Simpson Grierson

# Ngā Take Māori o Te Ao Ture:
# Māori Legal Update

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## Kua haehae ngā hihi o Matariki.

Ka kōrerotia tēnei whakataukī i te wā ka kite mārama atu i a Matariki i te rangi. Ko Matariki te wā e kōrerorero ai ngā pūrākau, he hokinga mahara, he whakatikatika mō te Tau Hou. Nā reira, kia ū koutou ki ēnei kaupapa mō tēnei hararei. Ngā mihi o Tau Hou Māori!

## Mahara mai ki te pānui tuawhā o Simpson Grierson.

In this issue, we first say moe mai rā ki te Rangatira, Moana Jackson. We then take a look at the key developments in te ao ture, including our observations on:

- the Ngāti Whātua Ōrakei decision where the High Court declined to declare there is exclusive mana whenua in Tāmaki Makaurau;
- the High Court's decision to reject judicial review of the 'vegetable exception' in the National Policy Statement for Freshwater 2020;
- the continuing co-governance debate;
- the Government's Environment Aotearoa 2022 report;
- the Three Waters Reform; and
- the New Zealand Māori council joining the Re Edwards (Te Whakatohea No 2) appeal.

Mauri ora!

## Moe mai rā e te Rangatira, Moana Jackson

*E te tōtara whakaruruhau o te wao nui o Tāne, takoto mai rā, haere, hoki atu ki a rātou e tatari ana mōu. Ka mau tonu ō mahi, ā, ake tonu atu.*

Moana Jackson of Ngāti Porou, Ngāti Kahungunu and Rongomaiwāhine was a quiet revolutionary, disruptor, navigator, transformer and visionary.

To mention only a few of Moana Jackson's works, he authored the ground-breaking and seminal paper *Te Whaipaanga Hou* (Report on Māori and the Criminal Justice System) in 1988, led an indigenous peoples working group that drafted the United Nations Declaration on the Rights of Indigenous People and convened *Matike Mai Aotearoa* (the independent working group on constitutional transformation).

Moana Jackson has given Māori the intellectual framework to not only understand what has happened to Māori in the past, but also to challenge the present and articulate possibilities for the future. Moana Jackson's work will echo and continue to inspire Māori for generations to come. His legacy will endure as Māori continue to realise his dream of a fair, just and equitable Aotearoa.

## Ngā whakahoutanga o ngā whakataunga

### High Court declines to declare there is exclusive mana whenua in Tāmaki Makaurau - the Ngāti Whātua Ōrakei decision

In Paengawhāwhā/April, the High Court issued its almost 300-page decision relating to the ongoing challenge by Ngāti Whātua Ōrākei (**NWŌ**) against the Crown's proposal to transfer land in central Auckland to other iwi as part of a Treaty settlement. NWŌ sought declarations that the proposed transfer would be a breach of tikanga. Specifically NWŌ argued that they were "ahi kā and mana whenua" giving them exclusive rights to the land. Several other iwi opposed the declarations, arguing that, according to their tikanga, mana whenua does not involve exclusivity in this case.

Justice Palmer was satisfied that NWŌ have ahi kā and mana whenua *according to their tikanga* - but was not willing to make declarations that would exclude the tikanga-based interests of other iwi/hapū. The Court proposed alternative declarations and invited submissions. In reaching this conclusion, Palmer J made several significant findings in terms of tikanga and the role of the courts.

Tikanga can be understood as behaviour that is tika ('correct' or 'right'); consisting of norms of behaviour which a hapū or iwi develop over time and which acquire such force that they are regarded by that hapū or iwi as binding. Tikanga:

- must be understood "holistically as an interlocking set of reinforcing norms";
- is constitutive of iwi and hapū - and a "consequence and source of Māori identity". Without tikanga an iwi/hapū are "not who they are". It is "quintessentially developed by each… in the exercise of their rangatiratanga";
- is not static: as circumstances change over time, so does tikanga;
- is a "way of life": it is practiced and "loses something when reduced to writing"; and
- varies across iwi/hapū - reflecting different circumstances. But it "rests on core principles that are common across most iwi and hapū". These common understandings "ease tensions, smooth relationships, and facilitate understandings between different iwi and hapū".

