

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Ngā whakahaere rauemi – natural resource management

Māori interest in natural resource management: 2022 in review

Chelsea Easter, Francesca Dykes, Sam Kenneally, and Dave Randal

Whakataunga – Overview

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

2022 was another busy year in the area, with progress made towards fundamental reform of the resource management system – which promises significant opportunities, and some risks, for Māori – as well as a number of notable judicial decisions made under environmental legislation. This article discusses these matters and briefly summarises Treaty settlement milestones in 2022.

(Continued at p 3)

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Kōrerorero – Discussion

Natural and Built Environment Bill and Spatial Planning Bill

As practitioners will be aware, in late 2022 the Government introduced the Natural and Built Environment Bill (NBEB) and Spatial Planning Bill, two of the three pieces of proposed legislation to replace the Resource Management Act 1991 (RMA). The Environment Select Committee is currently considering submissions on these Bills and its report is expected on 22 May 2023.

One of the five objectives of the reform is to give proper recognition to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori.

Once the final content of this legislation is settled, we hope to step through the changes to the resource management regime for readers and provide commentary on the key implications for practitioners working with Māori.

In the meantime, the Bills set out the basis for a new regime that will be underpinned by mātauranga Māori and rely heavily on spatial and other planning undertaken by and with iwi and hapū. Of note are the following provisions:

- One of the purposes of the NBEB is to "recognise and uphold te Oranga o te Taiao"^[1] which is defined as meaning:
 - (a) the health of the natural environment; and
 - (b) the essential relationship between the health of the natural environment and its capacity to sustain life; and
 - (c) the interconnectedness of all parts of the environment; and
 - (d) the intrinsic relationship between iwi and hapū and te Taiao.
- As has been foreshadowed throughout the reform process, the NBEB contains a requirement (in clause 4) to "give effect to" the principles of Te Tiriti o Waitangi, in contrast to the current directive to "take into account" those principles under the RMA. The requirement to "give effect to" Treaty principles echoes the Conservation Act 1987 requirement and has been described as the strongest form of Treaty clause.^[2]
- The proposed 'system outcomes' to be achieved through the new regime include several of relevance to Māori, including explicit reference to the protection or, if degraded, restoration of mana and mauri of air, water, soils, coastal waters, waterbodies and biodiversity.^[3] In particular, the existing RMA section 6(e) matter of national importance has been retained and expanded as a system outcome, to include recognition of, and making provision for, the relationship of iwi and hapū and the exercise of their kawa, tikanga (including kaitiakitanga), and mātauranga in relation to their ancestral lands, water, sites, wāhi tapu, wāhi tūpuna, and other taonga.
- Both Bills require persons to recognise and provide for the responsibility and mana of iwi and hapū to protect and sustain the

health and well-being of te taiao in accordance with the kawa, tikanga (kaitiakitanga) and mātauranga in their area of interest.^[4]

- Māori will be directly involved in the planning process. The Crown must engage with iwi authorities, groups that represent hapū, and/or other Māori groups with interests when preparing the overarching national planning framework, the first iteration of which the Government intends to issue later in 2023. Decisions on regional spatial strategies and natural and built environment plans will be made by regional planning committees; those committees will have at least six members, at least two of whom will be appointed by iwi authorities and groups representing hapū.
- A National Māori Entity will be established to provide independent monitoring of decisions under the Natural and Built Environment Act or the Spatial Planning Act, including whether the principles of te Tiriti have been given effect.^[5]
- The recent change to the compulsory acquisition powers of requiring authorities under the RMA to prevent 'protected Māori land' from being acquired by network utility operators that are also responsible special purpose vehicles (SPVs) has been retained in the Bill.^[6]

Once the Bills are enacted there will be a lengthy period of transition to the new regime. This period will present important new opportunities for Māori values and historical associations to shape life in each region of Aotearoa. Much work will be needed, however, to translate these opportunities into meaningful improvements for Māori and for the environment.

Holding central government to account in formulating national policy

Muaūpoko Tribal Authority Inc v Minister for Environment [2022] NZHC 883

This decision from 2022 provides an interesting backdrop to the current preparation by the government – in a way that must "give effect to" Treaty principles – of the first national planning framework under the new regime.

The case highlights judicial review as one legal avenue for Māori to challenge national policy, and in its decision the High Court analyses changes brought about by the National Policy Statement for Freshwater Management 2020 (NPS-FM) in the context of the current RMA requirement to "take into account" Treaty principles.

The Court considered an application for judicial review of the Minister of the Environment's decision to include clause 3.33 in the NPS-FM. Clause 3.33 provides a 10-year exemption for vegetable production from some of the national 'environmental bottom lines' for water quality set out in the NPS-FM, and was inserted due to concerns expressed by growers about the impact of the NPS-FM on domestic vegetable supplies.

The applicants, Muaūpoko Tribal Authority Incorporated (MTA) and Te Rūnanga o Raukawa Incorporated (Raukawa), represent iwi and hapū who are kaitiaki of Lake Horowhenua and Hōkio Stream, which are significant taonga and tūpuna. The exemption for vegetable production was at issue because Lake Horowhenua and Hōkio Stream are situated in one of two major vegetable growing areas in New Zealand. MTA and

Raukawa challenged the exemption on several grounds, including non-compliance with Part 2 of the RMA and the principles of Te Tiriti o Waitangi.

The High Court declined the application for judicial review on all grounds. In reaching this decision, the Court discussed the development process for the NPS-FM, including the Government's freshwater goals, the issue of vegetable production and the development of the vegetable exemption. After identifying that it may not be achievable to meet the strengthened national bottom line for nitrate toxicity and ammonia in Pukekohe and Horowhenua, a regulatory impact analysis had been carried out, and an in-principle decision made, subject to further consultation with local iwi and hapū. After further consultation, the Minister had requested that alternative solutions be developed and eventually the time-limited exemption had been selected. The 15 July 2020 briefing paper that recommended the time-limited exemption had noted that although it had not been tested with relevant iwi and hapū, it was most aligned with feedback generally (at [107]). A report supporting the new policy had then noted that the time limit would send a strong message to iwi about the government's intention to improve water quality and to vegetable growers that they must work to find solutions to improve water quality (at [110]).

In relation to the exemption's compliance with Part 2 of the RMA, the High Court considered whether s 5 of the RMA contains environmental bottom lines, especially in light of the recent decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 (TTR), discussed in our [2021 year in review article](#), and reaffirmed that it does not. The vegetable exemption was not contrary to s 5. The Court further considered ss 6(e) and 7(a) of the RMA, finding that the NPS-FM is consistent with the obligations in those sections. The vegetable exemption does not detract from ss 6(e) and 7(a), because regional councils are nonetheless required to meet the requirements of the NPS-FM in a way that gives effect to Te Mana o te Wai.

In determining whether the Minister failed to consider mandatory considerations, the High Court was asked by the applicants to consider the different relationships of MTA and Raukawa with Lake Horowhenua and the Hōkio Stream. The High Court declined to do so, concluding that their respective relationships were not particularly relevant to the Minister's decision (and noting that MTA and Raukawa were aligned in their opposition to the exemption).

The Court then considered the adequacy of the consultation undertaken. Although it would have been preferable for consultation to have occurred before the in-principle decision, the Court said, sufficient consultation did occur and it was genuine and approached with an open mind. The Court also rejected arguments relating to alleged unlawfulness and unreasonableness of the exemption.

Finally, the Court considered the principles of Te Tiriti, both under s 8 and whether any directly enforceable rights emerge from Te Tiriti itself. The High Court held that the "constitutional significance of the Treaty means direct enforcement by way of judicial review may be justified. This is consistent with the Court of Appeal's decision in *Takamore v Clarke* [2011]

NZCA 587 in which it was observed that the courts indirectly "enforce" the Treaty in a number of ways including by giving it "direct impact" in judicial review as an implied mandatory consideration...". The Court decided it was not necessary to determine this in this case on the basis it was not argued that the Treaty itself would give any greater rights than under s 8 of the RMA.

