretion to cancel or amend the order.

Mokaraka v Mokaraka – Waima C8 Block [2022] Māori Appellate Court MB 17

In *Mokaraka* an application was made to the Chief Judge to exercise jurisdiction under s 44(1) to amend succession orders made in 1993 and determining ownership of a house. The Deputy Chief Judge (under delegation) granted the amendments relating to the succession orders, but declined to cancel the order determining ownership of the house because her Honour did not consider it in the interests of justice to do so. An appeal was made to the Māori Appellate Court. The Appellate Court noted that the effect of *Inia* was that s 44(5) did not apply because the Deputy Chief Judge had entered upon the exercise of examining whether there was a mistake or omission, meaning the Appellate Court had jurisdiction to hear the appeal (at [17]).

The Māori Appellate Court did not, however, apply the ratio of *Inia*. Instead, the Appellate Court sought submissions from the parties as to whether it had jurisdiction to consider the appeal given s 44(5) (at [9]). One of the parties filed submissions on the question of jurisdiction submitting that s 44(5) applied and the appeal should be dismissed (at [10] and [18]). The other did not (at [10]).

The Court then sought to interpret s 44(5). Citing *Estate of George Amos – Horahora 1A4B*^[8] and *Rameka – Papamoa 2 Sec 2B3C3B1*^[9] the Court commenced its discussion of s 44 noting that the jurisdiction is unique (at [25]):

The special powers of the Chief Judge therefore represent a unique jurisdiction amongst the Courts of New Zealand. Their purpose is an attempt to strike a balance between allowing orders, often historical, to be amended or cancelled where it is necessary in the interests of justice, against the need for orders to be binding and conclusive to provide finality and certainty, recognising the importance of the principle of indefeasibility.

Noting the statutory requirement that the meaning of legislation must be ascertained from its text and in light of its purpose and context (at [27]), the Court turned to the text of s 44(5) (at [27]):

On a plain reading of s 44(5), the meaning of the text appears clear and unambiguous; the Chief Judge can decline to exercise

jurisdiction under s 44 and there is no right of appeal against such dismissals.

The Court reasoned that the key phrase in s 44(5) – being that the Chief Judge “may decline to exercise jurisdiction under this section” – included both the evaluative decision as to whether there was an error and the discretionary decision as to whether the interests of justice required intervention. The Court said it was difficult to infer from that statutory language that s 44(5) only applied in “very limited situations” where the Chief Judge had not entered those evaluative exercises (at [30]).

The Court considered there were three potential junctures where the Chief Judge could decline to exercise the s 44 jurisdiction (at [31]):

- before any evaluation, as contemplated by the Court of Appeal in *Inia*;
- after the evaluation, being satisfied there is no erroneous order or certificate; and
- at the discretionary stage, considering it is unnecessary in the interests of justice to remedy the identified error.

The Court stated that the reference to dismissal in s 44(5), without limited language, did not support an interpretation that restricts s 44(5) to only one of the three junctures (at [31]).

Turning to the purpose and context of s 44(5), the Court accepted that, as an ouster clause, s 44(5) should be given the most limited interpretation it was capable of bearing (at [33]). The Court reasoned that s 44(5) was part of a balance striking mechanism: the Act provided (under s 77) that orders with respect to Māori land were to be conclusive after ten years, but historical orders could be amended or cancelled (under s 44) in the interests of justice (at [34]). Striking the appropriate balance between the interests of justice and finality supported the proposition that appeal rights should not apply to every decision of the Chief Judge to dismiss s 44 applications, not just when the Chief Judge has not engaged on the substantive issue (at [35]). The Court concluded (at [36]):

In considering the meaning of s 44(5), both from its text and in its context, it is clear to us that it applies to all situations where the Chief Judge (or Deputy Chief Judge) declines to exercise jurisdiction and dismisses a s 44 application. Such decisions are not capable of appeal. This aligns with the purposes of the special powers of the Chief Judge to allow a limited power of correction while upholding the need for finality and certainty of orders by ensuring that orders are not easily overturned.

The Court noted that *Inia* was inconsistent with the Māori Appellate Court’s decision in *Haimona v Taiatini*,^[10] which was to the effect that s 44 cannot be exercised unless there is an error; the finding of an error being the prerequisite to the exercise of the jurisdiction (at [38]-[41]).

The Court also reasoned that the process that must be followed, under the Māori Land Court Rules, would render s 44(5) meaningless on the Court of Appeal’s reasoning. When an application is received, the Rules require the preparation of a preliminary report by the Registrar setting out various

details of the alleged error and the courts records and making recommendations. That report must be forwarded to the Chief Judge. There would never be a situation where the Chief Judge would not enter the evaluative exercise, because in all cases the Chief Judge will receive and consider the Registrar's report (at [42]-[46]).

Furthermore, the Court noted the High Court's decision in *Bennett v Māori Land Court*^[11] to the effect that where the Chief Judge receives the Registrar's report and proposes to dismiss the application, fairness requires that the report be referred to the applicant for comment (at [47]-[48]). The Court's implicit point was that the Chief Judge cannot dismiss an application without also hearing from the applicant on the Registrar's report, meaning the *Inia* approach to s 44(5) could never eventuate.

