

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Sir Edward Taihakurei Durie student essay competition 2022

Te Ture o Takutai Moana kei muri i te kēhi o *Re Edwards*: examining approaches to overlapping claims for customary marine title

Essay by William Morrison*

Foreword by Carwyn Jones, Māori Law Review co-editor

We are very pleased to publish the winning entry from the 2022 Sir Edward Taihakurei Durie student essay competition. The winning essay was written by William Iosefa Antonio Morrison and is entitled 'Te Ture o Takutai Moana kei muri i te kēhi o *Re Edwards*: examining approaches to overlapping claims for customary marine title'.

The Sir Edward Taihakurei Durie student essay competition is held annually and sponsored by the Māori Law Review. The competition is open to all undergraduate students studying law at a New Zealand law school and aims to recognise excellence in legal writing on significant and current legal issues affecting Māori.

William's essay focuses on the pathways under the Marine and Coastal Area (Takutai Moana) Act 2011 (the MACA Act) for the resolution of overlapping Customary Marine Title applications, particularly in light of the 2021 decision of the High Court, *Re Edwards (Te Whakatōhea No. 2)*. This was the first case to address overlapping applications under the MACA Act and, as such, it represents another significant step in the long-running efforts by Māori to receive legal recognition and protection of rights in relation to the takutai moana.

(Continued at p 3)

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William (Taga Savai'i ma Tafitoala Safata, Sāmoa) is in his final year at Te Herenga Waka – Victoria University of Wellington, completing an LLB(Hons) and a BA majoring in Political Science. In 2022, he was Co-President of the Pasifika Law Students' Society at Te Herenga Waka.

Alongside the competition winner, our judges also indicated that they wished to highly commend the essay submitted by Claire Downey. We will publish Claire's essay, entitled 'Absent from the Law: The needs of Takatāpui Māori in Health, Law and Policy', in the March issue.

Congratulations to both William and Claire.

Hei tīmatanga – Introduction

The takutai moana pertains to the Māori identity. Tangaroa (god of the sea and a manifestation of the sea itself) descends from Ranginui and Papatūānuku.^[1] All Māori are connected to this whakapapa. These genealogical links inform the relationship between Māori and the ngāhere, the animals, the elements and each other.^[2] It is important to begin any discussion of customary interests in the takutai moana with a recognition of this connection. This is because these contemporary legal issues and processes speak to the mamae inflicted on this whakapapa and inform the importance of recognition of custom in the takutai moana.

The Marine and Coastal Area (Takutai Moana) Act 2011 (the MACA Act) provided applicant groups with two pathways to establish legal recognition of customary marine title (CMT): negotiating directly with the Crown; or applying for a High Court order.^[3] However, applicants who applied under one pathway were unable to change pathways once the limitation period ended.^[4] The entirety of the common marine coastal area is subject to at least one application, many of which overlap.^[5] This is the biggest and most consequential process happening with Māori land and sea tenures at present.

Re Edwards (Te Whakatōhea No. 2) demonstrated that the tikanga consistent approach of "shared exclusivity" will be applied where applicants with overlapping claims achieve consensus.^[6] However, if overlapping applicants fail to achieve consensus, neither application pathway provides for a tikanga-consistent approach to achieve resolution. Though the High Court has not yet adjudicated a matter of this nature, this paper explores the different routes the court may take, considering the parameters of shared exclusivity.

It is outside the scope of this paper to articulate exactly what a tikanga consistent resolution process looks like. But I argue that the Crown negotiation pathway is best suited to assist overlapping applicants in achieving consensus, and unlike High Court litigation, it is more easily able to implement tikanga consistent dispute resolution processes.

Kōrerorero – Discussion

The Puzzle Pieces

Marine and Coastal Area (Takutai Moana) Act 2011

The MACA Act repealed the Foreshore and Seabed Act 2004 and sought to restore the customary interests extinguished by that Act.^[7] The MACA Act primarily created two forms of rights available to be recognised, CMT and protected customary rights (PCRs). I will focus solely on the application for CMT under the Act.

CMT recognises the customary relationship of iwi, hapū or whānau with the common marine and coastal area.^[8] CMT vests in the applicant groups a range of rights. Significantly, CMT holders may give or withhold permission for a new activity in the area that is carried out under resource consent.^[9] For CMT to be recognised over an area, the applicant group must demonstrate that it holds part of the common marine and coastal area in accordance with tikanga^[10] and has exclusively used and occupied the area without substantial interruption since 1840.^[11]

Waitangi Tribunal Inquiry

The MACA Act was subject to a Waitangi Tribunal inquiry of which Stage 1 was released in 2020.^[12] I will focus solely on the Tribunal's discussion in that report regarding overlapping interests.^[13]

The Tribunal found that the MACA Act provides for overlapping interests to be considered and resolved when applications are being decided.^[14] But the Crown has failed to fulfil its responsibility of providing applicants with processes in both pathways that allow parties with overlapping interests to achieve resolution.^[15] This procedural inadequacy likely stems from the fact that the Minister and officials initially expected relatively few Māori to apply for CMT and anticipated that no more than 4 per cent of the country's coastline would be available for CMT.^[16] The result has been a process that fails to adequately cater for the number of overlapping claims that eventuated.^[17]

Re Edwards (Te Whakatōhea No. 2)