Edwards J noted the potential for a breach of the duty of active protection in light of the historical context. However, because the exemption nonetheless requires the regional council to set targets to improve the situation, that duty was met in the case of the NPS-FM. The Court acknowledged that "If the vegetable exemption operated so as to maintain the status quo, or enable further degradation, then I would have found this claim to have been proved. Permitting the further degradation and pollution of the Lake, or failing to take active steps to restore it, would not be consistent with the Crown's active duty to protect a vulnerable taonga" (at [254]).

Other cases to bring to your attention

Perjuli Developments Ltd v Waikato District Council [2022] NZEnvC 51

In this decision, the Environment Court considered an appeal from Perjuli Developments Limited (Perjuli) relating to the review and cancellation of a resource consent for earthworks. The consent was cancelled on several grounds, including that it:

1. failed to note consultation with, and opposition of, Ngāti Tamainupō; and
2. misrepresented a letter from the Tūrangawaewae Board of Trustees indicating the cultural significance of the site and the conditions sought to protect certain areas of the site.

The Environment Court acknowledged that, as set out in the *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* decision (discussed in our [2019/2020 review article](#)), there are occasions where the Court must decide issues of mana whenua. In these circumstances it was not necessary to consider the respective mana whenua status of Ngāti Tamainupō and Ngāti Mahuta, two hapū of Waikato Tainui. The Court stated (at [35]):

Again we understand that Kīngitanga and Tainui Waikato are inclusive of hapū as mana whenua, and thus do not substitute for the mana of hapū but combine and reference it through the holistic concepts of relationship and whanaungatanga. Such a world view would not reduce the status of individuals, whanau, hapū or iwi but rather interconnect and reinforce them. We conclude that both the board and Ngāti Tamainupō can claim direct (and largely overlapping) relationship with the site.

The Environment Court concluded that the Council was justified in reviewing the consent on the basis that information made available to the consent authority contained inaccuracies which materially influenced the decision (at [54]). In terms of cancellation, the Court noted that the response should be proportionate and that "cancellation is a last resort.

Although the breach of trust with the hapū and Council by Perjuli is serious, that does not fully answer the issues under s 132. Such a breach makes cancellation a real option, but the primary purpose of the Act relates to sustainable management" (at [81]). However, the Court concluded that in light of the deliberate actions of Perjuli and the need to rebuild trust and respond to cultural concerns, cancellation was correct (at [113]).

Re Ngā Kaitiaki o Te Awa o Ngaruroro [2022] NZEnvC 227

This decision relates to an application for a water conservation order (WCO) over the Ngaruroro River by various parties. Ultimately, the relevant order sought was by Royal Forest & Bird Protection Society of New Zealand Inc and Whitewater NZ, over the upper and lower parts of the Ngaruroro River. There was opposition to this order for various reasons, including by tangata whenua.

The Environment Court carefully considered whether the WCO should be granted, noting that there is a presumption in favour of conservation.^[4] The Court concluded that no factor relevant to its decision-making (including under s 212(a) and (b) of the RMA or in relation to flood protection or climate change) displaced the presumption.

However, the Court went on to consider whether the WCO failed to meet ss 6(e), 7(a), and 8, including the requirement to "take into account" the principles of the Treaty, noting that the WCO did not include any reference to Māori values.

The Court concluded that the applicant had failed to consult adequately with several of the hapū and marae of the upper Ngaruroro River, noting that "It is not enough that those efforts were genuine because they did not result in even a minimal level of engagement with all affected iwi and hapū having a relevant interest according to tikanga" (at [433]). The Court went on to state:

[438] ... It is not an issue of tangata whenua having a right of veto over such applications, which the law confirms, in such situations, they do not. It is simply a case of tribes who are directly affected by the application not being consulted...

[439] Consultation assists in giving the Court confidence that the Court's responsibilities under ss 6(e), 7 and 8 of the RMA have been discharged. More specifically, that the Court has adequately considered tangata whenua's relationship with their whenua, (much of which they still own and with the Ngaruroro River running near or through those lands) or had adequate regard to their kaitiakitanga responsibilities as they have exercised them for generations. In addition, it assists in informing the Court whether the relevant Treaty principles, including those of consultation, active protection and acting in good faith, have been properly applied.

On balance, the Court concluded that having identified 'outstanding values' in the upper river, which would not be protected without the WCO, that the WCO should be granted with a new clause to provide for the recognition of Māori rights and interests, and the potential for a future transfer of authority concerning the management of water to an iwi authority.

Te Korowai o Ngāruahine Trust v Hiringa Energy Ltd [2022] NZHC 2810

This decision related to an appeal to the High Court by Te Korowai o Ngāruahine Trust (the Trust) against a "fast-track" decision made by an Expert Consenting Panel (Panel) approving resource consents for the construction of four large wind turbines (the Project). The Project is proposed to be undertaken by Hiringa Energy Ltd and Balance Agri-Nutrients Ltd, and consents were sought under the COVID-19 Recovery (Fast-track Consenting) Act 2020 (FTCA).

The Trust argued, among other things, that the Panel had not adequately considered the cultural landscape of Ngāruahine as a whole, and that it had not taken sufficient steps to address the adverse cultural effects of the Project, as required under Treaty principles. The relevant Treaty provision in the FTCA, s 6, differs from s 8 of the RMA (see [190]):

- The decision-maker must, in achieving the purpose of the Act, "act in a manner that is consistent with", rather than "taking into account", the principles of the Treaty.
- In addition, the decision-maker must act in a matter that is consistent with Treaty settlements.

Importantly, clause 31(12) of Schedule 6 to the FTCA provides that a panel must decline a consent application for a referred project if that is necessary to comply with the Treaty provision.

The High Court found that the Panel had not erred in recognising Hiringa's efforts to mitigate the effects of the Project on the cultural landscape of Ngāruahine. The Court provided guidance on the interpretation of s 6 of the FTCA:

[238] The Panel was required to assess the consistency of the proposal with relevant Treaty principles within the statutory framework. The applications did not satisfy all that iwi and hapū had sought in terms of tino rangatiratanga, but the Panel was required in achieving the purpose of the Act, to exercise its powers, in a manner "consistent with" the principles of the Treaty and Treaty settlements. The Treaty clause and related cultural provisions do not require the consent of iwi and hapū to the Project to achieve such consistency. (...)

[240] In the context of achieving the particular purposes of the FTCA, it was open to the Panel to be satisfied that in granting the consents it was acting in a manner consistent with the Treaty principles. Within the overarching legislative framework, and the particular limitations of the fast-track consenting scheme, it made no error in reaching that conclusion. (...)

[272] The decision-maker must show it has engaged with the cultural issues raised and satisfied itself that the adverse cultural effects which would prevent "consistency" with the principles of the Treaty have been addressed.

Additionally, the Panel's determination that the Project satisfied the requirements of the FTCA, and its decision to grant consents with conditions imposed in accordance with preferences expressed by hapū with mana whenua, were upheld by the High Court.

The High Court also found that the FTCA does not require a hearing to be held, as the Panel giving adequate reasons for its substantive decision meant there was no requirement to provide reasons for not holding a hearing. This is in line with the emphasis of the FTCA on time-limited decision-making, as a requirement to give reasons for a procedural decision to hold a hearing would run counter to its "fast-track" nature.

Ultimately the High Court dismissed the appeal, finding that the Panel acted in a manner consistent with the principles of the Treaty and Treaty settlements, as required by s 6 of the FTCA, and that the Panel appropriately addressed all concerns and material provided by the Trust.

Bay of Islands Maritime Park Inc v Northland Regional Council [2022] NZEnvC 228

This case relates to the protection of three areas in the Bay of Islands under the proposed Northland Regional Plan. This decision further addresses the intersection between the RMA and the Fisheries Act 1996 (Fisheries Act), which was previously discussed in our [2019/2020 review](#) in relation to *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532. Here the Environment Court noted that the "Fisheries Act is focused from a resource perspective but does include broader powers to maintain biological diversity (s9(b)) and protect benthic and other elements of the broader environment", whilst "the RMA is focused on biodiversity and interrelated values" and has a broader focus on the environment as well (at [66]-[67]). The Court confirmed that both Acts need to be considered in the context of tikanga and the relationship of tangata whenua to the relevant area (at [71]).