Palmer J described tikanga as a "…"free-standing" legal framework recognised by New Zealand law". Like the common law, the legal effects of tikanga can be overridden by legislation. But even Parliament cannot change tikanga: iwi do that, exercising their rangatiratanga. Similarly, one iwi cannot override the tikanga of another iwi without impinging on their rangatiratanga.

Tikanga can determine the outcome of a court's application of legislation or the common law; and can be a direct source of legal rights enforced by the Courts (see [358]). However, just because a court *can* do something - *should* it? The overriding message from Palmer J is one of extreme caution because:

- case law will not be authoritative precedent - courts cannot "make, freeze or codify tikanga"; and
- of "the inherently difficult task of transcending culturally-specific mindsets. Common law courts must "hold "in check closely" any unconscious tendency to see tikanga in terms of English law heritage". Courts "must be open to seeing tikanga on its own terms, as a distinct framework".

Palmer J went on to find that Te Tiriti protects Māori custom and cultural values, which "encompasses the Crown protection of tikanga". Accordingly, it "follows from both the terms and the principles of the Treaty that, where Treaty obligations legally bind the Crown, the Crown will have legal obligations in relation to tikanga, to act reasonably and in good faith, with mutual cooperation and trust, and to actively protect tikanga". The Crown's duty is to "take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū, and the Crown will need to actively protect the ability of iwi and hapū to exercise their tikanga".

This decision is a significant part of the rapidly evolving case law on the interaction between tikanga and 'state law'. There can be little debate now that tikanga must be regarded as an independent legal system in Aotearoa. It can be more than a 'source' of law. However, what this means in practice is unclear, especially given the inherent 'local' nature of tikanga. Moreover, the decision raises some complex questions about the role of courts in determining contested matters of tikanga. There is little doubt that there will be more litigation which further thrashes out these issues (read the full decision here).

### High Court rejects judicial review of the 'vegetable exception' in the National Policy Statement for Freshwater Management 2020

Justice Edwards rejected Muaūpoko Tribal Authority Incorporated and Te Rūnanga o Raukawa's application for judicial review of the inclusion of the 'vegetable exemption' in the National Policy Statement for Freshwater Management 2020 (**NPS-FM**). The Muaūpoko and Raukawa entities represent iwi and hapū with rangatiratanga, kaitiakitanga and mana over Lake Horowhenua and Hōkio stream. Lake Horowhenua is now one of the most polluted and degraded lakes in the country. The lake and its catchments are also in the heart of a key area for the domestic supply of vegetables.

The 'vegetable exemption' in the NPS-FM allowed regional councils to set targets for certain water quality attributes below national bottom lines if setting targets in line with the national bottom lines would compromise domestic fresh vegetable supply and food security. Muaūpoko and Raukawa argued that the exemption would permit historical pollution and continue degradation of Lake Horowhenua and Hōkio, and that it was included in the NPS-FM without proper consultation.

Justice Edwards said that regional councils can decide whether water quality targets should be set at, above or below bottom lines, but in doing so they had to give effect to other parts of the NPS-FW including Te Mana o te Wai, and the requirement to involve tangata whenua in decision-making. Because of the other provisions of the NPS-FM and ongoing consultation requirements, inclusion of the 'vegetable exemption' was found not to contravene the RMA or Te Tiriti Principles (read the full decision here).

## The continuing co-governance debate - the political "hot potato" of 2022

The continuing co-governance debate has surfaced to the forefront in recent months due to political pushback against increasing efforts towards co-governance.

Co-governance is a term used to describe the arrangements for decision-making partnerships between iwi and other groups, including central and local government. Primarily, co-governance applies to natural resources, but there are calls to extend it to service delivery to address the inequities Māori face in education, health, and housing. The idea is that, with Māori at the decision-making table, progress could be made towards creating a fairer and more equitable Aotearoa, consistent with Te Tiriti.

In 2018, the Government commissioned a report on potential co-governance arrangements with Māori. However, since the *He Puapua* report was published in 2019, the Government has denied that its proposals represented Government policy or intent. More recently, the Government has included co-governance in its Three Waters reform (which we discuss below), which has sparked much criticism (although there is some debate about whether Three Waters reform is in fact co-governance).