Edwards was the first case under the MACA Act to deal with overlapping applications and I will focus solely on the limb under s 58(b)(i), requiring the applicant to have *exclusively* used and occupied the area. Te Rūnanga o Ngāti Awa and Te Rūnanga o Te Whānau both participated in the proceedings as interested applicants who opposed Te Whakatōhea's claims of exclusivity.^[18] The Court did not consider the words "exclusive use and occupation" to require an intention and ability to control the specified area against third parties. It did, however, consider that the concept of shared exclusivity was not inconsistent with the MACA Act or with holding the area in accordance with tikanga.^[19]

The High Court noted that shared exclusivity is driven by a consideration of whether the specified area is held in accordance with tikanga.^[20] To establish shared exclusivity claimant groups cannot deny each other's history in claims to title.^[21] An acknowledgement of another claimant's

interest does not have to be amicable, but an acknowledgement must exist.^[22]

However, shared exclusivity is not a default outcome where two competing applicant groups are each claiming they have exclusive rights.^[23] This is because the applicants are required to demonstrate a consensus regarding the existence historically of shared exclusivity held in accordance with tikanga. The Court considered that jointly holding CMT avoids some of the practical problems associated with multiple CMTs for the same area being held by different parties, particularly where the parties want to exercise the rights conferred under s 62 of the MACA Act.^[24]

The Court noted that while cooperation and agreement between joint holders of CMT would be needed, tikanga has historically provided for a complex web of overlapping claims. Therefore, tikanga should be able to assist parties holding CMT on a joint or shared exclusive basis on how to jointly exercise the rights conferred by the grant of CMT.^[25]

Overlapping Interests

Overlapping issues are inherently complex and are tied to a lineage of issues often caused by raupatu.^[26] A recent Government publication cites the Waitangi Tribunal, stating that:^[27]

... the essence of Māori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which serve to unite or bind. The principle was not that of exclusivity but that of associations. Indeed, the formulation of dividing lines was usually a last resort.

This whakaaro is key to understanding the existence of overlapping interests in the takutai moana. It is also key to understanding how dispute resolution processes in this space might operate in a tikanga-consistent way. Though tikanga has accommodated a complex web of overlapping interests, as cited in *Edwards*, it cannot be romanticised as a one-stop solution for inter-Māori disputes.^[28] This is because, as the quote indicates, sometimes consensus simply cannot be reached and dividing lines must be drawn.

The Waitangi Tribunal has identified how Treaty principles and duties are relevant towards overlapping interests. These principles and duties inform the Crown's duty to be active in facilitating the resolution of overlapping interests. The essence of Treaty partnership is the guarantee to Māori of the right to exercise tino rangatiratanga over all taonga Māori, in exchange for the Crown's right to exercise kāwanatanga.^[29] In this exchange, each party is constrained by the rights of the other, committing each to partnership.^[30]

The Tribunal found that, where overlapping interests are concerned, the duty to act honourably and in good faith requires the Crown to facilitate between iwi and hapū.^[31] As well as this, the Crown must seek to actively preserve and promote amicable relations with, and between, groups and aim to minimise any damage to relationships.^[32] The Crown must act as best it can to effect a reconciliation between groups and assist in the preservation of all relationships.^[33]

Where interests and associations are disputed by overlapping groups, the Crown does not consider that it can or should determine or adjudicate whether a group has a predominant interest or any exclusive status in an area.^[34]

High Court Pathway

This section will assess the potential outcomes of the High Court pathway.^[35]

Shared Exclusivity

The concept of shared exclusivity is inherently paradoxical through a western view of property rights. Neither Te Whakatōhea nor competing applicants could be seen to have exclusively occupied the area through a pure western property lens. Shared exclusivity, as it exists within *Edwards*, seems to bear the name “exclusivity” to solely satisfy the legislation. But the logic of the High Court, in not drawing distinct lines between different iwi, hapū and whānau, seems to follow the logic of the Government in dealing with overlapping claims in the Treaty settlement context.^[36]

In the High Court, Churchman J applied a tikanga lens to both the MACA Act and Te Whakatōhea’s application. The Court did not consider that evidence of an express agreement in 1840 was required for there to be a finding of shared exclusivity.^[37] The Court considered such a submission ignored the context and role of tikanga, as well as the evidence provided by the Pūkenga and tohunga regarding places at the takutai moana from Maraetōtara and Tarakeha and out to Whakaari, being shared between the six Whakatōhea hapū.^[38]

The concept of shared exclusivity seemingly implements a tikanga approach as it empowers the complex web of overlapping rights that tikanga has historically provided for.^[39] But, as discussed above, there are caveats to the applicability of shared exclusivity in the takutai moana.

Where consensus is not achieved

As discussed above, shared exclusivity cannot exist where claimant groups deny each other’s history in claims to title.^[40] The MACA Act seemingly has no processes to adjudicate conflicts of this nature and the senior courts have yet to examine this issue in detail. The Waitangi Tribunal has indicated that the question of whether overlapping interests would preclude an applicant from satisfying the statutory test for CMT is a substantive interpretation question appropriate for consideration in Stage 2 of the Tribunal’s Takutai Moana Inquiry.^[41]

The High Court has not yet been presented with a dispute of this nature. But by virtue of the exclusivity requirement, if this situation were to arise, the Court will be presented with multiple options. Will the court adjudicate and decide whether one group has exclusivity? Will the court draw and impose a dividing line in the disputed area? Or do overlapping applications which fail to achieve consensus outright fail to obtain recognition of CMT?^[42] The MACA Act provides no guidance as to what process the Court should follow in these circumstances, highlighting yet another failure of the Act.