The Court concluded that the Fisheries Act provided adequate protection of biodiversity values in two of the areas applied for, but that one area was required to be protection under the RMA, due to the high diversity values of the area (although this did not prevent additional protection under the Fisheries Act). The Court concluded by acknowledging that "the Court has taken an incremental approach to protection in this case, recognising as it does the significant tikanga issues which arise as well as the interrelationship between the Fisheries Act and the RMA" but that if increased protection is not achieved "both the Minister and the Council may need to consider further controls to seek to protect these areas" (at [218]-[219]).

Protect Aotea v Environmental Protection Authority [2022] NZHC 1689

This decision relates to a judicial review of a decision of the Environmental Protection Authority (EPA) to grant a marine dumping consent for dredged material at the Cuvier Disposal Site, near Repanga (Cuvier Island) under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act). One of the grounds of review challenged the decision on the basis that it failed to take into account the likely effect the proposed dumping activity would have on tikanga-based customary rights and interests held by various iwi and hapū in relation to the area in which dumping will occur.

The Court considered whether the EPA had erred in relation to its assessment of existing interests. In doing so, the Court considered the principles identified or confirmed in the Supreme Court's *Trans-Tasman Resources* decision.

The EPA had erred by noting that pending claims under the MACA Act could not be considered as existing interests. However, that error was of no consequence in the particular circumstances. The Court concluded that the EPA did not err in its assessment of existing interests under s 59 of the EEZ Act because:

- there was no statutory obligation for the EPA to consult or hear submissions from parties served with specified documents;
- in the absence of any response to its letters the EPA would have been left to speculate as to which entities may be claiming an interest or right in the area;
- proactively seeking information from all 60 groups and entities on whom it had served the application would have involved considerable effort and delay and would have been unreasonable in the circumstances; and
- although a Cultural Impact Assessment was recommended by Ngā Kaihautū Tikanga Taiao (the EPA's Māori Advisory Committee), it would have been unreasonable in the circumstances as there were no identified existing interests to assess.

Ultimately, the Court concluded that the EPA had not erred by making its decision on the basis of the best available information at the time. The High Court declined the application for judicial review.

Updates on judgments discussed in previous articles

Raikes v Hastings District Council [2022] NZHC 3075

In previous articles we discussed the Environment Court's interim decision and subsequent appeal to the High Court in *Maungaharuru-Tangitū Trust v Hastings District Council* [2018] EnVC 79 (the Interim Decision) and [2019] NZHC 2576 (the High Court Decision) (in our [2018](#) and [2019](#) articles respectively). Following on from these cases, a further Environment Court Decision, *Maungaharuru-Tangitū Trust v Hastings District Council* [2021] NZEnvC 98 (the Revised Decision), recognised an area of land, known as Tītī-a-Okura or Tītīokura Saddle (the MTT88 site), as a wāhi tāonga or "site of significance" under the Proposed Hastings District Plan (the Proposed Plan).

In this decision the High Court considered an appeal from the Revised Decision in respect of the categorisation of the MTT88 site as wāhi tāonga in the Proposed Plan, as this extends into the Raikes' property. The Raikes' contended that the Environment Court had made errors in its assessment, relying on the cultural evidence at the hearing and failing to take into account the Raikes' own Christian beliefs. Further to this, the Raikes argued that the evidence did not support recognition of the site to the extent of the area approved on its land, and that cultural activities pointed to, such as tītī hunting and a historical trail, mainly occurred within defined areas along the present State highway.

The High Court dismissed the appeal. Of particular note, the High Court considered case law regarding the assessment of cultural evidence and approved the 'rule of reason' approach previously adopted by the High Court. The Environment Court had correctly applied the relevant law in its consideration of the evidence. The High Court noted the following:

[115] In one sense the cultural could be described as biased in the legal sense, in that the witnesses were giving evidence in support of MTT's case to recognise the site. However, the cultural evidence was given by witnesses who were themselves qualified experts. It was consistent and drew on whakapapa, stories handed down in the oral tradition and records of earlier evidence of kaumātua as well as other research. In assessing the evidence, the Court will look at all the evidence, including, as in this case, the landscape expert evidence, which here supported the cultural evidence. (...)

[117] The cultural evidence before the Court was through whakapapa (genealogy), kōrero tuku iho (the Hapū history), pepeha (tribal sayings), waiata (songs), whakatauākī (proverbs) and whakairo (carvings). The position was also supported by historical records, archaeological evidence, and statements of associations set out in the Maungaharuru Tangatu [sic] Hapū deed of settlement which indicate the association of the Hapū to identified areas. This was evidence which the Court was entitled to and did accept.

After reiterating the importance of testing the credibility and reliability of mana whenua evidence, the High Court noted that such evidence, if consistent and credible, will be strong evidence.

Te Whānau a Kai Trust v Gisborne District Council [2022] NZHC 1462

In our [2021 review](#), we discussed the Environment Court's decision in *Te Whānau a Kai Trust v Gisborne District Council* [2021] NZEnvC 115. At that time, we noted that the decision had been appealed to the High Court. The High Court judgment has since been issued.

The High Court held that the Environment Court had not erred in finding it had no jurisdiction under the RMA to recognise and provide for tikanga-based proprietary rights or interests in freshwater, reinforcing the position that the RMA is not designed to recognise issues of this type relating to freshwater. The other grounds of appeal involved evidence supporting unextinguished tikanga rights, whether the RMA can require Council funding through a provision of its Freshwater Plan, and issues relating to specific amendments to the Freshwater Plan.

The High Court rejected all grounds of appeal, resulting in the appeal being dismissed. *Te Whānau a Kai* sought leave to appeal to the Court of Appeal in late 2022 and the application was declined on all grounds.

Of note, the issue of jurisdiction relating to freshwater has been further discussed recently in *Attorney-General v Carter* [2023] NZHC 204. This was a declaratory proceeding where the High Court considered whether the Māori Land Court's jurisdiction under s 18 of the Te Ture Whenua Māori Act 1993 to determine ownership and rights to Māori freehold land includes the jurisdiction to make separate determinations about customary

title over freshwater on that land. The Court concluded that the Māori Land Court does not have jurisdiction to determine customary title in respect of freshwater, or to order damages for injury to such customary title to water.

Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council [2022] NZCA 598

In previous articles we have discussed the Environment Court's interim decision in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 and the High Court's decision in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388 (in our [2019/2020](#) and [2020](#) articles respectively). In the Environment Court, the majority dismissed appeals against consents allowing the expansion of an existing water bottling operation near Ōtakiri. The High Court upheld that decision, and (among other findings) held that the Environment Court majority had correctly concluded that assessing the consent application directly against the provisions in Part 2 of the RMA would not have added anything to its evaluation, given the coverage provided by the relevant regional planning instruments in the Bay of Plenty.

The Court of Appeal also dismissed further appeals, finding the High Court had not erred except in one instance (unrelated to Māori interests) which had not materially affected the ultimate outcome. In respect on the ground relating to Part 2 of the RMA, the Court of Appeal made the following finding:

[109] We have already set out many of the relevant extracts from the planning documents to which the High Court referred, at [90]-[92] above, and we do not repeat them here. We observe that they reflect an apparently comprehensive set of provisions dealing with issues relevant to the relationship of Māori with water, te mana o te wai and relevant Te Tiriti o Waitangi/Treaty of Waitangi principles. The latter include provisions recognising tino rangatiratanga and the degradation of mauri. The planning documents refer extensively to both the biophysical and metaphysical dimensions of activities relating to water. The appellants assert an error as a result of the Courts not referring in addition to pt 2, but we are left unclear as to what that might have added to the analysis carried out by reference to the planning documents. This was a case in which, in accordance with what was said in *RJ Davidson*, the Environment Court could properly conclude that nothing would be added by direct reference to pt 2. And in this respect, it is not a significant point to say that the planning framework might later change if what remained and was referred to dealt comprehensively with the issues affecting the wai from both a biophysical and a metaphysical perspective.

The appellants have sought leave to appeal to the Supreme Court.

Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga [2022] NZHC 2713

In our previous articles we have discussed the series of cases under the RMA which considered whether the Poutama Kaitiaki Charitable Trust (Poutama) has status as mana whenua under that Act. In our [2021 review](#), we discussed *Poutama Kaitiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2021] NZEnvC 165, which considered whether Poutama

come within the meaning of tangata whenua under the Heritage New Zealand Pouhere Taonga Act 2014. On appeal, the High Court rejected the appeal on the basis that "Poutama is clearly attempting to relitigate a matter that has already been determined twice by this Court, and the Environment Court" (at [43]).