The Court noted s 46, which permits the Chief Judge to refer an application to the Court or Māori Appellate Court for inquiry and report, and to state a case to the High Court. Noting that applications are often referred to the Māori Land Court, the Court stated the Chief Judge on receipt of that report would invariably enter into the exercise of examining whether there was a mistake or whether to exercise discretion prior to any dismissal. If s 44(5) could only apply where the Chief Judge had not entered that exercise, then it would essentially render s 44(5) meaningless (at [49]-[51]).

The Court noted there was only one situation of which it was aware (after extensive research) where a s 44 application had been dismissed without any kind of examination of the matter. That was where the applicant had withdrawn the application and the dismissal was by consent (at [52]).

Finally, the Court noted that it had been previously argued (unsuccessfully) that s 44(5) only applies in situations where the Chief Judge may decline to exercise jurisdiction for procedural reasons. Those reasons might include (at [53]):

- where the application does not relate to an order of the Court;
- where the application does not otherwise come within s 44 of the Act;
- where the applicant does not have standing;
- where an applicant cannot claim to have been adversely affected by the order as required under s 45(1); and
- where an applicant has not complied with any direction under s 45(2) or an application that comes within s 44(4).

In reference to those arguments, the Court said (at [53]):

Those arguments did not succeed then and cannot succeed now. While we accept that it may be theoretically possible for the Chief Judge to dismiss a s 44 application on procedural grounds, we have found no examples of this ever occurring. Indeed, a decision by the Chief Judge to decline to exercise the s 44 jurisdiction without undertaking any assessment or examination could be criticised as arbitrary.

The Court set out its conclusion, directly at odds with the Court of Appeal's decision in *Inia* and without reference to the doctrine of precedent, as follows (at [54]):

The meaning of s 44(5) is plain from its terms and in light of its purpose and context. Section 44(5) applies, without qualification, where the Chief Judge (or Deputy Chief Judge) declines to exercise discretion under s 44 and dismisses an application. In such circumstances there is no right of appeal. An interpretation which would narrow the application of s 44(5) to apply only to dismissals where the Chief Judge has *not* entered at all upon the exercise of examining whether there was a mistake or omission or whether to exercise his or her discretion is inconsistent with the purpose of the Chief Judge's special jurisdiction. It would also render s 44(5) almost meaningless, given that the provisions relevant to the Chief Judge's special powers contemplate the necessity of an examination or inquiry prior to the Chief Judge deciding to either dismiss an application or grant orders.

Hei whakaaro – Comments

The doctrine of precedent

The doctrine of precedent is known as *stare decisis*. It is the principle that courts are bound to accept and apply the principles of law laid down by courts of higher authority.^[12] Certain values underpin the doctrine, including fairness and equity (the notion that like cases should be treated alike) and certainty of law (which promotes uniformity and consistency in the law and decision-making).^[13] In New Zealand, Parliament has recognised the doctrine by declaring that, subject to any decision of the Supreme Court, decisions of the Court of Appeal under the Declaratory Judgments Act 1908 are binding as precedents “in all other Courts in New Zealand”.^[14] While not technically bound to follow its earlier precedents, the Court of Appeal has stated when it might depart from or overrule its earlier precedents^[15] and the Supreme Court has also said when it might not follow the decisions of the Privy Council.^[16]

Because appeals are made from the Māori Appellate Court to the Court of Appeal,^[17] the doctrine of precedent means that the Māori Appellate Court must follow the decisions of the Court of Appeal, whether the judges of the Māori Appellate Court agree with those decisions or not.

While the Court of Appeal's decision in *Inia* was not made under the Declaratory Judgments Act 1908, it is clear that the decision stood as a precedent to be followed in the Māori Land Court and Māori Appellate Court.

The Māori Appellate Court's decision in *Mokaraka* not to follow *Inia* is a departure from the doctrine of precedent. As noted above, that departure is possibly without precedent. At the time of writing, no appeal has been made from the Māori Appellate Court's decision.

One can readily understand the sense of frustration that must be experienced by a specialist court where the Court of Appeal gives a decision about that specialist jurisdiction that:

- lacks almost any reasoning on a question of jurisdiction;
- lacks a full consideration of the legislative context in which the statutory provision rests; and
- which lacks awareness of decisions from the specialist jurisdiction that are directly on point.

One of the consequences of the doctrine of precedent is that it is supposed to make the task of judges easier: they do not need to canvass the many complications and doubts of every case, that a court of higher authority has already entertained:^[18]

The application of precedent means that judges are not required to reason fully through the decision-making process. Having determined that the facts of a case are similar to those of a previous one, judges may reach a finding by the simple application of the precedent rule of law. The judge's task is therefore made easier: there is no need to canvass the many complications and doubts of every case.

Here the Court of Appeal in *Inia* did not canvass the various complications and doubts in relation to s 44(5) in its decision. That did not make the task of the Māori Appellate Court any easier when it could not contemplate a situation where the ratio of *Inia* could be applied in practice. From their perspective, the effect of *Inia* was to render one aspect of their specialist jurisdiction – s 44(5) – meaningless.