These options are not tikanga-consistent approaches. This is because applicants are not provided with adequate pathways to achieve resolution. As well as this, power is either removed from the hands of Māori in determining where the lines between overlapping applicants are drawn, or neither party can achieve restored recognition of their customary rights in the takutai moana at all.

Dual Pathways

The dual pathway problem

The Cabinet Māori Crown Relations Te Arawhiti Committee (MCR) noted that there is a lack of cohesion between the two pathways which, if not addressed, could result in unjust outcomes for iwi, hapū and whānau groups.^[43] It identified three options for addressing this problem:^[44]

1. Enable a decision maker to take account of and determine all relevant applications for CMT for an application area at the same time so that if CMT is recognised no subsequent CMT decision can be made in the other pathway for the same area; or
2. Enable a CMT issued in one pathway to be varied to reflect subsequent decisions made in the other pathway; or
3. Enable a decision maker to take account of and determine all relevant applications for CMT for an application area at the same time without preventing subsequent decisions in the other pathway and enable a CMT issued in one pathway to be varied to reflect subsequent decisions in the other pathway

The MCR focuses on the jurisdictional issues that arise by virtue of the dual pathway problem. The most prevalent issue is that CMT may not be able to be recognised as the current legislation only allows for the decision-maker under the Crown pathway^[45] to make determinations on Crown pathway applications, and for the decision maker under the High Court pathway to make determinations on High Court pathway applications.^[46]

For example, Te Kapu o Waitaha's application is seeking recognition in an area that overlaps with the area being considered in the *Ngā Pōtiki Stage Two* High Court hearing.^[47] Justice Powell raised concerns orally that he may not be able to make an order recognising CMT for any applicant if the evidence shows that Waitaha Iwi shares CMT with other groups who are participating in the hearing. Justice Powell has commented on the "cascading sequence of unjust outcomes" that could result.^[48]

Opening the pathways

The MCR aims to prevent unjust outcomes for Māori in the overlapping claims sphere but fails to take into account the legislative requirement for exclusivity and how this may hinder overlapping applicants.

Even if decision-makers in one pathway were able to reconcile applications in the other pathway, the concern remains that the MACA Act fails to provide adequate resolution services between applicants disputing exclusivity.^[49] As a result, legislative change of this sort will have the effect of remedying some dissonance between pathways but the issues it intends to solve will remain. These issues being that parties may not be able to

have CMT recognised, and parties may not be able to pursue their preferred pathway.^[50]

I argue that the Crown negotiation pathway is the best suited to deal with overlapping applications which fail to satisfy the requirements of shared exclusivity set in *Edwards*. This is because it is a more flexible process that can more easily enable parties to engage in tikanga processes to achieve resolution.^[51] Adhering to its Treaty obligations, it would be the Crown's responsibility to fund and facilitate tikanga consistent dispute resolution processes.^[52] This contrasts with the High Court pathway which, as discussed above, will have difficulty implementing tikanga processes where shared exclusivity is not satisfied.

Kōrero whakamutunga – Conclusion

Although the reading-in of shared exclusivity into the MACA Act in *Edwards* demonstrates promising steps forward in achieving tikanga consistent approaches to overlapping interests in the takutai moana, an array of issues remain.^[53] This is because shared exclusivity cannot be satisfied where overlapping applicants are unable to acknowledge each other's history in claims to title.

Where overlapping applicants fail to achieve consensus, the MACA Act is silent on how these may be resolved. In the High Court pathway, these applicants will, to my thinking, be provided with no tikanga-consistent options to resolve their applications. This is because the Court will likely be required to draw a line between disputed areas, or these applications will fail in their entirety.

Therefore, I argue that the Crown negotiation pathway is best suited to deal with overlapping applicants who fail to achieve consensus. This is because the Crown has an obligation to facilitate and fund parties with tikanga-consistent dispute resolution processes by virtue of its Treaty obligations.^[54] Also, the negotiation pathway is more procedurally flexible and can more easily incorporate these processes. Although, in some circumstances, consensus between applicants may never be possible, it is the Crown's obligation to try to facilitate this as part of restoring customary marine rights, which the Crown earlier cruelly abolished.^[55]

Ngā kupu āpiti – Notes

* William Morrison (Taga Savai'i ma Tafitoala Safata, Sāmoa) is in his final year at Te Herenga Waka – Victoria University of Wellington, completing an LLB(Hons) and a BA majoring in Political Science.

[1] Tina Ngata "Wai Māori: a Māori perspective on the freshwater debate" *The Spinoff* (New Zealand, 6 November 2018); and Te Ara "Tangaroa, god of the sea" <www.teara.govt.nz>.

[2] Tina Ngata, above n 1.

[3] Sections 62 and 95 respectively. See also Hamish Harwood and Lauren Philips "Takutai Moana Act – key developments from Re Edwards (Te Whakatōhea (No 2) and Re Ngāti Pāhauwera" (2022) April RMLA 30 at 30; and Community Law "Pathways for recognition of customary rights in te takutai moana" <www.communitylaw.org.nz>.

[4] Cabinet Māori Crown Relations Te Arawhiti Committee “Takutai Moana Dual Pathway Problem: Release of Consultation Document” (5 September 2022) MCR-22-MIN-0014 at 3; and Community Law, above n 3. The deadline for submitting an application was 3 April 2017.

[5] Harwood and Philips, above n 5, at 30.

