Simpson Grierson

Ngā Take Māori o Te Ao Ture:
Māori Legal Update

HAKIHEA/DECEMBER 2022

Meri Kirihimete me ngā mihi o te Tau Hou Pākehā.

Nāia te mihi maioha o te wā ki a koutou katoa. Kei te tūmanako mātou, kia whai wā ki te whakatā, ā, ki te whakawhanaungatanga i tēnei raumati ā te huringa o te tau hou Pākeha. He wā whakaaro mō tātou ki te whakaata me whakaaro i ō tātou wawata mō te tau hou e heke mai. Me haere haumaru, me haere rangimarie i tēnei hararei.

Mahara mai ki te pānui o Simpson Grierson.

In this issue, we take a look at some of the key developments in te ao ture, including our whakaaro on:

- the Supreme Court's decision in *Ellis v R*, reaffirming the relevance and common law status of tikanga in Aotearoa;
- Māori property rights in water being considered by the Māori Land Court;
- the Natural and Built Environment Bill (**NBE Bill**) and its greater recognition of Māori interests and engagement;
- the October 2022 draft report of the review into the Future for Local Government - He mata whāriki, he matawhānui;
- the 'Consitutional Kōrero' wānanga focused on constitutional transformation in Aotearoa; and
- our pro bono work with Tunuiarangi Rangi McLean on the appropriation of his tā moko.

These are only some of the many developments in te ao ture at present. Others include the recent High Court decision concerning a tikanga-based resolution process relating to the Central North Island Collective Settlement, the continuing co-governance debate (particularly in relation to the Three Waters reform), and the recent strike out application in *Smith v Fonterra* relating to a novel climate tort which awaits a decision from the Supreme Court.

Mauri ora!

Ngā whakahoutanga o ngā whakataunga

Ellis v R: A step change in the recognition of tikanga as law

The Supreme Court's landmark decision in *Ellis v R* [2022] NZSC 114 sets a precedent for what perhaps could advance Aotearoa's jurispridence into a bi-jural legal system - affirming tikanga Māori as an independant system of law, and confirming its status as the 'first law of the land'. Even though tikanga Māori was not entirely determinative to the issue in this case, Justice Joe Williams observed that its increasing recognition has "reflected, and continute to reflect wider, deeper social change". To that end, we provide our whakaaro on how the decision may affect future developments in the law.

Background - a snapshot

The facts of *Ellis v R* will be familiar to most, and can be found in the judgment here. Briefly, Peter Ellis was convicted of child sex offences in 1993, however maintained his innocence by seeking to clear his name by appeal to the Supreme Court in 2019. Mr Ellis however died before his appeal could be heard. The question for the Supreme Court was whether to allow the appeal to continue despite his death, with the test being if it would be in the interest of justice to allow the appeal. Interestingly, the Court asked whether tikanga Māori was relevant to the issue - and if so, whether it would affect the appeal.

In addressing the question, the Supreme Court relied upon the expertise of respected mātanga (tikanga experts), who determined (following a wānanga) that *hara, mana, ea and whanaungatanga* were relevant and fundamental in continuing the appeal. Each principle forms part of a woven, interelated network of obligations - which from a tikanga lens - give Mr Ellis, victims and respective whānau an interest in concluding the proceedings, despite their pākehā heritage.

In their "Statement of Tikanga", the mātanga raised caution as to whether tikanga Māori should, and could appropriately inform the common law, and the dangers that tikanga Māori could be misapplied or misappropriated by the courts. Unanimously however, they agreed that tikanga Māori should continue to inform the development of the common law.

The decision

The majority found that tikanga values were relevant in this case, and could be drawn upon in the development of the common law, however were not determinative in allowing the appeal. Significantly however, they said tikanga Māori was a third source of law - completely independent of statute and the common law. No test for 'incorporation' of custom into the law is required.