As matters currently stand, litigants who have unsuccessfully applied for relief under s 44 face a dilemma. Should they seek to appeal the decision of the Chief Judge (or Deputy Chief Judge) to dismiss the application to the Court that has held it lacks jurisdiction to entertain that appeal, where there is conflicting higher authority to the effect that the appellate court has jurisdiction to hear the appeal? They will almost certainly fail in the Māori Appellate Court by virtue of the *Mokaraka* decision and be pressed to appeal further to the Court of Appeal where they will be faced with arguing against the reasoning in *Mokaraka*. If successful there, they would return to the Māori Appellate Court to argue the appeal. That adds to the cost of litigation and undoubtedly affects strategic decision-making.

One option open to the Māori Appellate Court was to apply *Inia* – and determine that it had jurisdiction to hear the appeal – but to express the doubts it considered existed for that conclusion. That would have been consistent with the doctrine of precedent and would have given one of the parties in the litigation, or future parties in other cases, the opportunity to appeal to the Court of Appeal to seek to overturn *Inia* for the reasons expressed by the Māori Appellate Court.

Explaining Inia

The reasoning for the conclusion in *Inia* is light. Perhaps another way for the Court of Appeal to express its conclusion would have been this: the Deputy Chief Judge had considered and declined the s 44 application insofar as it sought to cancel a succession order. The Deputy Chief Judge made an order under s 44 not to cancel the succession order. That order was, by virtue of s 49(1), subject to appeal to the Māori Appellate Court. The question became whether s 44(5) applied to preclude any appeal.

Whilst the Deputy Chief Judge had expressed the order as declining to exercise jurisdiction, the Deputy Chief Judge was in fact exercising jurisdiction under s 44 to decide as much. Her Honour had considered the merits of the application and, having found an error, determined that it was not in the interests of justice to cancel the order. As such, her Honour had exercised jurisdiction under s 44 and s 44(5) did not apply. Section 44(5) precludes an appeal where no jurisdiction is exercised; here jurisdiction was exercised. There was, therefore, no bar to the Māori Appellate Court considering an appeal against that order.

Does Inia render s 44(5) “meaningless”?

The Māori Appellate Court makes a sound point in doubting whether there exists a possibility where the Chief Judge could ever dismiss a s 44 application without entering an evaluative exercise. The Court concluded the Court of Appeal’s reasoning would render s 44(5) “almost meaningless” given the necessity for there being some inquiry prior to any decision to dismiss an application (at [54]). But is that correct?

The Māori Appellate Court interpreted s 44(5) in light of delegated legislation, the Māori Land Court Rules 2011. The reasoning was that because the rules always requires some form of inquiry once a s 44 application is made, there could almost never be a situation where the Chief Judge did not embark on the evaluative exercise. The circumstances in which regulations may be considered as an aid for interpreting a statute are, however, limited. The general rule is that the regulations must be contemporaneous with the statute and the statute itself must be ambiguous.^[19] There is an immediate issue with the contemporaneity of the rules of 2011 being a guide to an Act of Parliament of 1993. Furthermore, and as is discussed below, the origins of s 44(5) lie in legislation of 1922. It does not follow that rules made in 2011 are an appropriate aid in statutory interpretation.

There are other issues. It is correct that on receipt of any s 44 application the rules require that the Chief Registrar “must” (and so in all circumstances) prepare a report and send it to the Chief Judge.^[20] But that does not necessarily mean the Chief Judge “must” (and so in all circumstances) consider that report, as the Māori Appellate Court concluded (at [46]). Neither the rules nor the Act require that. The statute only provides, in this regard, that the Chief Judge “may” refer the application to the “court” (which arguably might be considered to include, in this context, the Chief Registrar of the Māori Land Court) or the Māori Appellate Court.^[21] There may be circumstances, such as those in *Bennett*, where natural justice requires the Chief Judge to provide someone the opportunity to comment on the report before dismissing the s 44 application. There may, also, be circumstances where that is not required. It is surely possible that the Chief Judge might conceivably dismiss a s 44 application without having read the Chief Registrar’s report for reasons set out below.

This leads to a critical consideration: could there be situations where the Chief Judge might lawfully dismiss an application under s 44 without entering an evaluative exercise? The Māori Appellate Court identified six possibilities (at [53]):

- an application did not relate to an order made by the Court;
- the application did not otherwise come within s 44 of the Act;
- the applicant lacked standing;
- the applicant was not adversely affected;
- an applicant failed to comply with an order under s 45(2) requiring a security of costs;
- the application related to a vesting order made under Part 6 in respect of Māori customary land, contrary to s 44(4).

The Māori Appellate Court considered the above to be “theoretically possible”, but said there were no examples that the Chief Judge had ever declined to exercise the s 44 in any of these situations. That begs the question: just because the situations might not have happened yet does not mean they could not occur. The theoretical reasons identified by the Māori Appellate Court provide the potential situations where the *Inia* view of s 44(5) applies in a meaningful, and not meaningless, way.

Legislative history to s 44

Perhaps the Māori Appellate Court’s strongest point is that the meaning of s 44(5) is to be ascertained from its text in light of purpose and context. The Court of Appeal’s decision lacks a broad assessment of the purpose and context to s 44(5), something the Māori Appellate Court sought to provide. Indeed, one could go further and review the legislative origins of the Chief Judge’s power to correct mistakes, including the ability to appeal the exercise (or decision not to exercise) those powers. It is accepted that repealed Acts of Parliament may be regarded when interpreting modern Acts of Parliament.^[22]

The legislative history to s 44 is complex. It is hoped that the following summary of that history is both helpful and (though it might be a stretch) interesting.