[6] *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772. Consensus, for the purposes of this essay, means that the parties have satisfied the requirements for shared exclusivity articulated by Churchman J in *Re Edwards* at [166]. Note that appeals from the judgment are due to be heard by the Court of Appeal in late February 2023.

[7] Marine and Coastal Area (Takutai Moana) Act 2011, ss 5 and 6.

[8] Section 4(1)(b).

[9] Ministry of Justice *Recognising customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011* at 8. Some activities are excluded from this permission right. These are called ‘accommodated activities’. Marine and Coastal Area (Takutai Moana) Act, s 64 sets out the accommodated activities. The range of other rights can also be found in the report.

[10] Marine and Coastal Area (Takutai Moana) Act, above n 7, s 58(a).

[11] Section 58(b)(i).

[12] Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai2660, 2020). The purpose of the inquiry was to identify whether the Act was inconsistent with the Treaty of Waitangi. Stage One investigated whether the procedural and resourcing arrangements supporting the MACA Act breached the Treaty and prejudicially affected Māori. Stage Two, when released, will inquire into whether the broader statutory and policy issues relating to the Act itself breach Treaty principles and prejudice Māori.

[13] Some of this commentary will likely fall within the scope of Stage Two of the Waitangi Tribunal’s inquiry.

[14] Waitangi Tribunal, above n 12, at 79.

[15] *Re Edwards (Te Whakatōhea No 2)*, above n 6, at 79.

[16] Waitangi Tribunal, above n 12, at 79.

[17] At 79.

[18] *Re Edwards (Te Whakatōhea No. 2)*, above n 6, at 774; and Cabinet Māori Crown Relations Te Arawhiti Committee, above n 4, at 9. Ngāti Awa was a dual pathway applicant, but their preference was to pursue determination through the Crown pathway. In order to have their CMT recognised in the overlapping area, Ngāti Awa had to participate in the High Court pathway.

[19] *Re Edwards (Te Whakatōhea No 2)*, above n 6, at [161]. By adopting the concept of shared exclusivity, Churchman J imported a similar approach to the Canadian Courts in a similar matter. For example, *Ahousaht Indian Band v Attorney-General of Canada* 2007 BCSC 1162; [2007] BCJ 1730.

[20] *Re Edwards (Te Whakatōhea No. 2)*, at [161].

[21] At [166].

[22] At [166].

[23] At [179]. This is to ensure that the process is not used as a modern attempt to resolve an overlapping claim.

[24] At [169]. Section 62 confirms a set of rights following recognition of customary marine title including a natural resource management and conservation permission rights, other protection rights and ownership rights over taonga and certain minerals.

[25] At [170].

[26] New Zealand Government “Overlapping interests: The Crown’s understanding of customary interests and associations” and “What are overlapping interests?” <www.govt.nz>. This resource replaces the ‘Overlapping interests’ content on pages 53, 54 and 55 of New Zealand Government “The Red Book” <www.govt.nz>. However, in *Whakatōhea – Stage Two (no. 7)* [2022] NZHC 2644 at [218], Churchman J found that the Red Book which addresses process requirements in the Tribunal for overlapping claims in this historic settlement process is not relevant to claims under the MACA Act.

[27] New Zealand Government, above n 26, at “What are overlapping interests?”. Citing Waitangi Tribunal *The Ngati Apa Raupatu Report* (Wai 46, 1999) at 133.

[28] *Re Edwards (Te Whakatōhea No. 2)*, above n 6, at [170].

[29] Waitangi Tribunal, above n 12, at 11.

[30] Waitangi Tribunal *Tauranga Moana, 1886-2006: Report on the Post-Raupatu Claims Volume 1* (Wai 215, 2010) at 120.

[31] Waitangi Tribunal, above n 12, at 12.

[32] New Zealand Government, above n 29, at “What principles and guidelines underpin the resolution of overlapping interests?”.

[33] At “What principles and guidelines underpin the resolution of overlapping interests?”.

[34] New Zealand Government, at “Overlapping interests: The Crown’s understanding of customary interests and associations”.

[35] Either as single pathway applicants or as dual party applicants.

[36] New Zealand Government at “What are overlapping interests?”; and Waitangi Tribunal, above n 31, at 133.

[37] *Re Edwards (Te Whakatōhea No. 2)*, above n 6, at [180].

[38] At [180].

[39] At [170].

[40] At [166].

[41] Waitangi Tribunal, above n 12, at 81.

[42] It is outside the scope of this paper to discuss which of these options is most likely to be adopted by the High Court. Also, these options are not exhaustive.

[43] Cabinet Māori Crown Relations Te Arawhiti Committee, above n 4, at 1. This is what they identified as the “dual pathways problem”.

[44] At 1, 4 and 5.

[45] That being the Minister for Treaty of Waitangi Negotiation.

[46] Cabinet Māori Crown Relations Te Arawhiti Committee, above n 4, at 8.

[47] At 8; citing *Ngā Pōtiki Stage Two* HC Wellington CIV-2011-485-793, 9 August 2021 (Minute No 13).

[48] *Ngā Pōtiki Stage Two*, above n 47.

[49] This was the concern expressed by the Waitangi Tribunal, above n 12, at 12 and 79.

[50] Cabinet Māori Crown Relations Te Arawhiti Committee, above n 4, at Appendix 1. These issues were identified by the Committee but will not be solved by their recommended recourse.

[51] It is outside the scope of this paper to discuss what this may look like in practice.

[52] Waitangi Tribunal, above n 15, at 12 and 79.