They said that care must be taken to uphold the integrity of tikanga, as the court has "neither the mandate nor the expertise to develop or authoritatively declare the content of tikanga". Judges may be more comfortable in engaging with tikanga principles, if and when the relationship between tikanga and common law evolves over time. However, questions of tikanga will, and must, remain with Māori.

Our whakaaro on engaging with tikanga values

The Supreme Court's engagement with tikanga values, particularly aspects of mana, raises several issues, including how it will affect the common law. We have already observed in *Sweeney v The Prison Officer of Springhill Corrections Facility* [2021] NZHC 181, the High Court's willingness to restore the plaintiff's mana as part of declaratory relief. Perhaps decision-makers may look to mana and whanaungatanga in cases involving an individual's reputation, and the wider reputation of whānau, in respect of evolving torts - such as defamation and privacy - in a manner completely unique to Aotearoa.

While tikanga and kawa will continue to function at the 'flax-roots' level of whānau, hapū and iwi, environmental decision-makers may soon be required to engage more closely with values, such as mana, if the NBE Bill passes in its current form. We discuss this more below.

However, questions arise as to whether local iwi and hapū will have sufficient resources to engage with the statutory requirements imposed under the Bill. Similar issues may surface with kaumātua or mātanga being required to assist the judiciary to understand and apply tikanga where, for example, iwi and hapū are already lacking resources and capacity.

A key issue raised by Ellis is the extent to which the final determination will be deferred to experts in tikanga, particularly in respect of scenarios where the notion of mana whenua is being challenged. The courts are still navigating their way as to when they will defer to tikanga experts and when they are required to make a decision based on tikanga, especially in relation to issues relating to mana whenua.

Since *Ellis*, the Supreme Court has determined *Wairarapa Moana ki Pouākani Incorporated v Mercury NZ Limited* (the judgment can be found here), where the Court considered whether Ngāti Kahungunu ki Wairarapa lacked mana whenua over land that the Waitangi Tribunal determined should be returned to them. The majority in the Court considered that the concept of mana whenua was important, however it wasn't the only aspect of tikanga that was relevant. There is a wider tikanga framework which needs to be considered. The majority did not make a decision on what the tikanga should be, but instead, referred the decision back to the Tribunal to consider the issue through the whaka-ea process (the restoration of balance between disputants).

Similarly, Palmer J in *Ngāti Whatua Ōrākei Trust v Attorney-General* refused to declare that Ngāti Whātua Ōrākei had exclusive mana whenua status, but considered that the matter should be referred back to the tikanga-based settlement. Where the courts are required to determine the tikanga, they will do so on the basis of the evidence before it. This involves parties producing evidence or commentary from pūkenga (experts in tikanga), such as, the 'Statement of Tikanga' relied on in the *Ellis* decision. These recent developments in the courts demonstrate that the courts are cautious to take steps that would make, freeze or codify tikanga, and, where necessary, deferring the tikanga determination back to a tikanga process. It raises questions as to how cases might be decided in the future. Such cases will be of great interest - though the opportunities remain to weave both tikanga and the common law in a collaborative way.

Māori property rights in water being considered by the Māori Land Court – *Mercury NZ Ltd v Cairns*

Mercury NZ Ltd applied to the Māori Land Court to strike out an application by Cairns and others with Pouakani Claims Trust No. 2 (applicants). This case is one of the three currently before the Courts concerning Māori property rights in water.

The Pouakani application relates to riverbed land used by Mercury for hydropower generation in the Pouakani area. Litigation concerning rights to this area of the Waikato River began in 1987, where Mr Paki applied to the Māori Land Court for investigation of title to the bed of the Waikato River adjoining the Pouakani Blocks on the basis that it remained land held by the hapū of Pouakani under their customs and usages. It has led to decisions *Paki No. 1* and *Paki No. 2*, testing the Crown's assumptions of ownership through the river being navigable or the principle of a*d medium filum aquae* (ownership of adjacent land extending to the middle of the river).