Under the first legislation by which the Native Land Court operated, the Native Lands Act 1862, there was no Chief Judge, no express power for any Judge of the Court to correct any mistake or omission, no ability to rehear any case and no ability to appeal any decision. Rather, every court constituted under the Act was to be under the “Presidency of a European Magistrate” and the Court was to “exercise such powers as the Governor may from time to time appoint”.^[23] The Act provided for few matters beyond the determination of title,^[24] the issue of a certificate of title^[25] and the disposal of such lands.^[26]

The position of the Chief Judge was first established in the Native Lands Act 1865. There was no express ability for any Judge to correct mistakes, but the Act did provide for re-hearings. Part 10 of the Act was entitled “Appeal” and contained one provision, s 81. Section 81 enabled the Governor in Council to order a rehearing of any matter “judicially heard”.^[27]

The Native Lands Act Amendment Act 1868, s 3, appears to be the first express power the Native Land Court judiciary had to correct errors. The

Act permitted the Chief Judge and every Judge of the Native Land Court to amend “all defects and errors in any proceeding in such Court”:

The Chief Judge and every Judge of the Native Land Court may at all times amend all defects and errors in any proceeding in such Court whether there is anything in writing to amend by or not and whether the defect or error be that of the party applying to amend or not and all such amendments may be made with or without costs and upon such terms as to the Judge may seem fit and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made if duly applied for.

In the House of Representatives the only apparent explanation of the legislative intent behind s 3 was James Richmond’s statement that:^[28]

The other clauses had been introduced by the desire of the Attorney-General, not so much to strengthen the Native Lands Court as to avoid litigation which might arise, with no result but disappointment to the suitor. Any cases in the Native Lands Court, if carried into the Supreme Court, must be referred back again, and the real appeal for a dissatisfied claimant was in a re-hearing, which the Government had always the power of granting upon the applications of the claimant.

In the Legislative Council, Daniel Pollen explained that s 3:^[29]

only concerned technical defects in forms of procedure, and allowed that, where a failure of justice might occur from the want of strictly applying the rules of the Court by Natives not acquainted with the mode of procedure, the documents might be amended.

Subsequent Native Land legislation in the 1880s retained the capacity to seek a re-hearing^[30] and the power of the Chief Judge and other judges to correct defects and errors.^[31]

1894 marked a change. The Native Appellate Court was established.^[32] Rehearings were removed.^[33] The Appellate Court comprised the Chief Judge and other judges of the Native Land Court as appointed by the Governor.^[34] There was a general 14-day period within which to appeal as of right, but the Chief Judge could grant leave to appeal up to three months from the date of the decision.^[35]

The power to correct mistakes was retained in ss 38 and 39 of the Native Land Court Act 1894. Section 38 permitted any judge to remedy or correct defects or errors in any proceeding or document or to give effect to (or record) the intended decision. Section 39 concerned amendments after title had been ascertained. Section 39 provided the Chief Judge with a power and discretion to correct mistakes in orders of the Court in the following circumstances:

- The power arose where through any mistake, error or omission the Court had done something which it did not actually intend to do^[36] or decided any point of law erroneously.
- Any person alleging to be affected by the mistake, error, omission or erroneous decision in point of law could apply in writing.

- The Chief Judge had the power and discretion to make to remedy the mistake, error or omission or vary the actual or intended decision.
- The Chief Judge could do so “at any time” after title had been ascertained or the order matured.
- If the land had been alienated after title had been ascertained, all parties to the alienation were required to consent to any amendment made by the Chief Judge.
- Any decision of the Chief Judge was final, unless he granted leave to appeal within seven days.

The general power for the Court to correct defects was Act was carried through to the Native Land Act 1909, but the Chief Judge’s power to correct mistakes was not. The 1909 Act included a power for the Court and any Judge to make “all such amendments as are considered necessary to give effect to the intended decision or determination of the Court or to record the actual course and nature of any proceeding in the Court.”^[37] Rehearings were re-introduced (on applications made within 14 days)^[38] and the ability to appeal to the Native Appellate Court was retained (with notices of appeal to be filed within six weeks of the order appealed from).^[39] The Act also introduced the principle that no order relating to native land made by the Land Court or the Appellate Court could be annulled, quashed or declared invalid by any Court more than ten years after the date of the order.^[40]

In 1922 the Chief Judge’s jurisdiction to correct mistakes was re-instated through the Native Land Amendment and Native Land Claims Adjustment Act 1922. The 1922 Act provided the Chief Judge with jurisdiction, on application, to amend, vary, cancel any order of Native Land or Appellate Court or revoke any decision of either court.^[41] There needed to be a mistake, error or omission by either court in an order or an error of law. On receiving an application, the Chief Judge was permitted to refer the application to the Court for inquiry and report.^[42] The Chief Judge was permitted to act upon that report or otherwise deal with the application without formal sittings or hearing the parties in open Court.^[43] The Chief Judge could require security for costs from any applicant and summarily dismiss the application where it was not deposited.^[44] The jurisdiction did not relate to any order for the investigation of title or partition, save for the relative interests that were defined.^[45]

Section 44(5) has its origins in s 7(2) of the 1922 amendment:^[46]

Any order made by the Chief Judge upon such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same manner as any final order of the Court, but there shall be no appeal against the refusal to make any such order.