[53] *Re Edwards (Te Whakatōhea)*, above n 6, at [169] and [170]; and Dan Minhinnick and others “Important High Court decision on customary marine title” (June 16 2021) Russell McVeagh <www.russellmcveagh.com>.

[54] Waitangi Tribunal, above n 15, at 12 and 79; and New Zealand Government, above n 32, at “How does the overlapping issues process work?”.

[55] Marine and Coastal Area (Takutai Moana) Act, above n 7, at ss 5 and 6.

Te Kōti Matua – High Court

Insolvency – relevance of tikanga

Bamber v Official Assignee

[2023] NZHC 230
21 February 2023

Report by Elizabeth Derby

Whakataunga – Overview and result

Unsuccessful appeal from a District Court decision vesting the appellants' property in the Official Assignee under insolvency legislation. Grounds advanced on appeal included that the vesting was contrary to tikanga.

Insolvency – Insolvency Act 2006 – relevance of tikanga – procedure – right to give oral evidence	
Date	21 February 2023
Case	Bamber v Official Assignee (262 KB PDF)
Citation	[2023] NZHC 260
Court	Te Kōti Matua – High Court
Judge(s)	Harvey J
Earlier/later decisions	<i>Official Assignee v Bamber</i> [2022] NZDC 13038; <i>Monschau v Bamber – Tahorakuri A No 1 Section 33A2</i> (2015) 125 Waiariki MB 260 (125 WAR 260); Monschau v Bamber – Tahorakuri A No 1 Section 33A2 Block (2017) 157 Waiariki MB 173 (157 WAR 173); Bamber v Monschau – Tahorakuri A No 1 Section 33 A 2 (2019) 218 Waiariki MB 292 (218 WAR 292); <i>Bamber – Tahorakuri A No 1 Section 33A2</i> (2021) 259 Waiariki MB 274 (259 WAR 274); Bamber v Monschau – Tahorakuri A No 1 Section 33A2 [2016] Māori Appellate Court MB 363 (2016 APPEAL 363); Monschau v Bamber – Tahorakuri A No 1 Section 33A2 [2016] Māori Appellate Court MB 286 (2016 APPEAL 286); <i>Bamber v Official Assignee – Lot 39 DPS 3455</i> [2022] Chief Judge's MB 664 (2022 CJ 664); <i>Bamber – Lot 39 DPS 3455</i> [2016] 143 Waiariki MB 74 (143 WAR 74); <i>Bamber v Official Assignee – Lot 39 DPS 3455</i> [2021] Māori Appellate Court MB 161 (2021 APPEAL 161).
Legislation cited	Insolvency Act 2006, s 414(1); District Court Rules 2014, rr 9.47, 10.1-10.7.
Cases cited	<i>Earl of Oxford's case</i> (1615) 21 ER 485; <i>Keech v Sanford</i> [1726] EWHC J76; Ellis v R [2022] NZSC 114; <i>Lloyds Bank Ltd v Bundy</i> [1975] 1 QB 326; <i>Pearson v Official Assignee</i> [2022] NZCA 158; <i>Te Ara Rangatu o Te Iwi Ngāti Te Ata Waiohua Inc v Attorney-General</i> [2018] NZHC 2886; <i>Austin, Nichols & Co Inc v Stichting Lodestar</i> [2007] NZSC 103; Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] NZSC 127; <i>Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Ltd</i> [2022] NZSC 142; <i>District Court at Christchurch v McDonald</i> [2021] NZCA 535; <i>Nicholas v Commissioner of Police</i> [2017] NZCA 473.
Overview and result	Appeal from a District Court decision. The appellants were adjudged bankrupt in 2019 over debt owed to the Tahorakuri A 1 Section 33A2 Trust. In 2022, Judge Spear in the District Court ordered that the appellants' property be vested in the Official Assignee under the Insolvency Act 2006. The appellants appealed that decision to this Court on two grounds. Firstly, that the Judge should have allowed the kaumātua to speak to their affidavit evidence at the hearing. Secondly, that it is contrary to tikanga Māori that they should be removed from what had been their papakāinga or home in order to satisfy a debt owed to the Tahorakuri Trust. The appellants submitted that the issue should be referred to mediation so they can attempt a resolution

	of the matters outstanding between them and the Trust in accordance with tikanga. The issue before the Court was whether tikanga Māori is relevant to the issuing of orders under the Insolvency Act 2006. Held, appeal dismissed. The lower courts had all found that the appellants owed the Tahorakuri Trust a significant sum. To date, there had been no realistic proposal from the appellants to pay the amount outstanding. The Court found that it was within Judge Spear's authority to determine the procedure of the case and simply rely on the affidavit evidence. Further, the Court was not persuaded that any additional oral evidence on tikanga would have made a material difference to the outcome.
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Te Kōti Pīra Māori – Māori Appellate Court

Costs – unsuccessful appeal – Special Aid recipient

Tawa v Tuaropaki E Trust

[2023] Māori Appellate Court MB 1 (2023 APPEAL 1)
19 January 2023

Report by Elizabeth Derby

Whakataunga – Overview and result

Application for costs. The respondent, the Tuaropaki E Trust, sought costs against the applicant following her unsuccessful appeal of an earlier decision in the Māori Land Court.

