Hōngongoi 2023

Te Ao Māori

Trends & Insights

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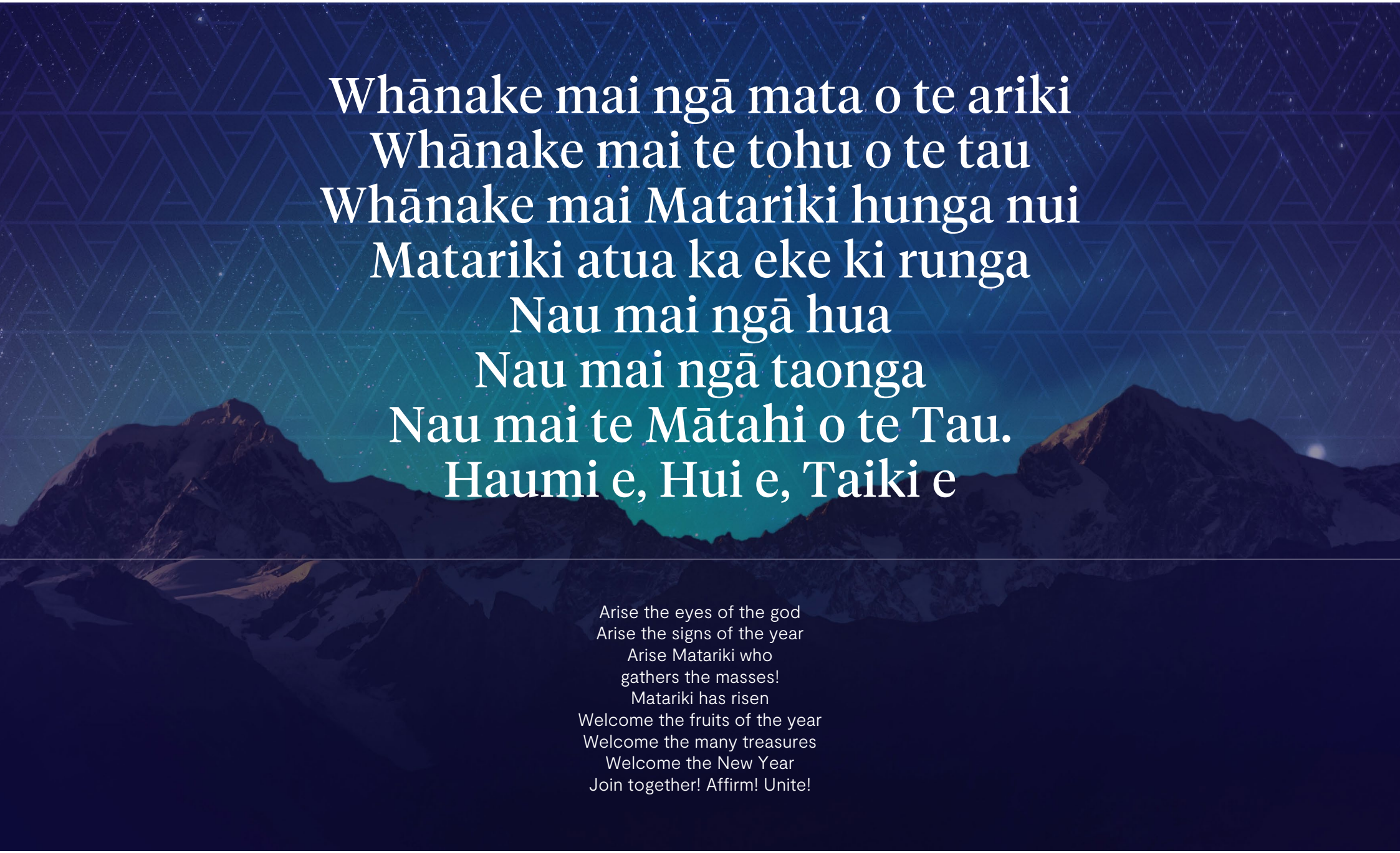


Arise the eyes of the god
Arise the signs of the year
Arise Matariki who
gathers the masses!
Matariki has risen
Welcome the fruits of the year
Welcome the many treasures
Welcome the New Year
Join together! Affirm! Unite!

Te Iwa o Matariki

Widely regarded as the beginning of the Māori new year, Matariki is a time to reflect on the year that has been and look to the horizon for what is to come.

Last year, Matariki became an official public holiday in Aotearoa New Zealand – the first indigenous public holiday celebrated at a national level around the world – a significant milestone. The Matariki cluster is made up of nine stars, or Te Iwa o Matariki, they are:

Pōhutukawa

Associated with those that have passed on since the last rising of Matariki.

Waitī

Associated with all fresh water bodies and the food sources that are sustained by those waters.

Waitā

Associated with the ocean, and food sources within it.

Waipuna-ā-rangi

Associated with the rain.

Ururangi

Associated with the winds.

Tupuānuku

Associated with everything that grows within the soil to be harvested or gathered for food.

Tupuārangi

Associated with everything that grows up in the trees: fruits, berries and birds.

Hiwa-i-te-rangi

Associated with granting our wishes and realising our aspirations for the coming year.

Matariki

The main star in the cluster. Connected to wellbeing and welcoming in the New Year.

Contents

Te Ao Māori

As we reflect on another year, we are inspired by Te Iwa o Matariki and all that they represent. The principles of the whetu are woven throughout this publication, which looks at the significant changes happening in the Māori law and business sectors.

Key trends we have identified include:

01

Prominence of Te Tiriti o Waitangi and tikanga principles in legislation and policy development, especially in big ticket law reform projects like the replacement of the Resource Management Act and the Three Waters reforms.

02

Momentum in the courts towards recognising tikanga Māori as a source of law and legal rights. We consider this is a positive step for Aotearoa, but observe a reluctance by Judges to make findings about tikanga in cases where its meaning is disputed.

03

The Māori economy is broadening its horizons post-pandemic, as Māori businesses strengthen existing trade relationships and new markets emerge as a result of free trade negotiations. But Māori economic actors continue to focus their efforts at home too, with increased investment in housing and other projects to deliver on the needs of whānau and hapū.

Perhaps as a consequence of the increased impact these factors are creating for Māori in the economy and in the halls of justice and government decision-making, Māori groups are taking stock of their relationship with the Crown. Māori are calling for a move away from the existing partnership-based relationship with the Crown, towards a relationship based on rangatiratanga – as guaranteed by Te Tiriti o Waitangi.

To support the ambitions of our clients, we challenge ourselves at Chapman Tripp and those we interact with to increase our knowledge and understanding of Te Ao Māori. Not only does this contribute to the fabric of Aotearoa, but it offers a genuine strategic advantage in the growing Māori economy.

Mānawatia a Matariki!

"To be a great leader in Aotearoa, understanding Te Ao Māori – its depth, beauty and sophistication – is now a baseline requirement. Clients seek our support to improve their Māori cultural awareness for three main reasons: They have a desire to participate in the Māori economy, especially with its trajectory of growth; they recognise that Māori culture offers a point of difference for New Zealand business, but awareness is required to engage with it authentically; and for compliance purposes. Whatever your reason, Matariki presents a great opportunity to consider how you will increase your Māori cultural competency to help all of Aotearoa succeed."