There was no discussion in the House or Legislative Council of the Chief Judge’s powers or the reason for there being no appeal against the refusal to exercise the powers.^[47] The purpose in allowing an appeal where the Chief Judge amended, varied or cancelled an order – but not where the Chief Judge refused to do so – was not stated. One presumes the reason was to afford any person affected by the change caused by the Chief

Judge's amendment, variation or cancellation the chance to appeal. Where no change occurred, there was no need for an appeal.

These powers were included largely unamended in the Native Land Act 1931, an Act "to consolidate and amend the Law relating to Native Land".^[48] Judges had the power to amend all defects or errors in the proceeding on such terms as the Court thought fit.^[49] Judges were able to make "all such amendments as are considered necessary to give effect to the intended decision or determination of the Court".^[50] The Chief Judge retained the power to amend, vary or cancel any order of the Land Court or Appellate Court where there had been any mistake, error or omission.^[51] The Chief Judge's decision to amend, vary or cancel any prior order was subject to appeal to the Native Appellate Court, but the Chief Judge's decision refusal to make any such order was not.^[52] Subject to the Chief Judge's powers, no orders were to be annulled by any Court in proceedings instituted more than ten years of the date of the order.^[53] Again, there was no comment about these powers during the Native Land Bill's passage through Parliament.^[54]

An amendment in 1935 specified that the Chief Judge's jurisdiction related to any mistake, error or omission whether of fact or law "howsoever arising".^[55] The amendment clarified that the mistake could arise from the applicant.^[56]

The Chief Judge's jurisdiction was continued in the Maori Affairs Act 1953, s452. The 1953 Act was also an Act to consolidate and amend.^[57] The scope of the jurisdiction included mistakes, errors or omissions in "the presentation of the facts of the case".^[58] The Chief Judge had "absolute discretion" to decline to exercise the jurisdiction.^[59] Where the Chief Judge was satisfied there had been a mistake, error or omission, the Chief Judge had the power to cancel or amend the order or make any such other order to remedy the mistake, error or omission.^[60] Every such order was subject to appeal to the Māori Appellate Court.^[61] No appeal lay, however, from the dismissal by the Chief Judge of an application under s 452:^[62]

No appeal shall lie to the Appellate Court from the dismissal by the Chief Judge of an application under this section.

Subject to the Chief Judge's power, orders relating to Māori land could not be annulled ten years after their date.^[63] The 1953 legislation also contained a general power for Judges to amend orders (warrants, records or other documents) to give effect to the true intention of any decision or determination.^[64]

The next key legislative step was the Te Ture Whenua Māori Act 1993. The s 44 jurisdiction is set out above. The 1993 Act was not expressed as one of consolidation, but an Act "to reform the laws relating to Māori land in accordance with the principles set out in the Preamble". There was no comment by members concerning the appealability of the Chief Judge's powers.^[65] One member stated there was an intention to draft the legislation so that people could actually understand it.^[66] That may be taken to indicate that at least some of the changes in statutory wording were for readability and not necessarily for reform purposes.

The following points could be made about the development of the s 44 jurisdiction:

- The Chief Judge's power to correct mistakes can be traced to the Native Lands Act Amendment Act 1868. At that time, there was no Appellate Court and rehearings could be granted only within six months of the decision at issue. The power to correct mistakes was held by all judges of the Native Land Court and was akin to a slip-rule. The apparent legislative intention was to provide the Court a means to correct technical defects.
- When the Appellate Court was established in 1894, re-hearings were initially removed, but the Chief Judge's power to correct errors was initially retained.
- Between 1909 and 1922 the Chief Judge's power to correct errors was absent from the legislation. During this period, a general slip rule was in effect.^[67] There was also the ability to seek a rehearing or to appeal a decision to the Appellate Court.
- The Chief Judge's jurisdiction to correct errors was re-instated in 1922 in a form more similar to the current jurisdiction. The origin of s 44(5) lies in this legislation. The wording of that provision appears to draw a sharp distinction between the decisions of the Chief Judge to correct mistakes as being subject to appeal with there being no appeal against the refusal to correct any mistake.^[68]
- Since then, the Chief Judge's jurisdiction has remained relatively constant in the legislation of 1931, 1953 and 1993.
- The wording of the provision precluding appeals against the refusal to exercise the powers has, however, shifted from:^[69]

Any order made by the Chief Judge upon such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same manner as any final order of the Court, but there shall be no appeal against the refusal to make any such order.

to:^[70]

(6) Every such order shall be deemed to be an order of the Court and shall be subject to appeal to the Appellate Court. ...

(7) No appeal shall lie to the Appellate Court from the dismissal by the Chief Judge of an application under this section.

to:^[71]

The Chief Judge may decline to exercise jurisdiction under this section in respect of any application, and no appeal shall lie to the Maori Appellate Court from the dismissal by the Chief Judge of an application under this section.