Costs – unsuccessful appeal – Special Aid recipient	
Date	19 January 2023
Case	Tawa v Tuaropaki E Trust (241 KB PDF)
Citation	[2023] Māori Appellate Court MB 1 (2023 APPEAL 1)
Court	Te Kōti Pīra Māori – Māori Appellate Court
Judge(s)	Deputy Chief Judge C L Fox (Presiding), Judges Doogan and Williams
Earlier/later decisions	Tawa v Ataria – Tuaropaki E (2021) 267 Waiariki MB 184 (267 WAR 184); Tawa v Tuaropaki E Trust [2022] Māori Appellate Court MB 377 (2022 APPEAL 377).

Legislation cited	Te Ture Whenua Māori Act 1993, ss 58 and 79(1); Legal Services Act 2011 ss 45(3)(a), (d).
Cases cited	<i>Wairoa District Council v Wairau – Kaiwaitau 7C2B</i> (2009) 128 Wairoa MB 168 (128 WR 168); Trustees of the Horina Nepia & Te Hiwi Piahana Whanau Trust v Ngati Tukorehe Tribal Committee & Tahamata Incorporation – Tahamata Incorporation (2014) 319 Aotea MB 238 (319 AOT 238); <i>Taueki v Horowhenua 11 (Lake) Māori Reservation Trust</i> [2019] Māori Appellate Court MB 652 (2019 APPEAL 652); Samuels v Matauri X Incorporation – Matauri X Incorporation (2009) 7 Taitokerau Appellate Court MB 216 (7 APWH 216).
Overview and result	Application for costs. The respondent, the Tuaropaki E Trust, sought costs against the applicant following her unsuccessful appeal of an earlier decision in the Māori Land Court. Counsel for the respondents submitted that an award of costs should be made against the applicant in relation to both the Māori Land Court proceedings and the Appellate Court proceedings. The total costs incurred by the respondent in these proceedings was a sum of more than \$40,000. The respondent acknowledged that the applicant was in receipt of Special Aid, but submitted that there were exceptional circumstances to warrant an award of costs. The respondent submitted that the application was unsuccessful and lacked merit, mediation was not sought, the proceedings were akin to normal civil litigation, and the trustees were put through significant time and effort to defend the applications. The respondent also noted that the receipt of special aid is not a barrier to costs. Thus, costs should be awarded. The applicant opposed any award of costs on the basis that she was in receipt of Special Aid, and none of the reasons given by the respondent amounted to exceptional circumstances. The applicant further submitted that it was not appropriate for the respondents to seek costs for the Māori Land Court proceedings. Held, the Court ordered the applicant to pay costs of \$5,000 to the respondent as a contribution to the costs incurred in the Māori Appellate Court proceedings. The Court considered that the respondent had been able to demonstrate exceptional circumstances in this case. This was because the Court agreed that the applicant had acted unreasonably in pursuing the issue before both the Māori Land Court and the Māori Appellate Court. However, the Court agreed with the applicant that it was not appropriate to make an award of costs in

	relation to the Māori Land Court application. The respondent should have raised the matter of costs in the Māori Land Court, but they did not. Overall, the Court considered that costs should be awarded against the applicant for the Māori Appellate Court proceedings. The Court stressed that it was not necessary for exceptional circumstances to be present to award costs against a recipient of Special Aid. The receipt of Special Aid was simply a factor that the Court took into account in exercising its discretion in this case. The Court did, however, consider the applicant's receipt of Special Aid to be relevant to quantum. It took this into account when awarding costs.
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Trusts – trustee removal – payments

Henderson v Brooking – Wharekahika A47

[2023] Māori Appellate Court MB 17 (2023 APPEAL 17)
8 February 2023

Report by Elizabeth Derby

Whakataunga – Overview and result

Unsuccessful appeal against removal of the appellant as a trustee.

Appeal – trusts – removal of trustee – breaches of trust – dismissed	
Date	8 February 2023
Case	Henderson v Brooking – Wharekahika A47 (335 KB PDF)
Citation	[2023] Māori Appellate Court MB 17 (2023 APPEAL 17)
Court	Te Kōti Pira Māori – Māori Appellate Court
Judge(s)	Judge Armstrong (Presiding), Judges Wara and Stone
Earlier/later decisions	<i>Brooking v Henderson – Wharekahika A47</i> (2022) 110 Tairawhiti MB 238 (110 TRW 238).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 37, 58, 97, 133, 137, 185, 218, 230, 240, and 326(c); Trusts Act 2019, ss 31, 34, 36, and 37.
Cases cited	<i>Holland v Jonkers</i> [2021] NZHC 3469; <i>Bathurst Resources Limited v L & M Coal Holdings Limited</i> [2021] NZSC 85; <i>Kacem v Bashir</i> [2010] NZSC 112; Faulkner v Hoete – Motiti North C No 1 [2018] Māori Appellate Court MB 17 (2018 APPEAL 17); Rameka v Hall [2013] NZCA 203; <i>Ellis v Faulkner – Poripori Farm A Block</i> (1996) 57 Tauranga MB 7 (57 T 7); <i>Perenara v Pryor – Matata 930</i> (2004) 10 Waiariki Appellate MB 233 (10 AP 233); <i>Apatu v Puna – Owhaoko C Block</i> [2010] Māori Appellate Court MB