Precious Clark, Pou Tāhu Rangapū / Chief Executive Officer, Maurea Consulting

"I have seen a significant positive change sweep across the motu regarding the uptake of te reo Māori and Māori cultural development within the public and private sectors. I've been struck by the passion and intent of the leaders and decision makers I've worked with. They want to do the right thing and build Māori cultural awareness within their workforces in a way that is respectful, inviting, safe, accessible and empowering. They understand the significance of this mahi and the commitment that is needed to fulfil their aspirations as well as ours."

Te Rau Winterburn, Kaiwhakahaere Kaupapa Māori / Head of Māori Initiatives, EP Te Ao Māori, Education Perfect

Growing recognition of tikanga and Te Tiriti in law and policy

Spotlight on tikanga and Te Tiriti in government decision-making

There is a trend in Aotearoa towards a prominence of Te Tiriti o Waitangi and tikanga principles in legislation and policy development, especially in big ticket law reform projects like the replacement of the Resource Management Act and the Three Waters reforms.

Cabinet Office Circular 2019

Tikanga and Te Tiriti o Waitangi are being increasingly recognised in both policy and law on the back of official guidance promoting their status.

On 22 October 2019, Cabinet released a new circular setting out agreed guidelines for consideration of Te Tiriti o Waitangi and the Treaty of Waitangi in policy development and implementation.[1]

1. Cabinet Office Circular "Te Tiriti o Waitangi / Treaty of Waitangi Guidance" (22 October 2019) CO (19) 5.

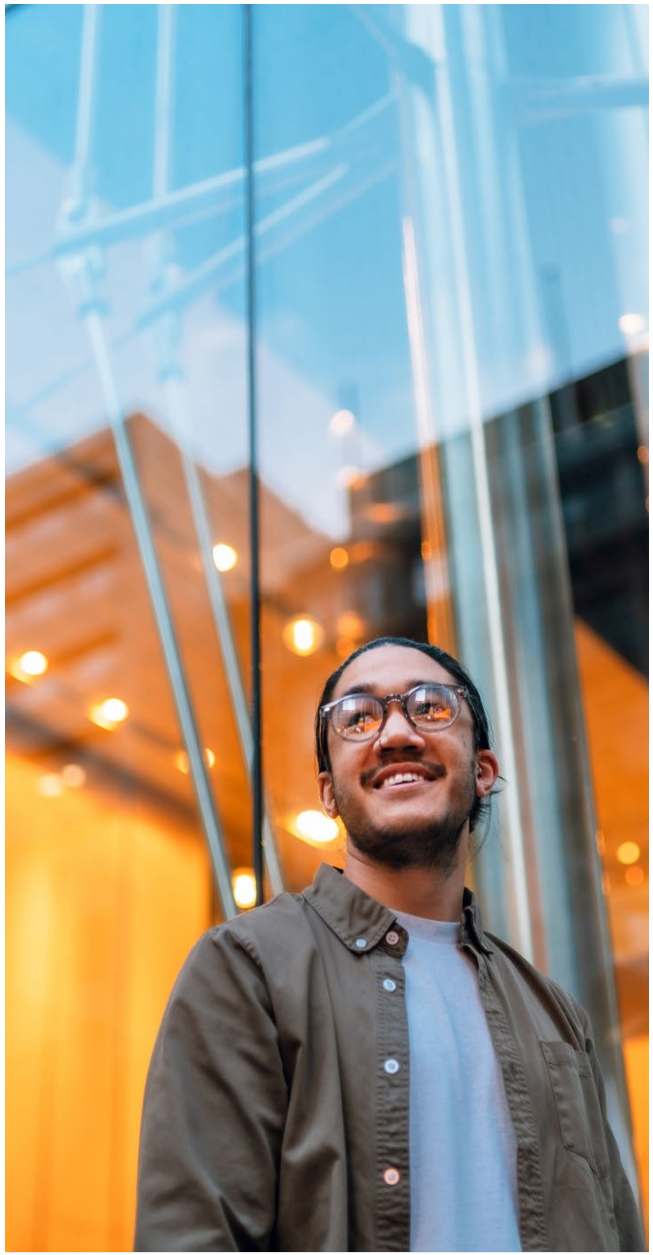
This updated earlier advice from 1989 to capture developments since then, in particular the recognition of tikanga Māori in common law and statute and the developing landscape of the Treaty relationship through the settlements process. Innovations included:

- A focus on the text of Te Tiriti and the Treaty rather than the principles developed by the courts, putting questions to policy makers for them to consider; and
- Acknowledgment of the Crown's previous failures, and intentional denial of rights granted to Māori under Te Tiriti.

Since the 2019 circular took effect, Te Tiriti clauses have been incorporated into more and more primary legislation. Examples include:

- Education and Training Act 2020, s 9;
- Public Service Act 2020, s 14; and
- Pae Ora (Healthy Futures) Act 2022, s 6.

Express statutory language strengthens the principle of legality in relation to Crown obligations under Te Tiriti, even though courts have held that Māori rights may be recognised by the common law without statutory expression and a decision maker may be required to weigh Treaty rights/interests even if there is no explicit reference to the Treaty in statute.



Legislation Guidelines 2021

Issued by the Legislation Design and Advisory Committee in September 2021, law makers now benefit from refreshed *Legislation Guidelines*. The Guidelines:

- Commit the Committee to asking whether all Māori rights and interests that may be affected have been identified;
- Encourage early engagement with Māori; and
- Recommend consultation with the Crown Law Office, Te Arawhiti/Office for Māori Crown Relations, and Te Puni Kōkiri/Ministry of Māori Development to assist with identifying affected interests.

The effect of these two instruments is evident in the Bills to replace the Resource Management Act 1991, the Natural and Built Environment Bill (NBEB) and Spatial Planning Bill (SPB), both of which seek to give effect to the principles of Te Tiriti o Waitangi and to recognise Te Ao Māori, including mātauranga Māori,[2] and the Three Waters reforms which expressly reserves Māori rights and interests in water and provides that all persons performing or exercising duties, functions, or powers under the Act give effect to Te Mana o te Wai.[3]

2. Natural and Built Environment Bill (186—1) Explanatory Note.
3. Water Services Entities Act 2022, s 4(1)(b).

Big ticket legislative reform

Resource management reform

The Bills[4] to replace the Resource Management Act 1991, the Natural and Built Environment Bill (NBEB) and Spatial Planning Bill (SPB) both seek to give effect to the principles of Te Tiriti o Waitangi and to recognise Te Ao Māori, including mātauranga Māori.[5]

At an overarching level, these outcomes are recognised through:

- The purpose of the NBEB, which is to recognise and uphold te Oranga o te Taiao. Te Oranga o te Taiao is a Te Ao Māori concept which speaks to:
  - The health of the natural environment;
  - The essential relationship between the health of the natural environment and its capacity to sustain life;
  - The relationship between the health of the natural environment and the health and well-being of people and communities;
  - The interconnectedness of all parts of the environment; and
  - The intrinsic relationship between iwi and hapū and te Taiao that is based on whakapapa.[6]
- The purpose of the SPB seeks to assist in achieving the purpose of the NBEB, which is to uphold te Oranga o te Taiao.[7]
- Greater provision for Te Tiriti o Waitangi, requiring all persons exercising powers and performing functions and duties under the two reform Bills to give effect to the principles of Te Tiriti o Waitangi.[8]
- System outcomes that must be achieved at a national and regional level to ensure the purpose of the Act is achieved, which include:[9]
  - 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, are recognised and provided for;
  - Statutory acknowledgements are recognised consistently with the provision made for them in relevant legislation; and
  - Protection or, if degraded, restoration of cultural heritage.