There is a notion that consolidating statutes do not alter the law. Where a provision in a consolidating Act is couched in slightly different terms from its predecessor, it may be presumed the difference is cosmetic only and does not change the substance.^[72] Here, the Acts of 1931 and 1953 were both Acts of consolidation and amendment and the 1993 Act was one of reform. In reframing the language of the capacity to appeal decisions of

the Chief Judge, was Parliament intending a change or not? *Hansard* is distinctly unhelpful.

If no change was intended, then the legislative history to s 44(5) does tend to support the Māori Appellate Court's view. That is because the precursors to s 44(5) more clearly stated that appeals were only to lie against decisions to correct mistakes, but not against decisions not to change orders to correct mistakes. A plain reading of those provisions is that in all situations where the Chief Judge refused to make the orders sought (or dismissed the application) there was no ability to appeal. The change to the language of jurisdiction in the 1993 Act ("The Chief Judge may decline to exercise jurisdiction ... and no appeal shall lie ... from the dismissal") was cosmetic only. The redrafting may have been, as one Member put it, to make the law actually understood, though there may be some irony in applying that statement to s 44(5) given the conflicting case law that has resulted.

If Parliament intended reform through the new wording of s 44(5), that intention was truly subtle. It must be noted that the 1993 Act removed the reference to the Chief Judge's "absolute discretion", which might be indicative of a shift in the degree to which the Chief Judge's decisions were to be subject to appeal. But the change effected would have been from no decisions being subject to appeal, to all decisions being subject to appeal aside from those where the Chief Judge did not enter an evaluative exercise.

My own view is that taken as whole, the legislative history to s 44 points to there being a need to appeal decisions that change orders already made, something that is only to happen in exceptional circumstances, with there being no such need to allow an appeal against a decision not to change an order. That is so particularly in light of the ability to appeal a decision in which the mistake is claimed to exist and the statutory principle of the finality of decisions. My own view is that the Māori Appellate Court has more correctly interpreted s 44(5) from its text and in light of its purpose and context such that the Court of Appeal should reconsider *Inia* when the opportunity arises.

The slip rule in the ordinary courts

By way of final comment, it may assist to place the truly "special" powers of the Chief Judge of the Māori land Court in the broader context of other New Zealand courts.

The Chief Judges of other courts do not have special powers to correct the mistakes and errors made by the judges of those courts. What other courts possess is known as a 'slip rule'. The District Court, High Court, Court of Appeal and Supreme Court all have almost identical rules that permit the Court or a Registrar to correct a decision if it:^[73]

- contains a clerical error or an error or omission arising from an accidental slip or omission, whether made by an officer of the court or not; or
- it is drawn up so it does not express what is decided or intended.

Some of the principles that have developed in relation to the slip rule in the High Court setting are:^[74]

- The rule reflects the Court's inherent jurisdiction to correct errors in orders as a result of a slip or accidental omission.^[75]
- The starting point is that once a judgment is perfected by sealing, in the interests of finality, it is not generally open to a party to challenge it except by way of the exercise of an available right of appeal. This starting point must yield to principles of natural justice or fairness in the context of litigation.^[76]
- The slip rule does not apply where the order implements exactly what was intended by counsel or a party, but is later discovered to be mistaken. In those circumstances, an application for recall is more appropriate.^[77]
- The rule cannot be used to improve on, to permit second thoughts about, or to resolve a contended internal ambiguity in the judgment that has been obtained.^[78]
- The jurisdiction will not be invoked where further evidence is required to determine the question at hand.^[79]

Examples of the use of the slip rule include: ^[80]

- The wrong section of the Act was stated in the judgment.^[81]
- An order was amended to include standard items of disbursements, which had inadvertently been omitted.^[82]
- Transposition of the plaintiff and defendant in the heading.^[83]
- Correcting the spelling of the respondent.^[84]

Section 44 is clearly wider than the slip rule applied in the ordinary courts. Section 44 permits the correction of any error of fact or law caused by a mistake (or omission) of the Court or Registrar or in the presentation of the facts to the court or Registrar. The slip rule permits the correction of a much narrower subset of mistakes:

- clerical errors;
- errors or omissions arising from accidental slips or omissions; and
- decisions drawn up that do not express what was decided or intended.

Where the order of the Māori Land Court contains an error of fact or law made by mistake by a Judge, the Chief Judge has the jurisdiction to cancel the order. That is, essentially, the jurisdiction exercised by a court on appeal where the appellant argues the judge erred in fact or law.

Ngā kupu āpiti – Notes:

[1] [Mokaraka v Mokaraka – Waima C8 Block](#) [2022] Māori Appellate Court MB 17 (2022 APPEAL 17).

[2] [Inia v Julian](#) [2020] NZCA 423.

[3] *Haimona v Taiatini – Te Karaka No 1A* [2016] Māori Appellate Court MB 390 (2016 APPEAL 390) at [43]-[46].

[4] Te Whenua Māori Act 1993, s 43.

[5] Te Whenua Māori Act 1993, s 58.

[6] Te Whenua Māori Act 1993, s 71(1).

[7] The Deputy Chief Judge has and may exercise, subject to the direction of the Chief Judge, the powers, functions and duties of the Chief Judge under ss 44 to 48: Te Ture Whenua Māori Act 1993, s 48A. The Chief Judge also has a general power to delegate his powers, functions and duties to the Deputy Chief Judge: Te Ture Whenua Māori Act 1993, s 8A(1).