	34 (2010 APPEAL 34); Gray v Paikea – Otara 5D2 (2022) 252 Taitokerau MB 210 (252 TTK 210); Wynyard v Waata – Manawakore C1 and D (2022) 247 Taitokerau MB 4 (247 TTK 4); Nikora v Trustees of Tuhoe – Tuhoe Te Uru Taumatua Trust (2021) 252 Waiariki MB 157 (252 WAR 157); Rihari v Auckland – Takou (2021) 240 Taitokerau MB 42 (240 TTK 42); Bloor v Karaitiana – Runanga 2E (2021) 259 Waiariki MB 286 (259 WAR 286); <i>Commerce Commission v Fonterra Co-operative Group Ltd</i> [2007] NZSC 36; <i>Wallace v Naknok</i> [2012] NZHC 382; <i>Hall v Radich-Chaytor</i> [2020] NZHC 409.
Overview and result	Appeal from a Māori Land Court decision which removed the appellant as a trustee of the Wharekahika A47 Trust. The appellant had provided services to the Trust and received \$15,000 in payment for those services. He participated in and voted on trustee decisions that authorised the payments. His brothers, who are trustees of the Trust, also voted to authorise the payments. The Māori Land Court determined that the appellant had breached numerous trustee duties and that these breaches were sufficient for the Court to remove the appellant as a trustee. The appellant submitted that the trust order for the Trust impliedly authorised payments to trustees. He also submitted that his brothers were entitled to participate in the trustee discussion and vote to approve payments to him. He disputed that there were sufficient grounds for him to have been removed as a trustee. Held, appeal dismissed. The Court did not accept there was an implied power in the trust order to pay trustees. The Court thus concluded that the payments made to the appellant were in breach of trust. For this reason, the Court did not need to consider whether the payments had been properly authorised. The Court saw no error in the approach taken by the Māori Land Court when considering whether the appellant should be removed as a trustee. Thus, the appeal was dismissed.

Te Kōti Whenua Māori – Māori Land Court

Trusts – appointment of trustees

Wray v Heath – Ongaonga No 1G Sec 2

(2023) 247 Waikato Maniapoto MB 250 (247 WMN 250)
24 January 2023

Report by Elizabeth Derby

Whakataunga – Overview and result

Application seeking an order for the appointment of two additional trustees to the Ongaonga 1G2 Block Trust.

Trusts – appointment of trustees – Ongaonga 1G2 Block Trust	
Date	24 January 2023
Case	Wray v Heath – Ongaonga No 1G Sec 2 (222 KB PDF)
Citation	(2023) 247 Waikato Maniapoto MB 250 (247 WMN 250)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge T M Wara
Earlier/later decisions	97 Tauranga MB 183-188 (97 T 183-188); 143 Waikato Maniapoto MB 52-53 (143 WMN 52-53); 238 Waikato Maniapoto MB 237-243 (238 WMN 237-243).
Legislation cited	Te Ture Whenua Māori Act 1993, s 239.
Cases cited	
Overview and result	Application seeking an order for the appointment of two additional trustees to the Ongaonga 1G2 Block Trust. The application was opposed by the sole trustee of the Trust, Mr Heath. Mr Heath opposed the appointment of the two trustee elects because there had been instances where unanimous decisions relating to trust matters had not been achieved, he alleged misappropriation of funds by one of the trustee elects, and he argued that there had been an irreparable breakdown in the relationship between himself and the trustee elects. Held, the Court ordered the appointment of the two additional trustees. The Court also directed that all trustees were to attend trustee training to improve their knowledge of trustee duties and obligations. The Court was not satisfied that the issues raised by Mr Heath in his opposition to the trustee elects rendered them unsuitable as trustees. The Court found them both to be hard-working and committed to the Trust.

Arotakenga pukapuka – Book review

The Constitution of New Zealand: A Contextual Analysis

Matthew SR Palmer and Dean R Knight
Hart Publishing, Oxford, 2022 (ISBN9781849469036)

Reviewed by Mihiata Pirini, law lecturer at University of Otago

Kōrerorero – Discussion

In *The Constitution of New Zealand: A Contextual Analysis* Justice Matthew SR Palmer and Associate Professor Dean R Knight provide a detailed and engaging account of the constitution of Aotearoa New Zealand. Across 12 chapters, they provide a high-level overview of the main features of our constitution, while also providing insights and specific examples to capture the reader, whether a student, constitutional scholar, or someone looking for a general introduction.

The book is part of a series by Hart Publishing covering constitutional systems of the world. The books are designed to appeal to the novice seeking “a road map” while also providing deeper analysis of the constitution in question. That goal is neatly achieved by Palmer J and Knight, who provide a well-structured description of the key features of the New Zealand constitution, while adding interest by approaching the task through the lens of “constitutional realism”. Constitutional realism delves beneath the “formal legal robes” of our constitution by focusing on how public power is exercised in reality, and in doing so seeks to engage with the substance of our constitution, not just its form. Justice Palmer has written about and applied this approach in his past scholarship, and it is used here to shed light on the perplexing and idiosyncratic features of how we govern ourselves. For example, the book explains, in clear terms, the puzzling paradox between our constant emphasis on the omnipotence of Parliament, and the reality that this power is not exercised to its fullest extent in practice. The authors use creative metaphors to help enliven the text: the common law is a pointillist painting whose shape emerges over time and at a distance. The Treaty is like Ruapehu – a dominant presence, somewhat unpredictable in impact, but here to stay. These qualities, plus the book’s accessible length, distinguish it from other general texts on New Zealand’s constitution.