Marine and Coastal Area (Takutai Moana) Act 2011

2022 was a significant year for the development of case law under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA), with the High Court holding several further hearings and releasing two judgments in the second stage of cases: *Re Edwards (Whakatōhea Stage Two)* [2022] NZHC 2644 and *Re Ngāti Pāhauwera Stage 2* [2023] NZHC 15.

Judgments to date on the first stage of cases have focussed on whether the tests for Protected Customary Rights (PCRs) and Customary Marine Title (CMTs) in ss 51 and 58 are met. The judgments on the second stage of cases focus on the form of the recognition order for PCRs and CMTs (s 109).

Re Edwards (Whakatōhea Stage Two) [2022] NZHC 2644 was the first judgment addressing s 109 of MACA. There were various issues with documentation including the lack of survey plans or maps identifying the location of the relevant PCRs and CMTs. Therefore, the decision was issued as an interim decision with an opportunity for the applicants to supplement their evidence. Nonetheless, the High Court made several findings about the nature of PCRs and CMTs and related wāhi tapu protection rights.

In particular, the Court highlighted the "critical importance" of wāhi tapu sites being clearly identified on maps so they could be incorporated into CMT (at [321]), and reiterated that wāhi tapu protections and restrictions can only be granted to protect a sacred area, not regulate unrelated behaviour or things that do not occur in the takutai moana such as camping.

Re Ngāti Pāhauwera Stage 2 [2023] NZHC 15 was similarly issued as an interim decision, and largely addressed issues relating to the draft orders and maps that are required to be resolved before the recognition orders can be finalised.

During 2022, the Court also held a specific wāhi tapu hearing relating to *Re Reeder (Ngā Potiki)*, and a stage one hearing for an application at Tokomaru Bay. Decisions from both these hearings are expected later this year.

Looking ahead, appeals from *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 by Whakatōhea Kotahitanga Waka, Te Rūnanga o Ngāti Awa, the Landowners Coalition, and cross-appeals from Ngāti Ruatakenga, Te Ūpokorehe Settlement Trust, and Ngāti Patumoana were heard in February 2023.

Treaty settlement milestones

Since our last update Ngāti Tara Tokanui signed its Deed of Settlement and Te Korowai o Wainuiārua initialled its Deed of Settlement. Ngāti Ruapani, Ngāti Hāua, and Ngāti Mutunga o Wharekauri signed Agreements in Principle with the Crown.

Legislation to give legal effect to five settlements was enacted in 2022:

- Ngāti Rangitihi Claims Settlement Act 2022
- Ngāti Maru (Taranaki) Claims Settlement Act 2022
- Maniapoto Claims Settlement Act 2022
- Te Rohe o Rongokako Joint Redress Act 2022
- Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Act 2022

Legislation has also been introduced for:

- Ngāti Tara Tokanui
- Ngāti Hei
- Ngāti Paoa
- Hauraki Collective

Developments to watch for in 2023

There are a number of significant developments to watch out for during the remainder of this year, notably the progress and enactment of the Natural and Built Environments and Strategic Planning Bills, and the introduction of the third piece of legislation to replace the RMA, the Climate Adaptation Bill. The Supreme Court is also expected to provide its *Port Otago* and *East West Link* decisions which will provide guidance on avoidance policies and Part 2 of the RMA. We discussed the Environment Court, High Court and Court of Appeal decision in *Port Otago* in previous articles.

Ngā kupu āpiti – Notes

[1] See clause 3(b).

[2] See *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [43]. The strength of 'give effect to', for example as in s 4 of the Conservation Act, has been discussed by the Supreme Court in *Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368. It is also used in a slightly different form in section 3A of the Climate Change Response Act 2002 and section 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.

[3] Clause 5(a)(i). See also cl 5(e) which is similar to s 6(e) of the RMA, cl 5(f) which is similar to s 6(g) of the RMA.

[4] NBEB, cl 6(3). SPA, cl 7.

[5] See generally cls 649-674.

[6] See clauses 497 and 525 of the NBEB and section 186 of the RMA. Section 186(7A) of the RMA was inserted by the Infrastructure Funding and Financing Act 2020. See section 7 of the Infrastructure Funding and Financing Act 2020 for the definition of SPVs. Section 11 of the Infrastructure Funding and Financing Act 2020 also includes a definition of 'protected Māori Law', which is similar to that in section 497 of the NBEB.

[7] At [416], citing *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* [1998] 1 NZLR 78 (CA) at 88.

Follow the links below for the previous reviews of Māori interests in natural resource management ([\(2013\) March Māori LR](#); [\(2014\) March Māori LR](#); [\(2015\) March Māori LR](#); [\(2016\) April Māori LR](#); [\(2017\) April Māori LR](#); [\(2018\) March Māori LR](#); [\(2019\) April Māori LR](#); [\(2020\) October Māori LR](#); [\(2021\) March Māori LR](#); and [\(2022\) February Māori LR](#).

This article was prepared by Chelsea Easter, Francesca Dykes, Sam Kenneally, and Dave Randal in Buddle Findlay's resource management and Māori law team, based in Wellington. Buddle Findlay acts for clients directly involved in two cases discussed in this article, namely *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* and *Te Whānau a Kai Trust v Gisborne District Council*.

Sir Edward Taihakurei Durie student essay competition 2022 – highly commended

Absent from the Law: the needs of takatāpui Māori in health, law and policy

Essay by Claire Downey*

Foreword by Carwyn Jones, Māori Law Review co-editor

The Māori Law Review sponsors the annual Sir Edward Taihakurei Durie student essay competition and each year publishes the winning entry. The winner of the 2022 competition was William Morrison. William's essay, 'Te Ture o Takutai Moana kei muri i te kēhi o *Re Edwards*: examining approaches to overlapping claims for customary marine title', was published in the February 2023 issue. In 2022, alongside the competition winner, our panel of judges also highly commended the essay written by Claire Downey and recommended that Claire's essay also be published. We are delighted to publish Claire's essay in this issue.

Claire's essay is entitled 'Absent from the Law: The needs of Takatāpui Māori in Health, Law and Policy'. The essay critiques the lack of analysis of the Crown's Tiriti obligations in relation to important developments for rainbow people such as the recent enactments of the Births, Deaths, Marriages, and Relationships Registration Act 2021 and the Conversion Practices Prohibition Legislation Act 2022. In her essay, Claire also

identifies an absence of a takatāpui perspective in the Waitangi Tribunal's *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*. The essay argues that the absence of a takatāpui perspective in the Waitangi Tribunal's inquiry and an absence of a Tiriti lens on rainbow policy lead to a failure to properly provide for the needs of takatāpui Māori.

Hei tīmatanga – Introduction

Recent legal movements from the Waitangi Tribunal and Parliament demonstrate that change is afoot in the areas of Māori health and support for rainbow and takatāpui Māori. Yet, these two limbs have yet to intersect in any meaningful way. The 2019 *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Stage One Report) has found that the New Zealand primary healthcare system is failing Māori. Simultaneously, the recent Births, Deaths, Marriages, and Relationships Registration Act 2021 (BDMRR) and Conversion Practices Prohibition Legislation Act 2022 (conversion practices legislation) have provided rainbow people in Aotearoa New Zealand with greater legal protections. In the Stage One Report, there was no discussion of the needs of takatāpui Māori. Nor is there express provision for Te Tiriti o Waitangi in the BDMRR Act or conversion practices legislation. This essay will analyse the findings in the Stage One Report, with reference to the recommended revised treaty principles for healthcare, considering the needs of takatāpui Māori and applying those principles to the conversion practices legislation and BDMRR.

What is takatāpui identity?