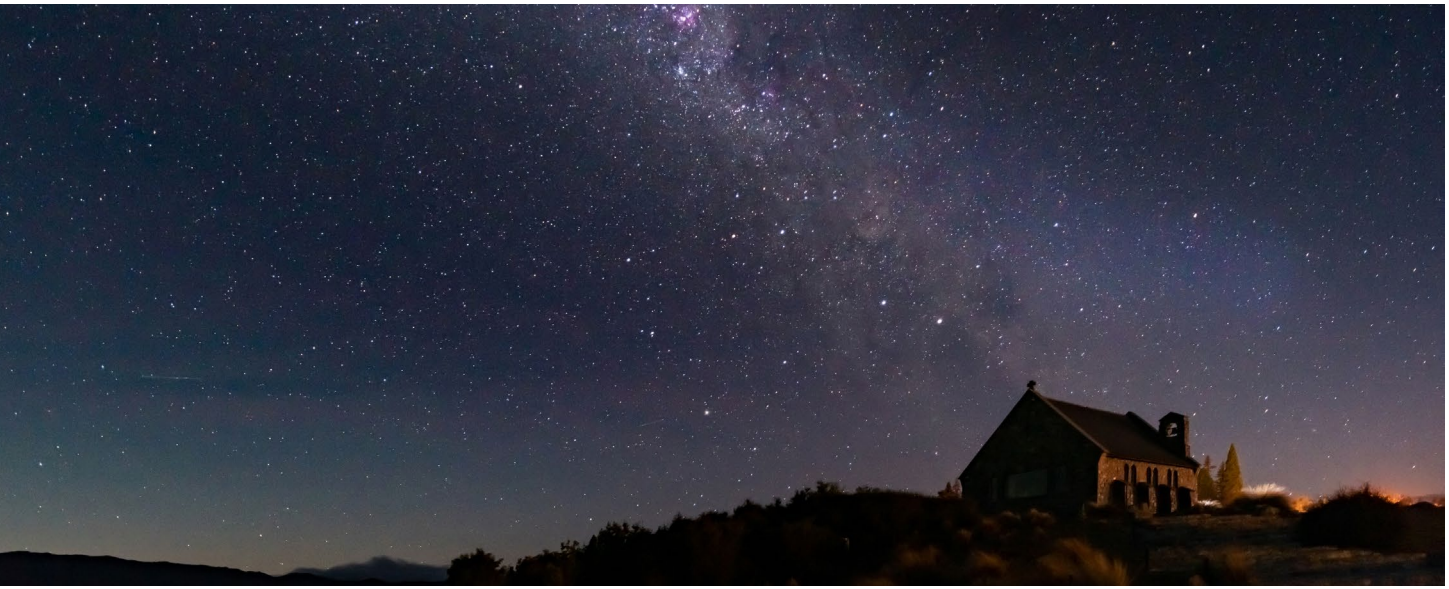
4. Note: references to the Natural and Built Environment Bill and Spatial Planning Bill relate to the Environment Select Committee Report dated 27 June 2023.
5. Natural and Built Environment Bill (186—1) Explanatory Note.
6. Natural and Built Environment Bill (186—1) Explanatory Note and clause 3.
7. Spatial Planning Bill (187—1) clause 3.
8. Natural and Built Environment Bill (186—1) clause 4; Spatial Planning Bill (187—1) clause 5.
9. Natural and Built Environment Bill (186—1) clause 5; Spatial Planning Bill (187—1) clause 3(a)(ii).

- Decision-making principles which require all persons exercising powers and performing functions and duties under the NBEB to recognise and provide for the responsibility and mana of each iwi and hapū to protect and sustain the health and well-being of te taiao in accordance with the kawa, tikanga (including kaitiakitanga), and mātauranga in their rohe or takiwā; and the protection and exercise of protected customary rights.[10] These principles are also reflected in obligations for decision-makers under the SPB.[11]

Implementation of these overarching outcomes is facilitated by:

- Obligations on the Crown to uphold the integrity, intent and effect of Treaty settlements;[12]
- Provision for decision-makers to have knowledge of, and experience and capability in relation to, important areas such as the principles of Te Tiriti o Waitangi, tikanga Māori, te reo Māori, mātauranga Māori, local kawa and tikanga, and the mātauranga of iwi and hapū within a region (including Board of Inquiry (BOI) members for the National Planning Framework (NPF), and Regional Planning Committees (RPCs) and Independent Hearing Panels (IHPs) for Regional Spatial Strategies (RSSs) and Natural and Built Environment Plans (NBEPs));[13]
- Establishing a National Māori Entity (NME) to independently monitor the cumulative effects of decisions made by persons exercising powers and performing functions and duties in giving effect to the principles of Te Tiriti o Waitangi, input into the development of the NPF and provide advice to persons operating in the system;[14]
- Requirements for decision makers to have regard to mātauranga Māori when preparing RSSs,[15] and provide strategic direction (to the extent an RPC considers they are of strategic importance to the region) on areas of cultural heritage and areas with resources that are of significance to Māori;[16]
- Increased opportunities for involvement by iwi, hapū and Māori within NBEB and SPB processes (including as members of the NME, BOI, RPCs and IHPs whether elected by iwi and hapū or as those with the requisite knowledge, experience and capabilities outlined above). The NBEB also includes opportunities for local authorities to enter joint management agreements to agree to jointly perform or exercise powers or duties relating to specific natural resources[17] and transfer powers to iwi authorities and groups that represent hapū;[18] and
- Engagement agreements for RPCs to agree and record how one or more Māori groups will assist in preparing or amending NBEPs, and how each party is resourced to participate.[19]

The effectiveness of the proposed recognition of Māori interests will take time to crystallise once the legislation is in place. While the proposed reforms have been received with cautious optimism by many iwi groups, we expect nuances – such as the recognition of tikanga in a consenting area where there are competing interests – will be resolved through litigation.[20]



10. Natural and Built Environment Bill (186—1) clauses 6(2) and 6(3).
11. Spatial Planning Bill (187-1) clauses 7 and 7A.
12. Natural and Built Environment Bill (186—1); clause 11 and Schedule 2; Spatial Planning Bill (187—1) clause 10 and Schedule 2.
13. Natural and Built Environment Bill (186—1) clause 30ZM, Schedule 10A, clause 63, Schedule 6 clause 9, Schedule 7 clause 93, Schedule 8 clause 2.
14. Natural and Built Environment Bill (186—1) clauses 30ZE–30ZT.
15. Spatial Planning Bill (187—1) clauses 23A(1) and 25(2).
16. Spatial Planning Bill (187—1) clauses 16(1)(b) and 17(1).
17. Natural and Built Environment Bill (186—1) clauses 30ZB-30ZD.
18. Natural and Built Environment Bill (186—1) clauses 30V-30X.
19. Natural and Built Environment Bill (186—1) Schedule 7, clauses 9-13C.
20. See for example *Ngāti Maru Trust v Ngāti Whātua Ōrākei Trust* [2020] NZHC 2768 decided under the present Resource Management Act, which concluded (at [133]) that the Environment Court has jurisdiction to determine the relative strengths of the iwi and hapū relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of an application and wording of the resource consent conditions.