Chapters 1 and 2 set the scene. Chapter 1 sketches our “constitutional culture” by identifying prevailing cultural attitudes towards the exercise of public power in New Zealand: egalitarianism, faith in authority, fairness, and pragmatism. Importantly, the authors caveat their analysis, making clear that definitions of culture are necessarily generalised and informed by one’s perspective. They also nod to the important work on Māori constitutional culture by scholars such as Carwyn Jones and Māmari Stephens. The book is written during the Covid pandemic and possibly before the Wellington-based protests against Covid laws; it does not deal with the effect of the pandemic on growing distrust in government. It would be interesting to hear the authors’ reflections on these developments and their potential impact on our constitutional culture. Chapter 2 provides an

account of the emergence of Aotearoa New Zealand, including the signing of te Tiriti | the Treaty and He Whakaputanga, which will provide important context to international readers.

Chapters 3 to 7 provide an account of our system of governance, structured around the three branches of government. Chapter 4 is a standalone chapter on the concept of democratic government, sketching out what aspects of our constitution justify us describing ourselves as a democracy. Chapter 5 on the Executive gives worthy attention to the role and duties of the public service in the constitution, perhaps reflecting the fact that one of the authors is a former public servant. Chapter 6 deals with Parliament and the concept of, and limits on, legislative supremacy. Collectively, these chapters give a practical, accessible explanation of the chain of accountability that underpins our constitution and connects the electorate, the House of Representatives, the Executive, and Cabinet. Chapter 7 covers the judiciary and contains a concise and up-to-date summary of tikanga as a form of law, gesturing towards the constitutional significance of [Takamore v Clarke](#) and ongoing developments represented by cases like [Trans-Tasman Resources v Taranaki-Whanganui Conservation Board](#). Chapter 8 deals with mechanisms designed to ensure accountability and transparency in the exercise of public power, such as the Ombudsman, the Official Information Act and administrative tribunals.

Chapter 9 addresses human rights, taking as its general theme the way in which accountability for exercises of public power can be ratcheted up where human rights are involved. Chapter 10 is devoted to the Treaty of Waitangi, and discussed further below. Chapter 11 is an insightful positioning of our constitution on a larger spectrum encompassing local, national, and global governance. It informs the reader of the contemporary dominance of national governance within current constitutional settings, while hinting at the potential for a growing influence at the local and global levels, for which our constitution will need to account. The position of Māori at local governance level is briefly outlined. Reference is made to increasing global pressures; climate change is not explicitly mentioned but will no doubt be in readers' minds. The book concludes with chapter 12, in which the authors consider possible constitutional futures. Here, the authors reinforce the importance of their assessment of constitutional culture, because they suggest that reforms that cut against the grain of that culture are more likely to fail, while reforms that are consistent with it are more likely to endure. We are most likely, the authors conclude, to see ongoing pragmatic tinkering, suggesting the power of a dominant cultural attitude of making iterative changes, as and when perceived necessary.

This journal's audience may be particularly interested in the book's treatment of the Treaty of Waitangi in chapter 10. Both authors have written on Treaty-related issues in the past, with Palmer J in particular having produced substantial scholarship in this area. In this text, analysis of the Treaty focuses mainly on how it demonstrates the "constitutional dialogue" between different holders of public power, and the way public power can be influenced by political, social and legal pressure that takes the Treaty as its focus. There's a fascinating account of Cabinet's evolving view of the Treaty throughout the 1970s, gleaned from two particular

Cabinet papers. The authors' decision to place the Treaty in its own chapter is important, sending a message of its singular status within our constitution. A necessary consequence is that the Treaty analysis is somewhat siloed out from other related themes, but the authors seek to overcome this by way of a summary, describing how Treaty interests manifest in each aspect of the constitution covered by the book.

As noted, the book strikes a balance between providing an accessible roadmap for the novice, and an analytical account that will engage those who already know the outlines of our constitution. Some may find that the balance is struck slightly more in favour of the former, meaning that intriguing ideas cannot always be explored in great detail. I was interested, for example, in the brief reference to accountability mechanisms that facilitate learning, by encouraging government actors to be "continuously reflexive and to focus on delivering community wellbeing". But this reflects the aims of the broader series of which the book forms part, and ought not to detract from recognition of the depth and breadth of material addressed within a reasonably short text. The work's accessible but comprehensive approach also makes it an excellent reference and teaching resource; many of its examples will help me teach first-year law students about our constitution.

Justice Palmer and Dean Knight's work is an important resource that will generate, and reinforce, awareness of and engagement with our unique constitution. Complex concepts such as "the rule of law" and "the Crown" are explained in a straightforward and clear manner but without losing a sense of their complexity; this makes the book relevant to those who are completely new to these constitutional concepts and equally to those who would benefit from thinking about them in a different way. The book will, and should, find a large audience.

Hui tanguru 2023 – additional content online

Te Kōti Whenua Māori – Māori Land Court

[Chief Judge's powers](#) – partition amendment cancelled – *Williams – Hohotaka 2A Section 4 and other blocks* (2023) Chief Judge's MB 2 (2023 CJ 2) – Elizabeth Derby

[Chief Judge's powers](#) – succession – birth certificate – *Smith v Bristowe – Succession to Eruera Pereto* (2023) Chief Judge's MB 39 (2023 CJ 39) – Elizabeth Derby

[Partition](#) – effective use of land – *Hinaki – Whāngārā A5* (2023) 116 Tairāwhiti MB 143 (116 TRW 143) – Elizabeth Derby

Te Rōpū Whakamana i te Tiriti o Waitangi – Waitangi Tribunal

[Tino Rangatiratanga me te Kāwanatanga – Te Paparahi o Te Raki Inquiry](#) – Elizabeth Derby

[Waikanae](#): Report on Te Ātiawa/Ngāti Awa claims – Elizabeth Derby