One of the leading works on takatāpui identity is Dr Elizabeth Kerekere's 2017 thesis, *Part of the Whānau: The Emergence of Takatāpui Identity; He Whāriki Takatāpui*. Dr Kerekere traces the history of takatāpui identity from Tūtānekai through to modernity, with a resurgence of the label in the face of colonial oppression. Takatāpui is defined as an "umbrella term that embraces all Māori with diverse gender identities, sexualities and sex characteristics including whakawāhine, tangata ira tāne, lesbian, gay, bisexual, trans, intersex and queer".^[1] Integral to being takatāpui is one's connection to whakapapa and mana, placing equal weight on Māori spiritual and cultural identity as on their gender and sexual diversity. Takatāpui existence, therefore, is distinct from tauwi and Pākehā experiences of being queer. Takatāpui not only experience the racism of being Māori, but also the queerphobia faced as a part of the rainbow community.^[2]

Obligations of the Crown to takatāpui Māori under Te Tiriti

This essay will advance on the argument that the Crown owes specific obligations to protect takatāpui Māori and gender identity in te ao Māori more generally. Previous Waitangi Tribunal inquiries have focused on the fiduciary duties that Te Tiriti o Waitangi gives rise to. In *Te Maunga Railways Land report* in 1994, the Tribunal said that "because the Crown is in the powerful position as the government in this partnership, the Crown has a fiduciary obligation to protect Māori interests".^[3] Relying on this, the

Crown has fiduciary duties to act in a way that benefits and protects takatāpui Māori interests.

Cases against the Crown in the 20th century established that the Crown's obligations of protection are not limited to physical resources or assets. In *Broadcasting Assets* the Court found that the Crown had actively contributed to the decline in Te Reo Māori usage and, therefore, had a greater obligation to protect the continuation of te reo.^[4] Similarly, in *Barton-Prescott v Director-General of Social Welfare*, the Court drew links between colonisation, the decimation of Māori family structure and the legal recognition of whānau, hapū and iwi family arrangements.^[5]

By analogy, as the Crown has actively contributed to the oppression of takatāpui Māori and suppression of diverse gender and sexual identities, the Crown owes a greater obligation of active protection to takatāpui Māori.^[6] The Crown has used the law as a tool against takatāpui Māori, and rainbow people generally, since 1840. When English law was adopted, so too was the law that made sodomy or buggery punishable by death.^[7] While sex between women has never been prohibited, it was not until 1986 that consensual sex between men was legalised. Even at present, discrimination against people based on gender identity is not protected under the Human Rights Act 1993, leaving trans and non-binary people open to discrimination.

Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry

Introduction to the Stage One Report

The absence of a takatāpui perspective in the Stage One Report does not correlate with an absence of health needs in that community. Rather, it is indicative that “discrimination against takatāpui has been normalised in the context of colonisation”.^[8]

The Health Services and Outcomes Kaupapa Inquiry (Kaupapa Inquiry) dates back to 2005 when the coalition of Māori Primary Health Organisations and Providers submitted a claim to the Tribunal (registered as Wai 1315).^[9] In 2016, Chief Judge Isaac announced the prioritisation of an inquiry into “nationally significant health issues”.^[10] The Kaupapa Inquiry has been undertaken in stages, with stage one focusing on primary healthcare. In the Hauora report, the Tribunal has reported on stage one, an inquiry into two claims (Wai 1315 and Wai 2687 (National Hauora Coalition)) with other claimants heard as interested parties.^[11]

Findings of the Tribunal

In 2019, the Tribunal made three interim recommendations, two of which were time-bound. The two time-bound interim recommendations were, firstly, for the Crown to give effect to the treaty partnership and empower tino rangatiratanga through the exploration of the possibility of a standalone Māori health authority^[12] and, secondly, for the Crown to adequately fund a treaty-compliant health system.^[13] The Tribunal found that the New Zealand Public Health and Disability Act 2000 and the primary health funding model were not treaty compliant.^[14] Crown counsel

submitted that the Crown's commitment to equity found in the primary healthcare framework "needs strengthening", but that the Crown has always been committed to pursuing equity through "concrete actions in plans".^[15] These arguments failed. Instead, the Tribunal found that:

"Under an equity-focused health system, the depth of, or imminent threat posed by, health inequity should heighten the urgency of action; the Crown's Treaty obligations are heightened under similar conditions. The deeper the need, the more urgent and substantial the targeted response should be."^[16]

While the Tribunal acknowledged that He Korowai Oranga (the Māori health strategy) and its articulation of the "three P's": partnership, participation, and protection, represented the strongest feature of the primary healthcare framework in direct pursuit of equity, the Tribunal also found that the principles were outdated and did not serve the purpose of creating equitable outcomes.^[17] The Tribunal recommended new Treaty principles be adopted for the primary healthcare system. They are a) the guarantee of tino rangatiratanga; b) equity; c) active protection; d) options; and e) partnership.^[18] These principles reincorporate the "three P's" in an updated way that responds directly to the needs of Māori in the primary healthcare framework.

Including takatāpui Māori

Since 2019, the Crown has taken steps to implement the time-bound recommendations made by the Tribunal, most notably with the establishment of a standalone Māori Health Authority in 2022. In Chapter 10 of the Hauora report, released in 2021, the Tribunal noted that the Government's decision to establish the Māori Health Authority was a "welcome development" that went beyond what its interim recommendations envisaged.^[19] The Tribunal further noted that the relationships this Authority will have with the Ministry of Health and Health New Zealand have "real potential" when considering the principles stated in the initial report.^[20] However, the Tribunal also found the Crown is still failing to address underfunding of Māori primary health organisations.^[21] The final recommendation on this was for the Crown and claimants to agree on an underfunding methodology and, once this is done, the Crown should fully compensate for the underfunding determined by the methodology.^[22]

The Crown should then use any funding formulas that are subsequently developed to address future primary healthcare funding, to address the allocation of rainbow primary healthcare funding. In Chapter 10, the Tribunal stressed the urgency of addressing underfunding of Māori primary health organisations "as a first step towards developing the funding regime a Treaty-compliant primary health system will require". In Budget 22, the Government announced that an additional \$2.2 million had been given to help establish eight primary healthcare providers to "provide gender-affirming care to gender diverse people".^[23] This gender-affirming care includes medical support such as hormone therapy, but not gender affirmation surgeries, putting a further pinch on the \$3 million funding boost allocated to gender affirmation surgeries back in 2019.^[24] Without an equivalent boost on funding for secondary healthcare services, gender

diverse people who need these surgeries will continue to wait years for affirmative healthcare they need. There is little information currently available on how this Budget 22 funding boost will be allocated, who will decide where the primary healthcare providers are set up, or how those decisions will be made. However, the application of the Treaty principles from the Stage One Report to rainbow healthcare funding may help to create equitable outcomes for takatāpui Māori in this area.

The distinct needs and experiences of takatāpui demonstrate the need for a Te Tiriti-compliant approach to rainbow healthcare funding allocation. Dr Kerekere found that, in discussing what it means to be takatāpui, a key theme was the importance of whānau and whakapapa connection.^[25] Therefore, in rainbow health, consideration needs to be given to the importance of ensuring access for takatāpui to culturally sensitive or Māori primary healthcare providers. Accessing healthcare as a takatāpui person carries not only the risks of being rainbow in the health space but also the risks of being Māori in a healthcare system that is founded on Western medicine and values. Taking a Te Tiriti-compliant approach to the allocation of rainbow primary healthcare funding may look like ensuring that existing Māori primary healthcare providers are sufficiently funded to provide comprehensive rainbow care for takatāpui. In the alternative, it may look like designating some of the eight primary healthcare providers under Budget 22 to be Māori rainbow primary healthcare providers. Both of these options would empower Māori to exercise authority over takatāpui primary healthcare, thus falling in line with Outcome 1 of *Whakamaui: Māori Health Action Plan 2020-2025*: “Iwi, hapū, whānau and Māori communities can exercise their authority to improve their health and wellbeing.”^[26]

Treaty principles could also guide the approach of rainbow primary healthcare funding allocation. Under the principle of partnership, the Crown could ensure that when the eight-rainbow primary healthcare providers are established, the Crown partners with the Māori Health Authority to decide how they will be set up. Going even further, Māori could exercise tino rangatiratanga over rainbow health funding for takatāpui Māori if the Crown provided specific funding for Māori rainbow health. The principle of options requires the Crown to “provide for and properly source kaupapa Māori health services” and ensure that all “primary health care services are provided in a culturally appropriate way that recognises and supports the expression of hauora Māori models of care”.^[27] At present, the Crown’s approach to the funding of rainbow healthcare falls short of this principle, leaving takatāpui Māori at risk of not being able to access rainbow healthcare in a culturally sensitive and empowering way.