Three Waters reform

The Government is pushing hard to pass the last legislative pieces for its Three Waters Reform package before the election. The reform stems from the Government Inquiry into Havelock North Drinking Water and the subsequent Three Waters Review (the Three Waters Reform Programme). The Programme has three key pou:

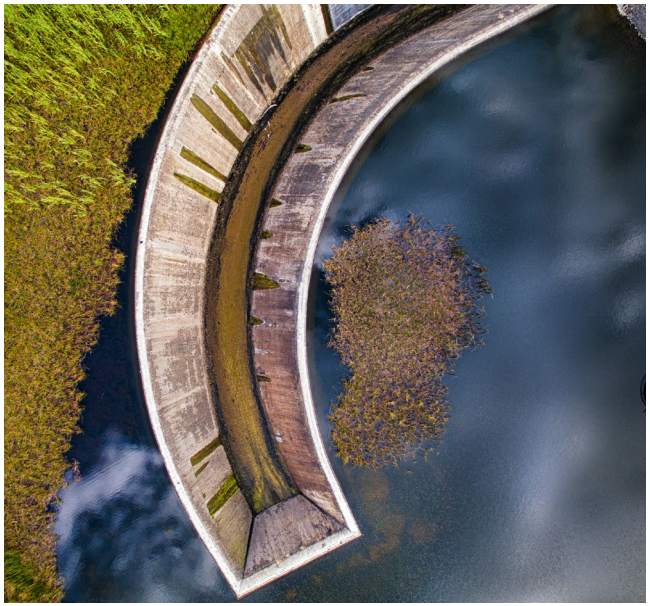
- Establishment of Taumata Arowai, a national water service regulator – already complete;
- Regulatory reforms in the Water Services Act 2021 – already complete; and
- Reforms to the water services delivery model.

This last piece is being progressed through the Water Services Entities Act 2022 (Entities Act), which will establish new water services entities around the motu to own and operate water services infrastructure and deliver water services,[21] and two Bills currently before Parliament, the Water Services Legislation Bill and the Water Services Economic Efficiency and Consumer Protection Bill.

The new Three Waters system is intended to promote the role of iwi/Māori, including providing pathways for enhanced participation by mana whenua as these services relate to their Treaty rights and interests, and improve outcomes for Māori. A number of mechanisms protect and promote iwi/Māori rights and interests.[22]

These include:

- Statutory recognition of the Treaty of Waitangi, including:
  - Requiring water services entities to give effect to the principles of the Treaty and engage with mana whenua;
  - Expressly providing that Treaty settlement obligations prevail over any provisions of the Entities Act; and
  - Reserving rights and interests in water;[23]
- A requirement that all persons performing or exercising duties, functions, or powers under the Act give effect to Te Mana o te Wai,[24] and setting out a process for iwi or hapū to provide a Te Mana o Te Wai statement for water services to a water services entity, which the entity must then acknowledge and respond to;[25]



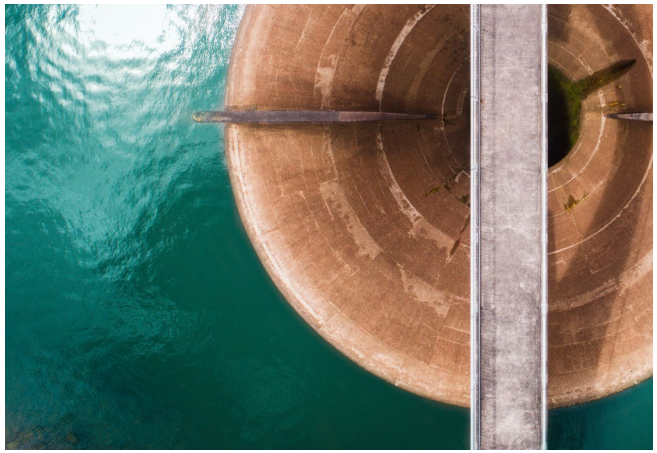
- One of the functions of the new water services entities will be to partner and engage with mana whenua and each annual report will need to contain information on actions the entity has taken to give effect to the Treaty;[26]
- Provision for an equal number of mana whenua representatives and territorial authority representatives on the regional representative group for each water services entity[27] – it is this regional representative group that will be responsible for appointing and removing an entity's board members, setting the strategic and performance expectations for the entity and undertaking a range of oversight and review functions;[28] and
- Requiring that both the regional representative group's board appointment committee and the entity's board have collective knowledge, experience and expertise in relation to the principles of the Treaty and perspectives of mana whenua, mātauranga, tikanga, and Te Ao Māori, and that entity boards have continuing education programmes in place to support members gaining knowledge of, and experience and expertise in relation to, the principles of the Treaty.[29]

Provisions recognising the importance of the Treaty and tikanga in Three Waters service delivery have received broad support from Māori.

This is a significant turnaround from initial widespread opposition by marae, rūnanga and hapū across the country to the first phase of the reforms (which focused on improving the quality of drinking water), based on concern that compliance officers would be able to enter marae without a warrant provided they "take account of the kawa of the marae so far as practicable in the circumstances".

This proposal did not make its way into the final form of the Water Services Act 2021 and, as noted above, the subsequent legislation to change how water services are delivered has adopted an approach which has been met with general approval by the representatives of iwi groups that are involved with the reform process.

21. Following Government announcements in April 2023, further amendments to the existing Water Services Entities Act 2022 will be made, including to increase the number of entities from 4 to 10.
22. Read document: Proactive release of Cabinet material related to the progressing the Three Waters service delivery reforms, 14 June 2021
23. Water Services Entities Act 2022, ss 4(1)(a), 9, 10, 76(a).
24. Water Services Entities Act 2022, s 4(1)(b).
25. Water Services Entities Act 2022, ss 143-145.
26. Water Services Entities Act 2022, s 13(d), 161.
27. Water Services Entities Act 2022, s 27(3).
28. Water Services Entities Act 2022, ss 27-42 and ss 138-142.
29. Water Services Entities Act 2022, ss 38(2)(c),(f), 59(2)(c),(f), 76(b).



Tikanga as a source of legal rights

Tikanga has been part of the common law of Aotearoa New Zealand since 1840[30] but is being increasingly recognised by the courts as a source of legal rights that operates both within and independently of the common law.

The 2012 decision in *Takamore v Clarke* was the leading judgment on the influence of tikanga on the common law for many years. In that case, the Supreme Court found that where tikanga is relevant, the common law requires reference to tikanga.[31] Elias J, in her minority judgment, said tikanga forms "part of the values of the New Zealand common law".[32]

A decade later, the status of tikanga Māori in case law has developed significantly. The courts now expressly recognise that tikanga is more than just a relevant consideration, it is more than simply "values".