In March this year, ACT leader David Seymour called for a public referendum on co-governance and has set out his case for what he calls the dismantling of democracy. Seymour has pointed to *He Puapua*, Three Waters and the Māori Health Authority as examples of co-governance principles being wrongly applied and seeking to create division in Aotearoa (read article here).

Prime Minister Jacinda Ardern responded by confirming that public consultation on co-governance with Māori will begin later this year (read article here).

The National Party leader, Christopher Luxon, has said no to a referendum for now. However, Luxon has suggested that the Government was pushing ahead with a different kind of co-governance than Aotearoa was familiar with and that he has "serious reservations" about co-governance in public service delivery (read article here).

Labour's Māori Ministers say that extending co-governance is key to addressing inequity for Māori and closing the gap between Māori and Pākehā. Māori Development Minister, Willie Jackson, notes that the nature of democracy has changed: "this is a democracy now where you take into account the needs of people, the diverse needs, the minority needs … it's not about the majority anymore, that's what co-management and co-governance is about. It's nothing to fear" (read article here).

Tukoroirangi Morgan, chairperson of Te Arataura (the Executive Board of Te Whakakitenga o Waikato, the governance body of Waikato-Tainui), has emphasised co-governance is "about a treaty relationship that's an enduring partnership, that's built on trust and confidence to do one thing: to work cohesively and collectively to try and improve the health and wellbeing of our tupuna awa [the Waikato River]" (read article here).

Co-governance is a continuing issue that we see featuring in the political landscape of Aotearoa and is one of central importance in achieving equity for Māori. We will continue to follow the co-governance debate as it proves to be the political "hot potato" of 2022 and look to the outcomes of the public consultation later this year.

## Environment Aotearoa 2022 - A new Matariki-based framework

In te ao Māori, the health of the environment is paramount to our own health and wellbeing. Our tīpuna understood this and lived during a time where they utilised resources and harvested in a way that was sustainable for future generations.

In its latest report on our environment, the Government has adopted te ao Māori values. *Environment Aotearoa 2022* places environmental change in the context of our lives as individuals, whānau and hapori (community). It utilises a diverse set of evidence drawing on mātauranga Māori, environmental and health science and economics.

*Environment Aotearoa 2022* is framed and organised by reference to Te Kāhui o Matariki (the Matariki star cluster). There are nine stars within the cluster - Pōhutakawa, Tupuānuku, Tupuārangi, Waitī, Waitā, Waipunarangi, Ururangi, Hiwa-i-te-rangi and Matariki herself. Each star represents a way that people connect with the environment. Traditionally, the stars were used to guide the harvesting of food and other activities and events within iwi communities.

This report sets out key findings by connecting the kaupapa to its associated star. This framework is set out below;

- Pōhutakawa = Loss and pressures on species and ecosystems
- Tupuānuku = Land and soil
- Tupuārangi = Biodiversity and land-based ecosystems
- Waitī = Freshwater
- Waitā = Marine environment
- Waipunarangi = Rain and frosts
- Ururangi = Air, winds and the sky

The report begins with Matariki and explores the connections between environmental health and human wellbeing. It then concludes with the youngest star, Hiwa-i-te-rangi, relating to impending challenges, aspirations and hopes for the future. The integrated approach and wellbeing focus of the report is intended to urge and empower Aotearoa to create the future we want, mō tātou mō ngā uri ā muri ake nei (for ourselves and for future generations). We think this is an excellent example of mātauranga Māori and western science being woven together to provide a more sophisticated understanding of our environment (read the full report here).

## Three Waters reform - what is happening?

The new Water Services Entities Bill (**Bill**) has recently been introduced to Parliament and aims to establish the legal framework for the much-anticipated Three Waters Reform. For background on the reform, take a look at our previous update here.

The reform will include four new Water Service Entities (**WSEs**), governed by boards who are appointed by Regional Representative Groups (**RRGs**). The RRGs will also set the strategic direction and expectations for the WSE and review their performance. Each entity will have a constitution that sets out the processes and composition for the Board, RRG and any optional Regional Advisory Panels (**RAPs**) as well as dispute resolution, remuneration and methods for amending the constitution. The Government will establish the first constitution for each WSE. The role of RAPs is to provide additional advice to the RRGs about specific matters of relevance to a particular geographic area.