Takatāpui identity in legislation and under Te Tiriti o Waitangi

With recent developments in Parliament for rainbow rights, the changes beg the question – are these legislative changes Te Tiriti compliant? The findings of the Tribunal in the Stage One Report offer a basis for analysis of the conversion practices legislation and the BDMRR Act. The conversion practices legislation outlawed conversion practices in New Zealand, offering both criminal and civil pathways for victims. The BDMRR

Act updated the process of name changes and available gender markers for official documents, with the changes coming into force in 2023. Both Acts have been passed with fanfare praising how they will protect and support rainbow New Zealanders. There has, however, been an absence of discussion of the Crown's Te Tiriti obligations with regard to these legislative developments. Arguably, the lack of consideration for takatāpui Māori needs demonstrates a persistent lack of knowledge on the intersection of Māori and rainbow identity.

Legislative examples

Concerns for rainbow mental health, and in some instances physical health, link the ban on conversion practices with the importance of the Stage One Report. Results from the 2019 New Zealand Mental Health Monitor showed that 56% of rainbow participants experienced mental illness in their lifetime compared to 30% in others.^[28] Dr Kerekere found in her research that most interviewees expressed some form of suicidality and depression.^[29] However, mental health will not be considered until later in stage two of the Health Services and Outcomes Kaupapa Inquiry. These factors considered, there remains strong evidence in support of taking a Te Tiriti-focus to the conversion practices legislation. For example, media coverage around conversion practices shows that Māori and Pasifika people are more likely to be victims of conversion practices, thus increasing the risk of adverse mental and physical health outcomes for takatāpui Māori and rainbow Pasifika.^[30]

The argument for analysing the conversion practices legislation from a health outcomes Te Tiriti lens rests on ensuring a connection between takatāpui Māori and te ao Māori. The principle of options may look like ensuring that alternative pathways for redress are legislated for in the Act. At present, there are options for out-of-court proceedings like Te Pae Oranga, but at the discretion of the Police.^[31] There remains, however, an absence of non-legal support for victims. If those experiencing mental distress want to seek mental health support, there is no specific pathway. An option submitted to the Justice Committee during the Select Committee process was the possibility of extending the ACC scheme to enable access.^[32] While neither of the options proposed here are perfect, they offer the potential for what legislation with options for Māori embedded into it may look like.

As with the funding for rainbow primary healthcare, the BDMRR Act 2021 empowers rainbow New Zealanders with gender-affirming legal support. The Act will enable people to change their name and gender on official documents by making a statutory declaration. However, like the conversion practices legislation, part of being able to access these positive changes for rainbow people is having, first, trust in the processes of law and government and, second, knowledge of and access to the resources to do this. The principle of equity from the Stage One Report requires the Crown to create equitable outcomes for Māori. Yet, these enactments may be handicapped in doing this due to the absence of specific provisions for Māori or Te Tiriti. Studies have shown that Māori tend to have less trust in the government.^[33] This distrust may feed into takatāpui Māori feeling excluded from the processes. Therefore, there is the possibility that,

without a Te Tiriti provision, there will be no specific framework implemented for properly resourcing organisations to help takatāpui Māori navigate the application process.

The future of takatāpui identity, Te Tiriti, healthcare, and legislation

Stage one of the Kaupapa Inquiry is merely the first step in assessing the Crown's alleged breaches of Te Tiriti concerning Māori health. Stage two will be structured in two parts with three priority areas: Māori with disabilities, Māori mental health and issues of substance use.^[34] Stage three will cover "the remaining national significant issues and eligible historical issues".^[35] Currently, there is no indication that the needs of takatāpui Māori in the health system will be addressed in these later stages. This absence of a takatāpui perspective will further exacerbate issues of "othering", inaccessibility, underfunding, and queerphobia experienced by takatāpui Māori in the health system.

As discussed in this essay, the principles enunciated in the Stage One Report offer a good basis for assessing the Crown's actions that affect takatāpui Māori. The application of these principles is a kind of "working with what we have" approach. However, there may be more appropriate analyses that emerge from the stage two and three reports for issues relating to takatāpui Māori. Ultimately, so long as takatāpui Māori are absent from the Kaupapa Inquiry, legislation, and other rainbow policy, the Crown will continue to fail to properly provide for the needs of takatāpui Māori. The Crown has an obligation to takatāpui Māori under Te Tiriti but, like many issues concerning rainbow people in Aotearoa New Zealand, there is little meaningful development happening.

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Ngā kupu āpiti – Notes

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- [2] Above at 45.
- [3] Waitangi Tribunal *Te Maunga Railways Land report* (Wai 315, 1994) at 68.
- [4] *New Zealand Māori Council v Attorney-General (Broadcasting Assets)* [1992] 2 NZLR 576 at 587.
- [5] *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 at 183.
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- [8] Above n 1 at 128.
- [9] Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Inquiry* (Wai 2575, 2019) at 2.
- [10] Above at 3.
- [11] Above at 5.
- [12] Waitangi Tribunal “Chapter 10: Final Recommendations” *Hauora: Report on Stage One of the Health Services and Outcomes Inquiry* (Wai 2575, 2021) at 10.
- [13] Above at 13.
- [14] Above n 9 at 96.
- [15] Above at 66.
- [16] Above n 9 at 67.
- [17] Above n 9 at 70; 162; 163.
- [18] Above at 163.
- [19] Above n 11 at p X of letter of transmittal.
- [20] Above at 9.
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- [23] Ayesha Verrall “Rainbow health gets funding boost” (press release, 5 June 2022).
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[34] Manatū Hauora Ministry of Health “Wai 2575 Health Services and Outcomes Kaupapa Inquiry” (29 June 2020) Manatū Hauora Ministry of Health <www.health.govt.nz>.

[35] Above.

Te Kōti Mana Nui – Supreme Court

Public works – role of the Minister for Land Information

Dromgool v Minister for Land Information

[2022] NZSC 157
22 December 2022

Report by Elizabeth Derby

Whakataunga – Overview and result

Unsuccessful appeal from a Court of Appeal decision about the role performed by the Minister for Land Information in agreeing to public works land acquisitions for construction of an electricity transmission line.

Public works – role of the Minister for Land Information – Court of Appeal decision upheld	
Date	22 December 2022

Case	Dromgool v Minister for Land Information (352 KB PDF)
Citation	[2022] NZSC 157
Court	Te Kōti Mana Nui – Supreme Court
Judge(s)	Winkelmann CJ, William Young, Glazebrook, O'Regan, and Ellen France JJ
Earlier/later decisions	<i>Dromgool v Minister for Land Information</i> [2018] NZEnvC 108; <i>Dromgool v Minister for Land Information</i> [2019] NZHC 1563; <i>Minister for Land Information v Dromgool</i> [2019] NZCA 508; Minister for Land Information v Dromgool [2021] NZCA 44; <i>Dromgool v Minister for Land Information</i> [2021] NZSC 71.
Legislation cited	Public Works Act 1981, ss 2, 18(1)(b), 20, 23(1), 23(4), 24, and 26; Resource Management Act 1991, ss 167, 171(1), 174(4), 185, 186(1), 186(2), 186(8), and 296; Criminal Procedure Act 2011, s 309; Senior Courts Act 2016, s 71(a); Magna Carta 1297 25 Edw 1 c 29.
Cases cited	William Young, Glazebrook, O'Regan, and Ellen France JJ: <i>Ortmann v United States of America</i> [2018] NZSC 125; <i>Seaton v Minister for Land Information</i> [2013] NZSC 42; <i>Unison Networks Ltd v Commerce Commission</i> [2007] NZSC 74; <i>Deane v Attorney-General</i> [1997] 2 NZLR 180 (HC); <i>Simpsons Motor Sales (London) Ltd v Hendon Corp</i> [1963] Ch 57 (CA); <i>Minister for Land Information v Seaton</i> [2012] NZCA 234; <i>Kett v The Minister of Land Information</i> EnvC Auckland A110/2000; <i>Brunel v Waitakere City Council</i> EnvC Auckland A82/2006; <i>Waitakere City Council v Brunel</i> [2007] NZRMA 235 (HC); <i>Kett v Minister for Land Information</i> HC Auckland AP404/151/00, 28 June 2001; <i>The New Zealand Guardian Trust Co Ltd v The Auckland Regional Council</i> PT Auckland A54/90; <i>Crimp v Invercargill City Council</i> (1991) 1 NZRMA 165 (PT); <i>Waimari District Council v Christchurch City Council</i> PT Christchurch C30/82; <i>Re Hatton</i> EnvC Auckland A25/98; <i>Ortmann v United States of America</i> [2020] NZSC 120. Winkelmann CJ: <i>Seaton v Minister for Land Information</i> [2013] NZSC 42; <i>Deane v Attorney-General</i> [1997] 2 NZLR 180 (HC); <i>Daganayasi v Minister of Immigration</i> [1980] 2 NZLR 130 (CA); <i>Associated Provincial Picture Houses Ltd v Wednesbury Corp</i> [1948] 1 KB 223 (CA).
Overview and result	Top Energy Ltd (TEL) sought easements to enable construction of an electricity transmission line between Kaikohe and Kaitia. It made requests to the Minister for Land Information in relation to acquiring land along the route. The Minister gave her agreement. Affected landowners (the appellants) made objections to the Environment Court. The Environment Court concluded that the taking of the land would be fair, sound, and reasonably necessary for achieving those objectives. The appellants then appealed the Environment Court decision to the High Court. The High Court allowed the appeal and set