30. *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [108].
31. *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [164].
32. *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

In the last few years, tikanga has been described as:

01 A body of Māori customs and practices, part of which is properly described as custom law (2021).[33]

02 A free-standing legal framework recognised by New Zealand law (2022).[34]

03 A direct source of legal rights that can be enforced by the courts (2022).[35]

04 Part of the fabric of Aotearoa New Zealand's law and public institutions through legislation, common law and policy (2022).[36]

05 A separate or third source of law in New Zealand, in the sense that tikanga will continue to be applied by Māori and will continue to develop independent of its place as part of the common law, or in legislation or policy (2022).[37]

Although the courts have made statements regarding the status of tikanga in the common law since *Takamore, Ellis v R* was the first case to directly address whether tikanga is part of New Zealand's common law. Peter Ellis died in 2019, after the Supreme Court granted leave to appeal his historical convictions for sex offending. Although at common law, his death meant any ongoing interest in his appeal ceased to exist, the Supreme Court invited submissions on whether that common law position should be modified by tikanga.

The Supreme Court found that tikanga and/or tikanga-derived principles are part of the fabric of Aotearoa New Zealand.[38] Accordingly, it is not necessary for a case to specifically concern Māori litigants, Māori issues or expressly involve the principles of the Treaty for tikanga to be relevant. None of those features existed in *Ellis*.

Notably, the Court in *Ellis* also found that the traditional colonial test for incorporation of custom into the common law, set out in *Public Trustee v Loasby*,[39] no longer applies. How tikanga should apply as a part of the New Zealand common law will be determined on a case-by-case basis, which is the usual common law method of incremental development.[40]

The Supreme Court went further in *Ngāti Whātua Ōrākei Trust v Attorney-General* by allowing the Ngāti Whātua Ōrākei Trust to bring legal claims based on existing rights under tikanga.[41] The subsequent High Court judgment confirmed that the courts can make declarations about tikanga, although this was qualified by the need for courts to be cautious when doing so, particularly if there is a dispute as to what tikanga applies.[42]

"Judicial caution" in cases of conflicting or competing tikanga

A trend of "judicial caution"[43] has emerged in cases of conflicting or competing tikanga. In such cases, the courts have generally been reluctant to determine tikanga. They instead encourage iwi parties to reach a tikanga-based solution amongst themselves.

In *Ngāti Whātua Ōrākei Trust*, Palmer J declined to make the tikanga declarations sought by Ngāti Whātua Ōrākei Trust – that particular tikanga concepts relevant to that case were understood across iwi in Aotearoa – as it would "provide a misleading impression of what the Court considers is a proper understanding of tikanga".[44] Instead, the Judge declared the relevant tikanga were made out "according to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei."[45]

33. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [169] per Willian Young and Ellen France JJ, and agreed to by Glazebrook J at [237], by Williams J at [296]-[297] and by Winkelmann CJ at [332].
34. *Ngāti Whātua Ōrākei Trust v Attorney-General (Judgment No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [32].
35. *Ngāti Whātua Ōrākei Trust v Attorney-General (Judgment No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [33].
36. *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [126].
37. *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [111].
38. *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [126].
39. *Public Trustee v Loasby* (1908) 27 NZLR 801 (HC) at 806.
40. *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 at [116].
41. *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.
42. *Ngāti Whātua Ōrākei Trust v Attorney-General (Judgment No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [458].
43. *Ngāti Whātua Ōrākei Trust v Attorney-General (Judgment No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [370], [378].
44. *Ngāti Whātua Ōrākei Trust v Attorney-General (Judgment No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [643], [645].
45. *Ngāti Whātua Ōrākei Trust v Attorney-General (Judgment No 5)* [2023] NZHC 74 at [55].

This unwillingness to interfere with conflicting tikanga extends to decisions by Crown officials.[46] In the context of an inter-iwi conflict over a taonga, the High Court found it would be inappropriate for a Crown official to make the ultimate decision. Rather, such a conflict should be resolved by tikanga-consistent processes — i.e., iwi should work through the conflict themselves or through a process that they agree. Where tikanga does not provide an answer, a tikanga-consistent dispute resolution process might.[47]

A reason for this "judicial caution" is that tikanga continually adapts to new circumstances as they arise and evolves through iwi and hapū.[48] Courts cannot make, freeze or codify tikanga.[49] This means that legal precedents in case law will not be authoritative as to the content of tikanga.[50]

The Supreme Court has emphasised that in tikanga, as in law, context is everything.[51] This means that although the Court might find that mana whenua had to give way to other tikanga principles in one case, that did not mean mana whenua would always give way to other tikanga principles in other cases.[52]

> **"Ngāti Whātua Ōrākei have seen first-hand how the Crown will repeat in the 21st century the same grievances it inflicted on our people in the 1840s. After taking the fight to the modern-day battlefield – the High Court – we secured recognition of our tikanga in our heartland of Tāmaki Makaurau. The next step is both a challenge and an opportunity: for central and local government to observe and respect our tikanga, especially in the context of further Treaty settlements and major infrastructure projects proposed for Tāmaki Makaurau."**
>
> Ngarimu Blair, Deputy Chair Ngāti Whātua Ōrākei Trust

46. *Hart v Director-General of Conservation* [2023] NZHC 1011 at [117].
47. *Hart v Director-General of Conservation* [2023] NZHC 1011 at [117], [119].
48. *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [78], [95]
49. *Ngāti Whātua Ōrākei Trust v Attorney-General (Judgment No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [371].
50. *Ngāti Whātua Ōrākei Trust v Attorney-General (Judgment No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [370].
51. *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [74].
52. *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [84].
53. *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [84].
54. *Attorney-General v Trustees of Whatitiri Māori*
55. *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* [2019] Māori Appellate Court MB 265 (2019) APPEAL 265), [2019] NZAR 1465. Leave has been sought to appeal this decision to the Supreme Court.
56. *Re Ōuri* 1A3 A20220007002, 14 December 2022.

Observations

- *Wairarapa Moana ki Pouākani Inc v Mercury NZ* (SC): the Waitangi Tribunal is "uniquely placed" and has the "necessary expertise" to consider tikanga issues.[53] These comments might limit the High Court's willingness to review tikanga assessments by the Tribunal.
- *Attorney-General v Trustees of Whatitiri Māori Reserves and Ors* (HC): Te Ture Whenua Māori Act 1993 does not allow the Māori Land Court to make orders for customary title in freshwater.[54]
- *Kruger v Nikora* (CA): the Māori Land Court does not have jurisdiction over the Tuhoe PSGE. This overturns *Moke v Trustees of Ngāti Tarāwhai Iwi Trust*.[55]
- *Re Ōuri 1A3* (MLC): first fully bilingual judgment in te reo Māori and English.[56]

Case law timeline

1987 — HIGH COURT

Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 (HC)

"There can be no doubt that the Treaty is part of the fabric of New Zealand society."

2003 — COURT OF APPEAL

Attorney-General v Ngāti Apa [2003] 3 NZLR 643 (CA)

Tikanga Māori is "applicable law."

2012 — SUPREME COURT

Takamore v Clarke [2012] NZSC 116

"Māori custom according to tikanga" forms "part of the values of the New Zealand common law."