In the current case, the applicants sought a determination by the Court that the land under the three hydro dams

and hydro lakes in the Pouakani area of the Waikato River is Māori customary land. Declarations are also sought that the current titles held by the Crown or Mercury are held in a fiduciary capacity for Pouakani hapū, and that Pouakani are owners of the river water that flows over the riverbed at Pouakani.

Mercury Ltd sought to strike out the application, arguing that the Māori Land Court does not have jurisdiction to hear claims about general land, general land interests, fiduciary claims and water ownership.

The Court dismissed the strike out application and considered the application raises difficult questions of the law. In relation to the water claim, the Court considered that it is unclear as to whether the Māori Land Court's ability to inquire into customary water rights has been ousted by the definition of land in Te Ture Whenua (Maori Land) Act 1993. This is an issue the Court will need to consider full arguments on. The Court also considered that water ownership is currently a contentious topic in Aotearoa, the arguments are novel. Moreover, this is a developing area of law which has tikanga elements at its core and the claim should be considered by the Court (read the full decision here).

NBE Bill brings with it greater recognition of Māori interests and engagement

New purpose clause

The NBE Bill has a new Part 1 which replaces the current Part 2 of the RMA. Part 1 includes a purpose clause which includes a requirement to "recognise and uphold" te Oranga o te Taiao - a new broad concept, which includes the relationship between the health of the environment and its capacity to sustain life, and the intrinsic relationship between iwi and hapū and te taiao. Part 1 includes several provisions that appear to go further than the current RMA provisions relating to the recognition and protection of Māori interests.

There is a 'Treaty clause', which requires all actors under the NBE Bill to "give effect" to the principles of te Tiriti o Waitangi. This should give the principles more influence over decision-making, compared with the RMA's requirement to take them into account. We expect that this will increase the focus on clarifying what the principles require in terms of environmental decision-making.

New system "outcomes" must be provided for in all plans and the National Planning Framework (NPF - which replaces current national direction, such as National Policy Statements and National Environmental Statements). There are 18 non-hierarchical system outcomes, and three that relate to Māori concepts or rights. One is to protect and restore the mana, mauri and ecological integrity of key environments. Another is to recognise and provide for iwi and hapū's exercise of tikanga, and protection of customary rights.

All actors under the NBE Bill must recognise and provide for the responsibility and mana of each iwi and hapū to protect and sustain the health and wellbeing of te taiao in their area of interest. Area of interest is defined as their traditional rohe, so is quite broad. More generally requirements to, for example, provide for the exercise of tikanga by each hapū and their mana will potentially create challenges for decision-makers where multiple hapū express differing views.

New entity - National Māori Entity

The National Māori Entity (**NME**) is a new independent entity to monitor performance of bodies such as local authorities and Crown agencies in light of their obligations under the Treaty clause. The NME can undertake monitoring itself, or provide reports on request. If the Minister or other monitored entity receives a report, they must respond to the report and its recommendations, within 6 months, and the response must show the entity has considered what measures it intends to take in response. However, there is no requirement that an entity must follow the recommendations of the NME, and no apparent repercussions if it does not.

New way of making plans - Regional Planning Committees

The Regional Planning Committee (**RPC**) will create the plan and Regional Spatial Strategy (under the Spatial Planning Bill) for a region. There must be at least two iwi or hapū representatives on the RPC. The process for creating a RPC is complex and long, with an iwi and hapū committee being created, who must engage with iwi and hapū in the region and appoint a Māori appointing body. The Bill does not set out how or if this participation will be remunerated. The appointing body then has to choose who should be the representatives on the RPC. The RPC also has to initiate engagement agreements with Māori groups, which can be iwi or hapū, or other Māori groups with interests (such as urban Māori authorities), if the RPC believes that is appropriate. These engagement agreements should inform the making of plans, however the Bill does not stipulate how that will be done, and will likely be reliant on the negotiating power of the Māori group involved.

The Waitangi Tribunal recently inquired into claims about policy proposals for the arrangements for Māori representation on RPC. The claimants were concerned the Crown's proposed process for appointing Māori to the Committees was unfair and would favour post-settlement governance entities over other Māori group, such as, hapū, Māori landowners, New Zealand Māori Council, and urban Māori representatives.