	aside the Environment Court's report. The Court of Appeal then reversed the High Court decision and confirmed the report of the Environment Court. The appellants were granted leave to appeal to this Court, on a limited ground. The approved question before the Court centred around "whether the Minister must be satisfied that the proposed taking is fair, sound, and reasonably necessary for achieving the objectives of the network utility operator or whether it is sufficient that the Minister is satisfied the proposed taking is capable of meeting that test." Counsel for the appellants submitted that, in making a decision under s 186 of the Resource Management Act 1991, the Minister "must personally undertake a consideration of the alternatives and must satisfy him or herself that, on the information available at the time of the s 186 decision, the taking would be fair, sound, and reasonably necessary." Counsel for the respondent argued that it was not for the Minister to consider alternatives and determine which was the better of the two, but that the Minister must be satisfied the requiring authority has adequately considered alternatives. Held, appeal dismissed. The majority of the Court (William Young, Glazebrook, O'Regan, and Ellen France JJ) accepted the respondent's submission that given the requiring authority's expertise and the detailed work it will have undertaken in relation to the project, it would make no sense for the Minister and his or her officials to be obliged to undertake a parallel process involving a reconsideration of alternatives and of the reasonableness of the proposed acquisition. The majority disagreed with the High Court's conclusion that the Minister must personally consider alternatives. Chief Justice Winkelmann, dissenting, would have allowed the appeal on the basis of an error of law in the Environment Court.
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Te Kōti Matua – High Court

Trusts – enforcement proceedings – repayment of trust funds

Doney v Adlam

[2023] NZHC 363

1 March 2023

Report by Elizabeth Derby

Whakataunga – Overview and result

Application by the trustees of the Savage Papakāinga Land Trust for substitution of judgment creditor and leave to issue enforcement proceedings against the respondent.

Trusts – enforcement proceedings – repayment of trust funds – Savage Papakāinga Land Trust	
Date	1 March 2023
Case	Doney v Adlam (521 KB PDF)
Citation	[2023] NZHC 363
Court	Te Kōti Matua – High Court
Judge(s)	Harvey J
Earlier/later decisions	Savage v Adlam (2014) 95 Waiariki MB 176 (95 WAR 176); Adlam v Savage (2015) Māori Appellate Court MB 59 (2015 APPEAL 59); Adlam v Savage [2016] NZCA 454; Adlam v Savage [2017] NZSC 11; <i>Pacey v Adlam – Matata Parish 39A 2B 2B 2A</i> (2017) 178 Waiariki MB 32 (178 WAR 32); <i>Savage v Adlam</i> HC Auckland CIV-2022-470-44; <i>Doney v Adlam</i> [2022] NZHC 2963; <i>Savage – Lot 39A Sec 2A Parish of Matata</i> (2022) 272 Waiariki MB 298 (272 WAR 298); <i>Barnes v Adlam</i> DC Rotorua CIV-2015-063-257; <i>Barnes v Savage</i> (2017) 176 Waiariki MB 226 (176 WAR 226); Adlam v Niao (2018) Māori Appellate Court MB 478 (2018 APPEAL 478).
Legislation cited	Te Ture Whenua Māori Act 1993, s 58(3); Trusts Act 2019, s 26; Central North Island Forests Land Collective Settlement Act 2008, sch 2; Ngāti Tūwharetoa (Bay of Plenty) Claims Settlement Act 2005.
Cases cited	Ellis v R [2022] NZSC 114; <i>R Chesney v New Zealand Drycleaners and Dyers Ltd</i> [1958] NZLR 599; <i>Wati v Sharma</i> [2020] NZHC 2010; <i>Re Giddings, ex parte Simpson</i> [2017] NZHC 2560; <i>Bay Citys Real Estate Ltd v Re/Max New Zealand Ltd</i> HC Napier CIV-2010-441-134; <i>Lawton v Redemptech Holdings Pty Ltd</i> [2017] NZHC 3104; <i>Wilson Parking New Zealand v Fanshawe 136 Ltd</i> [2014] 3 NZLR 657; <i>Bahin v Hughes</i> (1886) 31 Ch D 390; <i>Foley v Burnell</i> (1783) 1 Bro CC 274; <i>Wright v Pitfield</i> [2022] NZHC 385; <i>S v N</i> [2021] NZHC 2860; <i>Hunia v Keepa</i> [1895] 14 NZLR 71; <i>Hunia – Horowhenua 11</i> (1898) Otaki

	Appellate MB 377 (OTI 377); <i>Nireaha Tamaki v Baker</i> [1901] AC 561 (PC); <i>Public Trustee v Loasby</i> (1908) 27 NZLR 801 (SC); <i>Baldick v Jackson</i> (1911) 13 GLR 398; <i>Hineiti Rirerire Arani v Public Trustee</i> (1919) NZPCC1; <i>Te Weehi v Regional Fisheries Officer</i> [1986] 1 NZLR 680; <i>In re a claim to the Waitangi Tribunal by Henare Rakihia Tau and the Ngai Tahu Maori Trust Board</i> (1990) 4 South Island Appellate Court 672; Kameta v Nicholas [2012] NZCA 350; Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2021] NZSC 127; Takamore v Clarke [2012] NZSC 116; <i>Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Ltd</i> [2022] NZSC 142; <i>Ngāti Wahiao v Ngāti Hurungaterangi and Ors</i> [2017] NZSC 200; Te Rūnanga o Ngāti Manawa v CNI Holdings Ltd [2016] NZHC 1183; <i>Ngāti Hurungaterangi v Ngāti Wahiao</i> [2017] 3 NZLR 770; <i>Bidois v Leef</i> [2015] 3 NZLR 474; <i>Rapata (Robert) Leef as representative of Ngāti Taka v Colin Bidois as representative of Pirirākau</i> [2017] NZSC 202; Re Edwards (Te Whakatōhea No 2) [2021] NZHC 1025; Re Reeder & Ors (Ngā Pōtiki Stage 1 – Te Tāhuna o Rangataua) [2021] NZHC 2726; <i>Re Ngati Pahauwera (Stage Two)</i> [2023] NZHC 15; Ngāti Whātua Ōrākei Trust v Attorney General [2018] NZSC 84; <i>Ngāti Whātua Ōrākei v Attorney-General</i> [2022] 3 NZLR 601; <i>Ngāti Whātua Ōrākei Trust v Attorney-General</i> [2023] NZHC 74; <i>Phillips v Ashby – Oromahoe 17B2</i> (2006) 6 Taitokerau Appellate MB 271 (6 APWH 271); Wihongi v Samson – Otarihau 2B1C [2018] Māori Appellate Court MB 469 (2018 APPEAL 469); Fenwick v Naera [2016] 1 NZLR 354 (SC); Clarke v Karaitiana [2011] NZCA 154; <i>Proprietors of Mangakino Township v Māori Land Court</i> CA65/99; Rameka v Hall [2013] NZCA 203; Tito v Tito [2012] NZCA 493; <i>Bamber v The Official Assignee</i> [2023] NZHC 260.
Overview and result	Application for substitution of judgment creditor and leave to issue enforcement proceedings against the respondent. The applicants are the trustees of the Savage Papakāinga Land Trust. The application concerns a 2014 Māori Land Court judgment where the respondent was ordered to repay amounts totalling about \$15 million. At the time of this decision, the Trust had received just under a third of the money owed. The trustees sought to enforce the outstanding debt including by way of sale of two properties owned by the respondent. The respondent opposed the orders sought by the trustees on the grounds that the trustees were estopped from enforcing the judgment based on representations made to her by former and current trustees during the proceedings that she would not lose the properties, and that the trustees had delayed taking steps to such an extent that it would then be unjust to "have her effectively rendered homeless as a seventy-six-year-old superannuant with limited