2017 — SUPREME COURT

Proprietors of Wakatū v Attorney-General [2017] NZSC 17, [2017] 1 NZLR 423

The Crown owed legally enforceable fiduciary duties to the Māori customary owners in acting on their behalf to create reserves as part of a land sale in 1845.

2018 — SUPREME COURT

Ngāti Whātua Ōrākei Trust v Attorney-General [2018] NZSC 84, [2019] 1 NZLR 1156

"Rights and interests according to tikanga may be legal rights recognised by the common law… Where claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them."

2020 — HIGH COURT

Ngāti Maru Trust v Ngāti Whātua Ōrākei [2020] NZHC 2768, [2021] NZRMA 179

Resource management decision-makers should be "able to identify, involve and provide for iwi and their mana whenua in accordance with mātauranga Māori and tikanga Māori."

2020 — SUPREME COURT

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board [2020] NZCA 86, [2020] NZRMA 248

"The tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand."

2021 — HIGH COURT

Re Edwards (Te Whakatōhea (No. 2)) [2021] NZHC 1025

The courts are to engage in a "factual assessment that will be heavily influenced by the views of those who are experts in tikanga."

2021 — HIGH COURT

Re Ngati Pahauwera [2021] NZHC 3599

"The concept of holding in accordance with tikanga and exclusive use and occupation in accordance with that tikanga are… fundamentally different to European property rights."

2021 — HIGH COURT

Sweeney v The Prison Manager, Spring Hill Corrections Facility [2021] NZHC 181, [2021] 2 NZLR 27

"Where material to a case, the Courts can, and may have an obligation to, recognise and uphold the values of tikanga Māori in applying the law of judicial review and granting remedies."

2021 — HIGH COURT

Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2) [2021] NZHC 291, [2021] 2 NZLR 1

"What is recognised by a court cannot change the underlying fact of tikanga determined by the hapū or iwi, exercising their rangatiratanga."

2022 — HIGH COURT

Mercury NZ Limited v The Waitangi Tribunal [2021] NZHC 654

"…the statutory provisions to be applied by the Tribunal do not give it a discretion to make decisions that are inconsistent with tikanga, or which would involve a contemporary breach of the principles of the Treaty."

2022 — SUPREME

Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board and Ors [2021] NZSC 127

A "broad and generous" interpretation should be taken of statutory Treaty provisions. Tikanga Māori are "applicable law."

2022 — HIGH COURT

Ngāti Whātua Ōrākei Trust v Attorney-General [2022] NZHC 843

"Neither the Crown nor parliament determines mana whenua or ahi kā roa."

2022 — SUPREME

Peter Ellis v R [2022] NZSC 114

"… tikanga will need to be considered where it is relevant to the circumstances of the case. … In some cases, tikanga and its principles may be controlling."

2022 — SUPREME COURT

Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd [2022] NZSC 142

"…mana whenua need not be the controlling tikanga because other tikanga principles were also in play."

2022 — MĀORI LAND COURT

Pokere v Bodger – Ōuri 1A3 (2022) 459 Aotea MB 210 (459 AOT 210)

The first fully bilingual judgment in te reo Māori and te reo Pākehā.

2023 — HIGH COURT

Calvin Tui Hart and others v DOC and Te Runanga o Ngāi Tahu [2023] NZHC 1011

The decision of DOC to deliver whale jawbones to one iwi, where another iwi contested that decision, was unlawful: "the question of any allocation needs to be resolved by an iwi-to-iwi process, undertaken consistently with the principles of tikanga."

Trends in Takutai Moana cases

Litigation under the Marine and Coastal Area (Takutai Moana) Act 2011 (MACA) has been slow to progress through the courts. This is due in large part to the sheer volume of cases, all filed on the sunset date in 2017.

Other reasons are: overlapping claims matters, the availability of expert witnesses and Crown funding issues. But since 2021, judgments have begun to flow from the High Court and the Court of Appeal. Trends we have identified are:

- A shift in the burden of proof to presume customary title has not been extinguished;[57]
- Adoption of a tikanga lens when determining whether customary marine title exists under s 58 of MACA;[58] and
- A reliance on pūkenga and their evidence in determining the tikanga that applies to the case.[59]

Shift in burden of proof

Under the Foreshore and Seabed Act 2004, the presumption was that customary interests to the foreshore and seabed had been extinguished,[60] so the burden when applying for customary rights rested with the applicant.

In contrast, the Courts have consistently interpreted s 106 of MACA as shifting the burden of proof to the respondents. They have taken this approach although, on its face, it is inconsistent with the terms of the s 106 itself.

The presumption is now that "...in the absence of proof to the contrary...a customary interest has not been extinguished".[61] Mallon J recognised the presumption in the first MACA case, *Re Tipene* and it was reaffirmed by Churchman and Powell JJ in *Re Edwards*[62] and *Re Reeder*.[63]

This shift mirrors the current common law view that Māori customary rights were not extinguished by the importation of the English common law in Aotearoa.[64]

57. Marine and Coastal Area (Takutai Moana) Act 2011, s 106(3). See also *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [80] and [100].
58. *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [119]–[120] and [130]–[131].
59. Re *Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [325].
60. See Foreshore and Seabed Act 2004 (repealed), s 50(1).
61. Marine and Coastal Area (Takutai Moana) Act, s 106(3). See also *Re Tipene* [2016] NZHC 3199 at [39].
62. *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [80] and [100]. Churchman J observed "The presumption that a customary interest has not been extinguished is new" (at [80]).
63. *Re Reeder* [2021] NZHC 2726 at [22].
64. *Ellis v R* [2022] NZSC 114 at [172], citing *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [166] per William Young and Ellen France JJ, which cited: *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [150] per Tipping, McGrath and Blanchard JJ; *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18] per Elias CJ, Blanchard and Tipping JJ and [105] per McGrath J; and *Ngati Apa v Attorney-General* [2003] 2.

Approaching s 58 with a tikanga lens

The Court in *Re Edwards* recognised that the purposes under MACA do not favour incorporating western legal property concepts such as proprietorial interests in the interpretation of "holds the specified area in accordance with tikanga".[65] Rather, tikanga should be at the forefront of the assessment.

Churchman J stated that the first step in analysing whether the takutai moana has been held in accordance with tikanga is to look at the whakapapa and whanaungatanga of the applicant groups.[66] This involves factually assessing the evidence of tikanga and the lived experience of the applicant group.[67] A Court will be heavily influenced by those who are experts in tikanga in its determination.[68]

An example of the Court adopting a tikanga lens under s 58 is *Re Edwards*, where Churchman J said:[69]

> "In terms of tikanga, the confiscation of lands and destruction of property would not have severed the connection with the takutai moana. That is because Whakatōhea hapū continued to exercise their rights in respect of the takutai moana."

Churchman J's approach to s 58 does not attempt to force tikanga into the western legal paradigm. Importing external western views into the assessment of s 58 would likely result in distorting the claimed customary interest (i.e., it could exclude areas that tikanga would support are held in accordance with tikanga).