[8] *Estate of George Amos – Horahora 1A4B* [2002] Chief Judge's MB 54 (2002 CJ 54).

[9] *Rameka – Papamoa 2 Sec 2B3C3B1* [2016] Chief Judge's MB 457 (2016 CJ 457).

[10] *Haimona v Taiatini – Te Karaka No 1A* [2016] Māori Appellate Court MB 390 (2016 APPEAL 390) at [43]-[46].

[11] *Bennett v Māori Land Court* HC Whangarei, CP5/99, 11 August 2000.

[12] *Laws of New Zealand Courts* at [37]. Stare decisis translates as "let the decision stand": Jacinta Ruru, Paul Scott, Dunacan Webb *The New Zealand Legal System: Structures and Processes* (6th ed, LexisNexis, Wellington, 2016) at 408.

[13] Jacinta Ruru, Paul Scott, Dunacan Webb *The New Zealand Legal System: Structures and Processes* (6th ed, LexisNexis, Wellington, 2016) at 101. The authors list (at 101) other values as being: ease of decision-making (judges may reach a finding by the simple application of precedent), detail (in comparison with statute law, precedent allows more detail in the law), flexibility (because law is contained in decisions, rather than clear rules, there is more room for interpretation), ad hoc-ism (the common law fills gaps in the law as they arise) and controls on decision-making power (precedent acts as safeguard against the whims of a particular decision-maker). See also the authors' discussion of the principle at 407-419.

[14] Declaratory Judgments Act 1908, s 12.

[15] Prior to the establishment of the Supreme Court, New Zealand's Court of Appeal identified circumstances where it would overrule its past decisions: see *Dahya v Dahya* [1991] 2 NZLR 150 (CA). There Cooke P stated (at 155-156) a "cogent reason must be necessary to justify departure from such degree of certainty as the doctrine of stare decisis achieves".

[16] In *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 a majority of the Supreme Court decided not to apply, and effectively overruled the ratio of, an earlier decision of the Privy Council on appeal from the New Zealand Court of Appeal (*Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721). In overruling that decision, Tipping J stated that previous decisions of a final appellate court should be departed from only in "compelling circumstances": *Couch v Attorney-General (No 2)* at [104]. McGrath J stated "cogent reasons" were needed for the Supreme Court to reconsider or depart

from a decision of the Privy Council, but added: “rigid adherence to precedent would perpetuate inappropriate legal rules, continuation of which is not justified by the advantages of certainty”: *Couch v Attorney-General (No 2)* at [210].

[17] Te Ture Whenua Māori Act 1993, s 58A.

[18] Jacinta Ruru, Paul Scott, Dunacan Webb *The New Zealand Legal System: Structures and Processes* (6th ed, LexisNexis, Wellington, 2016) at 101.

[19] *Interfreight Ltd v Police* 3 NZLR [1997] 688 (CA) at 692.

[20] Māori Land Court Rules 2011, r 8.3(1).

[21] Te Ture Whenua Māori Act 1993, s 46(1).

[22] Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 351.

[23] Native Lands Act 1861, s 5.

[24] Native Lands Act 1861, s 7.

[25] Native Lands Act 1861, s 12.

[26] Native Lands Act 1861, s 17.

[27] No order for a rehearing was to be made more than six months after the decision in question. There was no stated process for applications for rehearings, though applications were presumably made to the government and not to the Court because the power lay with the government to order the re-hearing.

[28] (8 October 1868) 4 NZPD 231.

[29] (15 October 1868) 4 NZPD 332.

[30] Re-hearings were provided for in: Native Land Act 1873, 58; the Native Land Court Act 1880, s 47; the Native Land Court Act 1886, ss 75-78.

[31] The power to correct defects and errors was provided for in: Native Land Act 1873, 104; the Native Land Court Act 1880, s 59; the Native Land Court Act 1886, s 63.

[32] Native Land Court Act 1894, s 79.

[33] Transitional provisions related to applications for rehearings already made: Native Land Court Act 1894, s 91 (no appeals lay from rehearings made prior to the Act) and s 94 (applications for rehearings made but not dealt with prior to the Act were, at the Chief Judge’s discretion, to be dealt with as appeals under the new Act).

[34] Native Land Court Act 1894, s 79.

[35] Native Land Court Act 1894, s 84.

[36] Or had left something undone which it did not intend to be left undone.

[37] Native Land Act 1909, s 27(1).