	assets and income." Counsel for the respondent submitted that the enforcement proceedings should be either set aside or subject to a stay. Counsel also raised tikanga issues. For the first issue, substitution of trustees, the applicants submitted that there had been a change of trustees and it would be appropriate that those persons be recorded by way of substitution as the trustees for the purposes of the application to enforce the outstanding judgment of the Māori Land Court. On the issue of enforcement of the Māori Land Court judgment, counsel for the applicants submitted that "no substantial miscarriage of justice will arise from enforcing the judgment debt and selling the properties; they are the ordinary consequences of enforcement of a judgment." On tikanga issues, counsel for the respondent submitted that the appropriate next step would be for the Court to direct mediation, as this would provide an opportunity for the parties to resolve the claim kanohi ki te kanohi (face to face). Counsel responded to submissions that "the trustees' failure to take account of tikanga in pursuing the sale order would result in a substantial miscarriage of justice." Counsel for the applicants submitted that, even under tikanga, the trustees still have an obligation to make decisions in order to protect their assets. Held, the Court granted the Savage Papakāinga Land Trust trustees' application for substitution of judgment creditor. The Court also granted the application for leave to issue enforcement proceedings, including a sale order, against the respondent. The Court saw nothing controversial in the granting of the application for substitution of judgment creditor and noted that this aspect was purely administrative. This aspect of the application was granted. The Court did not accept that the delay in enforcing the judgment debt had been unreasonable. The Court also found that the trust's position for recovery had been consistently expressed in correspondence with the respondent's representatives throughout the litigation, contrary to the respondent's assertions that representations had been made to her by individual trustees. The Court found that none of the brief communications highlighted by the respondent could amount to the trust's representation not to pursue the debt. The Court emphasised that the trustees had a legal obligation to pursue the debt.
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	The Court found that a stay of enforcement was not appropriate and that estoppel did not apply. As a result, the Court accepted the trustees' position that they were entitled to enforce the judgment they had secured against the respondent. Having arrived at the conclusion that leave should be granted, the Court went on to consider tikanga, as raised by counsel for the respondent. The Court discussed the relevance of tikanga in this case "in three specific contexts: ownership and whakapapa; the management of the whenua; and dispute resolution." The Court saw evidence that there had already been multiple meetings held between the trustees and the respondent to find solutions, but that those attempts had been unsuccessful. Counsel for the respondent had submitted that a further process of hui and mediation should be attempted. On this issue, the Court believed that the time had long passed for such an approach. The Court, in this case, operated under the principle that tikanga should not apply in circumstances where it is inappropriate or irrelevant. The Court found no principles of tikanga that would support the approach proposed by the respondent, especially because there were assets available to contribute to the remedy that the Trust was entitled to pursue. In pursuing this remedy, the trustees were "seeking to apply the principles of tikanga to achieve ea for the trust beneficiaries, including themselves and [the respondent], in accordance with their duties." The Court thus found that, when correctly applied, the relevant principles of tikanga reinforced the respondent's responsibility to repay the Trust the judgment debt that remained outstanding.
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Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal

Legal aid – claimant funding

Report on Whakatika ki Runga, a mini-inquiry commencing Te Rau o te Tika: the Justice System inquiry

Te Rōpū Whakamana i Te Tiriti o Waitangi – Waitangi Tribunal (Wai 3060, 2023)
17 February 2023

Report by Elizabeth Derby

Whakataunga – Overview and result

This report is described as a mini-inquiry commencing the Waitangi Tribunal's inquiry *Te Rau o te Tika: The Justice System Inquiry*. The Waitangi Tribunal examined settings for claimant funding and has found that the Crown breached its Treaty duty to ensure that Māori claimants have the necessary resources to participate fully in the Tribunal's inquiry processes.

Legal aid – claimant funding – translation costs – report on Whakatika ki Runga, a mini-inquiry commencing Te Rau o te Tika: the Justice System inquiry	
Date	17 February 2023
Report	Report on Whakatika ki Runga, a mini-inquiry commencing Te Rau o te Tika: the Justice System inquiry (1.84 MB PDF)
Citation	Wai 3060, 2023
Tribunal	Te Rōpū Whakamana i Te Tiriti o Waitangi - Waitangi Tribunal
Member(s)	Judge Carrie Wainwright (Presiding), Dr Paul Hamer, Dr Ruakere Hond, and Dr Hana O'Regan
Prior/later parts	

The following summary is provided from the Tribunal's media release:

The Waitangi Tribunal's latest report finds the Crown breached its Treaty duty to ensure that Māori claimants have the necessary resources to participate fully in all its processes. Claimants have been seeking a solution for several years, including through an urgent inquiry. Hearings finally took place in the latter half of 2022 as part of the newly constituted inquiry into the justice system, known as Te Rau o te Tika. The claimants argued that the unavailability of funding compromises their ability to make and pursue their Waitangi Tribunal claims, which undermines the institution as a pillar of New Zealand's constitution.

The Tribunal heard claimants in 53 claims on why the current arrangements for funding claimants are not working and do not meet

Treaty standards. Claimant lawyers called over 40 witnesses, many of whom said the inadequate funding arrangements caused hardship and distress, and discouraged participation.

The Crown called eleven witnesses from eight separate government agencies. Their evidence explained those agencies' point of view on the funding arrangements that operate in eight kaupapa inquiries. The Crown conceded problems with current funding arrangements but argued that they were good enough in Treaty terms. (Kaupapa inquiries is the name given to inquiries focusing on subject areas of national significance like health services and the justice system.)

The Tribunal did not accept the Crown's characterisation of the problems. It details in its report the many flaws in the present ad hoc funding arrangements. It was particularly concerned that officials knew about the inadequacies, but Ministers did not act on their advice. The Tribunal says that when the Crown fails to resource Māori properly to participate in its inquiries, the purpose of the Waitangi Tribunal is seriously undermined. It is up to the Crown, which created the Waitangi Tribunal for 'the observance, and confirmation, of the principles of the Treaty of Waitangi', to ensure that claimants can access its processes easily, and in a culturally comfortable way. There is simply no point in having a Waitangi Tribunal otherwise.

The Tribunal says it is now urgent for the Crown and Māori to sit down together to design suitable funding arrangements. It is not acceptable, in this area of policy that primarily affects Māori, for the Crown to come up with policy and leave 'consulting' Māori to the end. The Tribunal also recommends a standardised funding protocol until the long-term arrangements are agreed.

Another problem to which claimants sought a solution is getting the Ministry of Justice to pay to translate into English documents filed in Māori. Translations are required because there are participants in the process who cannot read Māori. Claimants told the Waitangi Tribunal that wasn't their fault. If the Tribunal requires translations, the Ministry of Justice should wear the cost. The Tribunal agreed. It strongly stated the imperative for the Ministry of Justice to prioritise and fund this work. Claimants and their lawyers have a right to file submissions and evidence in Māori, and the Crown must support the use of te reo Māori in the Tribunal whether orally or in writing. It was after all the Waitangi Tribunal that, 40 years ago, found that te reo Māori is a taonga under the Treaty.