65. *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [119]–[120], affirmed in *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [178].
66. *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [42].
67. *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [272] at [130].
68. *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [131].
69. *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [200] and [204].
70. *Re Edwards (Te Whakatōhea* (No.2)) [2021] NZHC 1025 at [272].
71. *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [325].
72. *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [367].
73. *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [49].
74. *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025 at [301].
75. *Re Edwards (Te Whakatōhea (No.2))* [2021] NZHC 1025. See *Te Kahui Takutai Moana O Ngāi Whānui Me Nga Hapū v Landowners Coalition Inc* [2022] NZCA 27 at [2].
76. *Te Kahui Takutai Moana O Ngāi Whānui Me Nga Hapū v Landowners Coalition Inc* [2022] NZCA 27 at [2].
77. Te Kahui Takutai Moana O Ngāi Whānui Me Nga Hapū v Landowners Coalition Inc [2022] NZCA 27 at [47] and [51].
78. *Te Kahui Takutai Moana O Ngāi Whānui Me Nga Hapū v Landowners Coalition Inc* [2022] NZCA 27 at [43].

Reliance on pūkenga/pūkenga evidence

The Court has discretion under s 99 of MACA to appoint pūkenga to assist the Court. The High Court in both *Re Edwards* and *Re Ngāti Pāhauwera* appointed pūkenga to assist the Court on a number of issues, including the applicable tikanga informing the case.

In *Re Edwards*, Churchman J described pūkenga as:[70]

> "...the proper authorities on tikanga...who have been tasked or honoured with the mātauranga of their tīpuna – the knowledge and wisdom passed down to them by their ancestors."

He said that the findings of pūkenga are likely to be "highly influential" where directly relevant to questions of tikanga.[71] However, where there is disagreement about the findings (as in *Re Ngāti Pāhauwera*) that influence will be reduced:

> "...in accordance with HCR 9.38, the fact that parts of the pukenga's report are not accepted by all parties goes to the extent which I can rely upon the pukenga's report."[72]

So the influence of pūkenga depends on the degree the parties agree on the findings in their report. Where questions of tikanga are at the core of the decision, we consider it is appropriate to refer to pūkenga. That is because most of the Judges determining these applications will not be comfortable determining questions of tikanga without assistance.

The Law Commission/Te Aka Matura o te Ture is currently considering whether the Evidence Act 2006 sufficiently provides for the admission of relevant evidence relating to mātauranga Māori and tikanga Māori. Chapman Tripp provided a submission, linked here.

Further observations

Judicial caution in determining issues of tikanga

Explicit examples of this are Powell J in *Re Ngāti Pāhauwera* finding "the Court is not the appropriate place for whakapapa issues to be resolved"[73] and Churchman J taking a similar approach in *Re Edwards* in respect of defining whakapapa.[74]

Cases reaching the Court of Appeal

Te Kahui Takutai Moana O Ngāi Whānui Me Nga Hapū v Landowners Coalition Inc was an appeal of *Re Edwards,*[75] concerning the High Court's approach in determining whether the applicant groups met the tests for customary marine title (CMTs).[76] The Court, in determining whether the Landowners Coalition had the status to bring an appeal, found that it did[77] because applications for recognition of CMTs and protected customary rights are matters of interest to all the people of New Zealand.[78]

The substantive decision of *Te Kahui Takutai Moana O Ngāi Whānui Me Nga Hapū* will likely provide important commentary on the test under s 58 for CMTs.

The Māori economy grows at home and abroad

The Māori economy is on the rise. While initial projections indicated that the asset base of the Māori economy would be $100 billion by 2030[79], we expect it to soar past that projection.

Reflecting on 2022

Despite the challenges and disruptions of the COVID-19 pandemic, Māori businesses continue to identify and exploit opportunities especially in overseas markets.

Motivations for iwi directors and governors to invest are multifaceted, encompassing new large-scale housing initiatives to meet whānau and hapū needs, growing into new markets and consolidating production of traditional exports. Investment activity continues to be fuelled by Treaty settlement activity and strong iwi balance sheets.

79. NZTE Māori Economy Investor Guide, June 2017 (see commentary here).

For the subset of Māori businesses that have been identified as Māori authorities (essentially a tax status available to certain entities that hold assets for the collective benefit of Māori), StatsNZ reporting for the period from December 2021 to December 2022 shows:

- Total number of filled jobs rose by 590 to 13,210;
- Total value of exports fell by $38m to $192m; and
- The total value of sales fell by $95m to $988m.

In relation to the drop in value of sales, the largest industry movements were goods-producing industries (down $50m and 19%); rental, hiring and real estate services (down $15m and 18%); and primary industries (down $53m and 16%). Business financial data for the same period indicated a general increase in sales (up $16b and 8.7%), with the largest percentage changes arising in transport; professional, scientific, technical, administrative and support services; and arts, recreation and other services.

But this does not capture the full breadth of the Māori economy, which can include certain privately owned businesses and charities, and those collective ownership entities established under Te Ture Whenua Māori Act 1993 that have not elected to be designated as a Māori authority.

Neither does it capture revaluation movements associated with underlying capital assets, which can be significant.

Settlements

Since 1995 there have been 86 Treaty settlements signed into law worth approximately $2.6 billion (excluding relativity payments). There are still a number of iwi that are yet to settle, including Ngāpuhi, which is the largest iwi by population in New Zealand and is set to receive a sizable redress package.

Year of deed of settlement	Financial and commercial redress amount
WHAKATŌHEA	
2023	$100m
	NGĀTI TARA TOKANUI
	2022 $6.0m
TE ĀKITAI WAIOHUA	
2021	$10m
	MANIAPOTO
	2021 $165m
NGĀTI KAHUNGUNU KI WAIRARAPA TĀMAKI NUI-A-RUA	
2021	$115m
	NGĀTI PAOA
	2021 $24m
NGĀTI MARU	
2021	$30m
	NGĀTI RANGITIHI
	2021 $11m
MORIORI	
2020	$18m
	NGĀTI HINERANGI
	2019 $8m
TE PATUKIRIKIRI	
2018	$3m
	NGĀTI RANGI
	2018 $17m

Increase in Māori investment activity

International and private sector partnerships

We have seen an increase in:

- The number of international businesses and investors looking to partner with iwi; and
- The number of iwi partnering with the private sector.

Iwi have utilised international and private sector partnerships to participate in a wider range of investments and unlock new commercial opportunities (in particular, those with traditionally high barriers to entry). Māori Kiwifruit Growers Incorporated and their marketing partnership with industry-dominant Zespri to export kiwifruit to Hawaii and Taiwan is a recent example.

Iwi-to-iwi collaboration

We are also seeing growth in iwi-to-iwi collaboration. Iwi are increasingly capitalising on the benefit of collaborating with other iwi to aggregate resources in order to access large investment opportunities. Leading examples are the Iwi Collective Partnership in the fisheries space and the Tōtara Collective in the asset holding and Māori land trust and incorporation space. We expect the increase in iwi-to-iwi collaboration to continue.

Māori participation in export markets

From 2017 to 2022 total exports of goods by Māori authorities grew:

21%

$630m → $761m

EXPORTS TO CHINA	EXPORTS TO US	EXPORTS TO OTHER COUNTRIES
20%	7%	73%

Although traditional Māori exports remain strong (such as mānuka honey, seafood and horticultural goods), we expect more diversification into markets such as digital technology and luxury goods on the back of free trade agreements, such as the NZ-UK Free Trade Agreement signed on 1 March 2022.