- [38] Native Land Act 1909, s 28(1).
- [39] Native Land Act 1909, s 48(3).
- [40] Native Land Act 1909, s 38(1).
- [41] Native Land Amendment and Native Land Claims Adjustment Act 1922, s7(1).
- [42] Native Land Amendment and Native Land Claims Adjustment Act 1922, s7(3).
- [43] Native Land Amendment and Native Land Claims Adjustment Act 1922, s7(3).
- [44] Native Land Amendment and Native Land Claims Adjustment Act 1922, s7(4).
- [45] Native Land Amendment and Native Land Claims Adjustment Act 1922, s7(10).
- [46] Native Land Amendment and Native Land Claims Adjustment Act 1922, s7(2).
- [47] See (1922) 198 NZPD at 682, 775-776, 761, 798 for the Bill's full passage through Parliament.
- [48] Native Act 1931, Long Title.
- [49] Native Land Act 1931, s35.
- [50] Native Land Act 1931, s36.
- [51] Native Land Act 1931, s38.
- [52] Native Land Act 1931, s38(2): "Any order made by the Chief Judge upon such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same manner as any final order of the Court., but there shall be no appeal against the refusal to make any such order."
- [53] Native Land Act 1931, s51.
- [54] See 229 (1931) NZPD 658; 230 (1931) NZPD 173, 559-578, 579, 615, 947. Perhaps this is to be expected, given the comment of Mr O'Brien (MP for Westland): "Just a few years ago we had a consolidating measure relating to the land laws of New Zealand, which went through this House, if I remember rightly, in three of four hours. I understand that that measure was in the hands of the Law Draftsmen over two years, and I would ask any honourable member who was here then whether he understood every clause that he dealt with in that short time. If members were to go through the Bill that is before us at the present time, dealing as it does with Native legislation extending over the last twenty years, they would have to spend not only a few hours in this chamber but a few days in studying it out to see whether the consolidation is exactly in the right direction or not." (28 October 1931) 230 NZPD 573.
- [55] Native Purposes Act 1935, s3.
- [56] Native Purposes Act 1935, s3.

- [57] Maori Affairs Act 1953, Long Title.
- [58] Maori Affairs Act 1953, s452(1).
- [59] Maori Affairs Act 1953, s452(1).
- [60] Maori Affairs Act 1953, s452(5).
- [61] Maori Affairs Act 1953, s452(6).
- [62] Maori Affairs Act 1953, s452(7): “No appeal shall lie to the Appellate Court from the dismissal by the Chief Judge of an application under this section.”
- [63] Maori Affairs Act 1953, s68.
- [64] Maori Affairs Act 1953, s60(1).
- [65] See the Bill’s progression through Parliament: 531 (1992) NZPD 12236-12245, 12363-12368, 124050-12420 and 533 (1993) NZPD 13403, 13585-13586, 13593-13594, 13656-13667, 13740-13743, 13759-13764.
- [66] Sonja Davies (MP for Pencarrow): “The present legislation suffers enormously from its complexity in terms of both its language and the numerous amendments that have been made over the years. We particularly wanted to ensure that we had legislation that people could actually understand. If we have done that, we have made quite a breakthrough.” (18 November 1992) 531 NZPD 12419; second reading of the Māori Affairs Bill, which was later renamed the Te Ture Whenua Māori Bill.
- [67] Native Land Act 1909, s 27(1).
- [68] Native Land Amendment and Native Land Claims Adjustment Act 1922, s7(2): “Any order made by the Chief Judge upon such proceedings amending, varying, or cancelling any prior order shall be subject to appeal in the same manner as any final order of the Court, but there shall be no appeal against the refusal to make any such order.”
- [69] Native Land Amendment and Native Land Claims Adjustment Act 1922, s7(2); and Native Land Act 1931, s38(2).
- [70] Māori Affairs Act 1953, s452(6) and (7).
- [71] Te Ture Whenua Māori Act 1993, s 44(5).
- [72] Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 647.
- [73] District Court Rules 2014, r 11.10; High Court Rules 2016, r 11.10; Court of Appeal (Civil) Rules 2005, r 8; Supreme Court Rules 2004, r 43A.
- [74] See generally Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers, updated to 10 June 2022) at [HR11.11.01].
- [75] *Milson v Carter* [1893] AC 638 at 640; *Nash v Nash* (1995) 8 PRNZ 575 (CA).
- [76] *Creative Development Solutions v Chorus New Zealand Ltd* [2020] NZHC 2180 at [25].

[77] *Sloots v Sloots* [2020] NZHC 1696 at [7]; *FL Trustees 2012 Ltd v Moore* [2021] NZHC 763 at [10]. In the High Court, recall occurs under r11.9. Recall may happen at any time before a formal record of the judgment is drawn up and sealed.

[78] *Broadview Investments Co Pty Ltd v Corporate Interiors (NZ) Ltd* HC Wellington CP123/92, 12 August 1998; *Bhullar v Auckland Co-operative Taxi Society Ltd* [2018] NZHC 1375 at [3].

[79] *Brickell v Attorney-General* (2002) 16 PRNZ 557 (HC); *FL Trustees 2012 Ltd v Moore* [2021] NZHC 763 at [14] and [17].

[80] See generally Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers, updated to 10 June 2022) at [HR11.11.05].

[81] *Crewther v Welch (No 2)* (1992) PRNZ 350.

[82] *Nash v Nash* (1995) 8 PRNZ 575 (CA).

[83] *Dairy Meats (NZ) Ltd v Blue Sky Meats (NZ) Ltd* HC Invercargill CP9/97, 27 May 1997.

[84] *Turrall v Bluett* [2018] NZHC 760.

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Te Kōti Whenua Māori – Māori Land Court

[Injunction](#) – permanent injunction – accessway – *Donaldson v Hemi* – *Whaanga 1D1D Roadway* (2021) 230 Waikato Maniapoto MB 168 (230 WMN 168) – Toni Love