The Tribunal found that the Crown as a Treaty partner is required to protect and empower the exercise of tino rangatiratanga, which would entail the Crown providing secretariat / administrative support and funding to enable the proposed self-determined processes for those appointed to the RPC to occur and succeed. A lack of capacity and capability due to a crucial lack of resources has hampered the ability of Māori to participate in resource management, and the Tribunal's view is that this should not be repeated in the new system.

However, the Tribunal was unable to reach an overall view as to whether the Crown's proposed policy concerning RPC is Treaty compliant. This is because the bespoke RMA arrangements negotiated through Treaty settlements and other processes still need to be transitioned into the new system, and those arrangements would potentially trump or even displace the proposed appointments process in some regions (read the Tribunal's report here).

Final note

Joint management agreements and Mana Whakahono ā Rohe continue in the new system, although the latter can also be initiated by groups representing hapū, not just iwi authorities.

You can read more in our series on 'Beyond the RMA' here. Submissions for the NBE Bill close on 30 January, and Simpson Grierson is happy to assist with putting together a submission.

Draft report of the review into the Future for Local Government - He mata whāriki, he matawhānui

The Review into the Future for Local Government has released its draft report ***He Mata Whāriki, He Matawhānui*** for formal consultation. The draft report sets out the Review Panel's recommendations for the future of local government, including a heavy emphasis on 'co-governance' and te Tiriti o Waitangi. Importantly, the draft report recommends that a large-scale holistic review be undertaken including the development of a new legislative framework, including new statutory provisions to:

- Drive partnership, kāwanatanga and rangatiratanga, and recognise te ao Māori values;
- Require councils to incorporate an agreed, local expression of tikanga whakahaere in their standing orders and engagement practices; and
- Require chief-executives to promote the incorporation of tikanga and to develop, maintain and grow council staff's understanding and knowledge of te Tiriti, the whakapapa of local government, and te ao Māori values.

The recommendations are highly aspirational and we look forward to the Review Panels' further comments on how these can be implemented. We also anticipate that submissions and central government's response will further shape the final report. Consultation on the draft report closes on 28 February 2023 and submissions can be made online here.

Constitutional Kōrero - constitutional transformation in Aotearoa

Last month, a national wānanga called 'Constitutional Kōrero' was hosted by Dr Claire Charters on behalf of the Borrin Foundation and Te Puna Rangahau o te Wai Ariki at Waipapa Taumata Rau / the University of Auckland. Members of our Simpson Grierson Whānau had the privilege of attending and being involved in this important and once-in-a-decade wānanga.

The wānanga brought together international thought-leaders on constitutions and Indigenous peoples as well as tangata whenua to present and generate transformative, practical and robust options for constitutional transformation in Aotearoa. Particularly, to realise Māori rights in te Tiriti o Waitangi, He Whakaputanga and the United Nations Declaration on the Rights of Indigenous Peoples. Accordingly, the two key questions driving the wānanga were: what would a te Tiriti based constitution look like, and how would we realise it?

One observation that we made was that, generally, when looking at all of the examples discussed from Indigenous peoples around the world, Aotearoa is in a truly unique position where there really is no precedent. While it is exciting to consider the potential for constitutional change to improve Aotearoa, we are also very mindful of the significant challenges that this process will bring.

As the momentum for transforming our constitution to realise Māori rights and exercising tino rangatiratanga continuously builds around Aotearoa, we look forward to observing how our constitution evolves.