The Bill requires anyone who is performing duties, functions or powers under the Act to give effect to the principles of te Tiriti o Waitangi and to Te Mana o te Wai (to the extent relevant). The WSE Boards will be required to have processes in place for the WSEs to give effect to the principles of te Tiriti and engage with mana whenua.

RRGs will have equal members of mana whenua representatives and territorial authority representatives. The RRG will have a collective duty to act for the benefit of all communities in their area, taking into account the diversity of those communities and including the interests of future communities. The mana whenua representatives will be appointed by the mana whenua whose rohe or takiwā lies within the WSE area.

Each RRG will also have one territorial authority co-chair and one mana whenua co-chair. However, co-chairing arrangements will be established through each WSEs' constitution, not through the new Bill. Similarly, the RRG for Entity A (covering Auckland and Northland) will have a unique arrangement that includes 4 Auckland Council representatives, 4 Tāmaki Makaurau iwi/hapū representatives, 1 representative from each Northland Council and 3 iwi/hapū representatives from Te Tai Tokerau. This will be established through Entity A's constitution.

The Bill empowers mana whenua to provide Te Mana o te Wai statements to the WSEs. These can be created by individual iwi or hapū or groups of iwi or hapū and may relate to one or more freshwater bodies. The WSE are then required to engage with the mana whenua who provided the statement and provide a response that includes a plan for giving effect to te Mana o te Wai for the freshwater body or bodies.

Submissions on the new Bill are currently open (see here) and we look forward to seeing the legislation be further refined through the parliamentary process.

### New Zealand Māori Council joins Re Edwards (Te Whakatohea No. 2) appeal as intervener

The Court of Appeal in *New Zealand Māori Council v Te Kāhui Takutai Moana O Ngā Whānui Me Nga Hapū* has granted the New Zealand Māori Council (**NZMC**) leave to intervene in appeals from a precedent-setting decision on the Marine and Coastal Area (Takutai Moana) Act 2011 (**MACA**).

*Re Edwards (Te Whakatohea No 2)* was the second case under MACA to grant Customary Marine Title (**CMT**) and Protected Customary Rights (**PCR**) to a range of applicants including hapū of Whakatōhea, Ngāti Awa and Ngāi Tai. CMT and PCRs allow the applicants to exercise customary rights, without other permissions like resource consents, in the Marine and Coastal Area. However, this was the first decision to consider overlapping claims and the first substantial articulation of the legal tests for CMT and PCR.

The Court ruled that, to be granted PCR, applicants must prove the rights have been exercised since 1840, in accordance with tikanga, and are not extinguished. For CMT, applicants must prove exclusive use and occupation of an area since 1840 without 'substantial interruption'. The Court held that resource consents did not necessarily amount to substantial interruption and that applicants could be awarded joint PCR or CMT. Crucially, the Court held that holding an area 'in accordance with tikanga' is a factual assessment for experts in tikanga to determine and the Court relied heavily on pūkenga for its findings.

*Re Edwards (Te Whakatohea No 2)* has since been appealed by both applicants and interested parties. Importantly, the Court of Appeal has now granted the NZMC leave to join the appeals as an intervener.

The NZMC sought leave to join the appeal on the issue of the tests for PCR/CMT, arguing that they are directly relevant to the ongoing Wai 2660 claim in the Waitangi Tribunal. The Wai 2660 claim is investigating whether the MACA regime is inconsistent with te Tiriti. The Court of Appeal observed that the Crown is using the judgment from *Re Edwards (Te Whakatohea No. 2)* in the Waitangi Tribunal to explain the importance of tikanga within the MACA regime. Further, NZMC argued and the Court accepted that the NZMC is well-placed to provide a pan-Māori perspective. The Court of Appeal ultimately granted the NZMC leave to join the appeal as an intervener (read the full decision here).

We will keep a close watch on the further developments in the *Re Edwards (Te Whakatohea No. 2)* case and in the Wai 2660 claim.

### Te reo Māori classes in Ōtautahi

Ngā mihi nui ki ngā kaimahi o Ōtautahi! Congratulations to all those in the Simpson Grierson Ōtautahi office who completed a 10 week Te Reo and Tikanga Māori programme earlier this year. Tēnā koe e Mere (Mary Dimond) from Taimana Training who facilitated the office upgrade in pronunciation, basic te reo, and their understanding of tīkanga and te ao Māori.

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