The NZ-UK FTA contains a dedicated Māori Trade and Economic Cooperation chapter that "recognises the value of increased Māori participation in international trade and investment and promotes cooperation between the Parties to the NZ-UK FTA to enable and advance Māori economic and wellbeing aspirations, for example through collaboration to enhance the ability of Māori-owned enterprises to access and benefit from the trade and investment opportunities created under the FTA".

Māori exporters will have intellectual property issues at front of mind under the new FTA, especially given the recent battle between New Zealand and Australian producers over the ability to trademark mānuka honey. The Intellectual Property Office of New Zealand recently declined a trademark application for the word "mānuka".

"In this high interest rate environment, there is a massive opportunity in the Māori economy – where capital (debt/equity) ratios tend to be significantly lower than the rest of the economy. With the right people and structures, the Māori economy is in a prime position to harness that opportunity."

Te Rangimarie (Rangi) Ririnui, Investment Director – Māori, New Zealand Trade & Enterprise.

Housing

Tangata Māori and Pasifika are experiencing the worst of the current housing crisis statistically. Covid-19 revealed existing inequities in the housing sector and extreme weather events such as Cyclone Gabrielle displaced thousands of residents from their homes.

Iwi entities have been working overtime to support their iwi and hapū members with emergency and temporary housing, while also trying to remove barriers preventing more Māori home ownership within their rohe tīpuna (ancestral lands).

In 2021, the Government committed $730 million to Whai Kāinga Whai Oranga which is a four-year commitment to speed up the delivery of Māori-led housing and infrastructure. The 2023 budget allocated an additional $200 million.

Current large projects

Northland

IWI
Te Pouahi o Te Taitokerau

NO. PROPOSED HOUSES
110 (Infrastructure)
80 (New homes)

FUNDING STRUCTURE
Iwi-Crown

AMOUNT OF FUNDING
$55 million

Hawke's Bay

IWI
Ngāti Kahungunu

NO. PROPOSED HOUSES
131

FUNDING STRUCTURE
Iwi-Crown

AMOUNT OF FUNDING
$45.3 million

Wairoa

IWI
Tātau Tātau o te Wairoa

NO. PROPOSED HOUSES
56

FUNDING STRUCTURE
Iwi-Crown

AMOUNT OF FUNDING
$22.8 million

East Coast

IWI
Toitū Tairāwhiti

NO. PROPOSED HOUSES
150

FUNDING STRUCTURE
Iwi-Crown

AMOUNT OF FUNDING
$55 million

Porirua

IWI
Ngāti Toa Rangatira

NO. PROPOSED HOUSES
800+

FUNDING STRUCTURE
Was Iwi-private, iwi bought out partner

AMOUNT OF FUNDING
$65+ million (land value)

From partnership to mana motuhake: approaching a new horizon

Mana motuhake

The concept of mana motuhake is deeply rooted in Māori philosophy and is difficult to fully articulate in English, given that te reo Māori conveys cultural values that do not exist to the same extent (in some cases – at all) in English.

Two key elements of mana motuhake that are well understood are autonomy and self-determination. The concept is closely related to tino rangatiratanga, as guaranteed by article 2 of Te Tiriti o Waitangi.

Mana has no one meaning but includes influence, prestige, power, respect and authority. Motuhake means to separate, position independently and stand-alone and, in the context of mana motuhake, stresses the importance of the independence of power.

On this basis, the closest English interpretation of mana motuhake is self-determination, although it has different connotations and meanings for different iwi. For example, for Ngāi Tūhoe, mana motuhake is such an intrinsic principle that it cannot be separated from their identity.[80]

80. Te Rangimārie Williams Crown offer to settle the historical claims of Ngāi Tūhoe (October 2012) - read here.

81. Pae Ora (Healthy Futures) Act 2022.
82. McMeeking S., Leahy H., Savage C. An Indigenous self-determination social movement response to COVID-19. Altern. Int. J. Indig. Peoples. 2020;16:395–398. doi: 10.1177/1177180120967730.

Read our commentary: the state of partnership between the Crown and Māori under Te Tiriti o Waitangi

Since the Waitangi Tribunal was established in 1975, most of the discussion has centred around tino rangatiratanga and partnership with the Crown. As Treaty settlement relationships with the Crown mature (and in some cases, sour), we are observing a determination in some Māori groups to move away from partnership with the Crown and instead exercise mana motuhake at an individual and collective level.

Moving away from partnership

Partnership is one of the key principles derived by the Courts from the intention of the Treaty partners at the time that Te Tiriti o Waitangi and the Treaty of Waitangi were signed. This principle has been manifested in a number of ways, including:

- Strategic partnerships between Oranga Tamariki (Ministry for Children) and iwi and Māori organisations to improve the wellbeing of tamariki Māori;
- The Pae Ora (Healthy Futures) Act 2022 iwi-Māori partnership boards as a way for Māori to exercise tino rangatiratanga and mana motuhake at a local level in relation to health outcomes;[81]
- Te Ao Mārama – a judicially led kaupapa supported by the Ministry of Justice in partnership with local iwi to co-design tailored services to improve the experience for all people who participate in the court system, including victims and whānau;
- Whai Kāinga Whai Oranga partnerships with a number of iwi to deliver new homes in priority regions around the country;
- Tākai Here Agreement – a partnership agreement between Te Rūnanga o Ngāti Toa Rangatira, Te Rūnanganui o Te Āti Awa and Ara Poutama Aotearoa which delivered a 26-bed reintegration accommodation and support service in Lower Hutt, Wellington.

Māori have fought hard for success in these partnership relationships, but are increasingly voicing their aspirations to become self-sufficient and empowered to provide tailored, innovative services and solutions for their own people. Minimising reliance on the Crown is necessary to enhance mana motuhake.

The government contracting environment remains highly prescriptive, and Māori are severely constrained in their ability to deliver whānau-centred, Te Ao Māori driven solutions within the bounds of Crown partnerships. Collective mana motuhake for Māori organisations requires trust, resourcing, and hands-off support from the Crown.

Māori organisations have already demonstrated excellence in the ability to deliver adaptive and innovative solutions for their people during the COVID-19 pandemic response. The COVID-19 pandemic has been described as the "only example in our contemporary history of the Māori community having better social outcomes than non-Māori".[82]

These outcomes were a direct result of iwi and Māori organisations mobilising off their own bat and immediately to provide strategy, planning, systems, testing, vaccination, helplines, kai, hygiene packs, medications, welfare checks and isolation support to address their community needs.

The same mana motuhake practicality and immediacy has been evident in the response to the natural disasters that have afflicted Te Tairāwhiti (East Coast). Kaimahi (workers) of these organisations coordinated efforts to evacuate whānau, house and feed displaced whānau (often at local marae), deliver radios and generators, and provide services in a way that government organisations were not able to.

There is still a way to go before Māori have mana motuhake over all their affairs, whenua and taonga, with partnership still being the central principle governing the Crown-Māori relationship. Mana motuhake is crucial in achieving equitable outcomes for Māori by enabling Māori to develop excellent, innovative solutions for the communities that they know, care about, and understand deeply.

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