Appropriation of Tā moko - our pro bono work with Tunuiarangi Rangi McLean

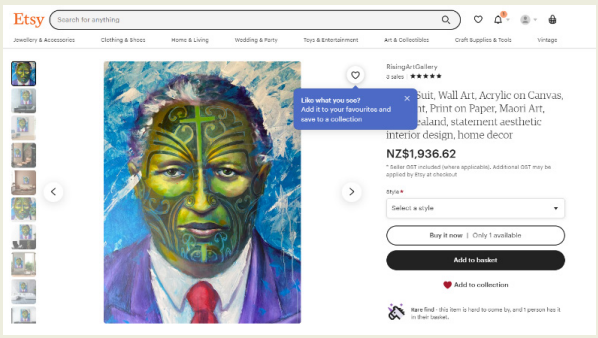
Simpson Grierson has recently completed an important piece of pro bono work relating to the appropriation of an image of Tūhoe kaumatua, Tunuiarangi Rangi McLean (**Rangi**).

As shown on the right, the unauthorised art copied a photograph taken as part of an exhibition to celebrate the reclamation of tā moko post-colonisation. The original purpose of the photograph was to celebrate a sacred part of te ao Māori and its resurgence into modern day Aotearoa. The German artist's depiction of the photograph distorts, alters and colours the original. It was then placed on Etsy for monetary value.

Tā moko are tapu in te ao Māori. The journey to bear tā moko, particularly mataora, can be the result of a long spiritual journey and will often require the blessing of kaumātua. Tā moko display deeply personal information, including a person's whakapapa, nobility or history.

It was culturally insensitive for the artist to attempt to commercially gain from painting Rangi without consent. It was also disconcerting that someone's moko could end up hanging on a stranger's wall in another country, without any understanding or appreciation of its significance.

The artwork was successfully removed from sale on Etsy within 24 hours of Simpson Grierson sending a cease and desist letter- however, this was a result of Etsy responding to remove the artwork, not the artist himself. The artist, who does not fully appreciate the impact of his artwork on Rangi and the wider community, would not agree to remove the artwork from his website.



(Unauthorised Art)

(Original Photograph)

While Etsy's removal of the artwork was a quick and successful result, it does not undo the pain already caused to Rangi or address the wider issue of cultural symbols and images being used without consent.

This is not the first and will not be the last time there has been cultural appropriation of sacred parts of the Māori culture (see Oriini's experience here). Legal action is not a long term solution. This is too late, the mamae (pain) has already been caused. This is a good reminder of the limitations of copyright law in Aotearoa and the lack of protection it provides to cultural property rights.

Simpson Grierson

New additions to our SG Whānau

We have six new additions to the SG Whānau Group this summer, all of whom are part of our awesome new Summer Clerk cohort. We mihi to and introduce our new kaimahi. Nau mai, haere mai.

Bessie Isaachsen (Ngāi Tai, Ngāti Porou, Ngāti Kahungunu) is studying at Waipapa Taumata Rau (The University of Auckland) and is looking forward to working in both the Commercial Litigation and Commercial teams in the Tāmaki Makaurau office this summer.

Cody Malaki (Liku in Niue) is studying at Waipapa Taumata Rau (The University of Auckland) and will be rotating between the Intellectual Property and Commercial Litigation teams in the Tāmaki Makaurau office this summer.

Katriana (Kat) Taufalele (Ta'anea, Vava'u, Fanga 'o Pilolevu, Tongatapu in Tonga) is studying at Waipapa Taumata Rau (The University of Auckland). This summer she will be working in the Banking & Finance and Local Government & Environment teams in the Tāmaki Makaurau office.

Ngahuia Muru (Ngāti Ranginui, Ngāi Te Rangi, Waikato-Tainui) studies at Te Whare Wānanga o Waikato (The University of Waikato). Ngahuia will be working in the Commercial and Employment teams in Tāmaki Makaurau.

Taumata Toki (Ngāti Rehua – Ngātiwai ki Aotea, Ngāpuhi) studies at Waipapa Taumata Rau (The University of Auckland) and will be working in the Construction Litigation and Commercial Property teams this summer in the Tāmaki Makaurau office.

Tawhiwhi Watson (Ngāti Kahungunu) is studying at Te Whare Wānanga o Ōtākou (The University of Otago) and is excited to be working within the Employment and Corporate teams over the summer in the Tāmaki Makaurau office.

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