Simpson Grierson

Ngā Take Māori o Te Ao Ture:
Māori Legal Update

HAKIHEA/DECEMBER 2021

Meri Kirihimete me ngā mihi o te Tau Hou Pākehā. Nāia te mihi maioha o te wā ki a koutou.

He tau uaua anō tēnei tau nā te mate korona. Engari, kua mahia tonutia te mahi e tātou. Ko tēnei te wā ki te āta haere, ā, ki te whakatā. Kia pai tō koutou hararei.

Mahara mai ki te pānui tuawhā o Simpson Grierson.

In this issue, we take a look at the key developments in te ao ture, including our observations on the Supreme Court's landmark decision on tikanga Māori as an "applicable law"; WAI2522: the Waitangi Tribunal's report on the CPTPP and the Crown's failure to protect Māori data; and the Court of Appeal's decision dismissing the prospects of a novel climate change duty.

We explore recent updates affecting te taiao and te ōhanga, including:

- The Three Waters Reforms: Where to next for 2022;
- Ngā Ngaru Raitahi O Aotearoa: The National Māori Authority releases its first report on the grocery sector;
- Changes to the rating of Whenua Māori;
- A guide to assist iwi and hapū with local climate risk assessments; and
- The introduction of new climate-related financial disclosure laws.

We also introduce our newest members of the SG Whānau, and congratulate our most recently admitted rōia.

Mauri ora!

Ngā whakahoutanga o ngā whakataunga

Supreme Court Trans-Tasman Resources decision; a step-change in legal recognition of tikanga Māori

Recently, in *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] NZSC 127, the Supreme Court dismissed the long-running appeal and made several precedent-setting findings about the recognition of customary interests and the applicability of tikanga Māori in New Zealand law. As discussed in our previous updates, the case involved a dispute over whether the Environmental Protection Agency (**EPA**) was correct to issue consents for seabed mining in the South Taranaki Bight under the Exclusive Economic Zone Act and Continental Shelf (Environmental Effects) Act 2012 (**Act**). A key issue for the Court was whether the EPA must take into account Māori customary interests when making decisions under the Act. Ultimately, the Court directed the EPA to consider the consent application once again.

Supreme Court decision and implications from this ruling

The Court held that the EPA had applied the Act incorrectly, with a majority holding that the Act's purpose "to protect the environment from pollution" created "an environmental bottom line". However, the majority considered that, even with a bottom line approach, a consent could be granted provided that avoidance, mitigation, or remediation reduced the harm so that the harm was no longer "material".

Further, the Court held that in decision-making under the Act, a "broad and generous construction" should be used for the Treaty of Waitangi clause, with Parliament needing to make it "quite clear" in legislation if it wishes to limit the effect of the Treaty under any legislation.

The Act requires the EPA to take into account several matters in deciding whether to grant the consents, including "existing interests" and "other applicable law". The Court held that "existing interests" could include tikanga-based customary rights and interests, such as those founded on kaitiakitanga, and that this included rights claimed for but not yet granted under the Marine and Coastal Area (Takutai Moana) Act 2011.

Similarly, the Court held that "other applicable law" includes tikanga where relevant. Recognising tikanga as "other applicable law" is a notable development by the Court of the approach it had previously adopted in *Takamore v Clark*, where tikanga was recognised as a "value" of the common law. The Court noted that 'tikanga as law' forms a subset of tikanga more broadly, but left open whether tikanga is a separate - or third source - of law, and whether changes should be made to the traditional tests for recognising custom as law. The Court noted that, viewed through a tikanga lens, the 'material harm' to be weighed in this application will need to include assessment of not only physical harm, but also spiritual harm to the mauri of the area.

Our observations

This decision marks a step-change, both in the Courts' recognition of tikanga and customary interests, and in the considerations that will impact future law making. The decision to 'read in' Treaty of Waitangi obligations to legislation, cements the Treaty's place as a key component of New Zealand's constitutional arrangements. It also means that in the future, Parliament will need to *expressly* exclude such considerations from legislation, if it wants to remove Treaty considerations from decision-making.

Further, the decision that tikanga Māori is 'other applicable law' is the latest in a long evolution of recognition of tikanga Māori by New Zealand Courts. While the decision leaves open how tikanga will be determined and applied by the Courts, we anticipate that the growing body of jurisprudence on tikanga will help define an appropriate approach. Of note is Justice Williams' decision which states that such determinations "must not only be viewed through a Pākehā lens". We therefore expect that the assistance of pukenga, and the soon-to-be-refreshed Law Commission guidance may be crucial for the Courts in future.

WAI 2522: Crown failed in their duty to actively protect ‘Māori data’ as mātauranga Māori

In its report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**), released on the 19th of November 2021, the Waitangi Tribunal addressed the remaining issues between the e-commerce provisions and Māori data sovereignty. The free trade agreement, revised as the CPTPP, is between New Zealand and eleven other countries. The Tribunal concludes there is a heightened level of risk towards Māori interests.

The Tribunal did not determine the extent to which these provisions may affect Māori governance, but acknowledged that any digital data pertaining to Māori is to be held as taonga, and so should be treated as such by the Crown in its duty as a Treaty partner. Any data concerning or being generated by Māori is ‘inextricably linked to mātauranga Māori’, even when it enters the digital domain. The significance of this concept elevates this as a key consideration to the Crown within their negotiations, one which should not be subject to a balancing act against other trade interests.

The Tribunal confirmed that the Crown failed to protect taonga, because they lacked a governance framework that outlined the ability of Māori to exercise control over their digital data. Key concerns for the claimants were CPTPP provisions that did not prevent data from being stored overseas. The Crown’s passive stance on these provisions represents a lack of acknowledgement of Māori data as taonga, and the concern that the Crown may act in contravention of their commitments under Te Tiriti, to further these CPTPP trade interests.

However, even with these findings of a breach of Te Tiriti, the Tribunal took the unusual approach of not making immediate recommendations. This process of inquiry into the proposed free-trade agreement has taken five years, and with a positive response from the Crown to these claims being observed, aligning with their whole-of-government response to the Wai 262 report, making recommendations would be inappropriate. With the issue of engagement and secrecy being mediated between the Crown and the claimants, the Tribunal did not wish to make a recommendation so as not to interfere with this ‘out of Court’ process.

Climate Change: Court of Appeal dismisses tortious claims against corporate emitters

In its recent decision of *Smith v Fonterra Co-Operative Group* [2021] NZCA 552, the Court of Appeal held that as a "matter of principle and policy" the law of tort is not "an appropriate vehicle for addressing the problem of climate change."

Rather, the Court suggested that the climate crisis is "quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination".

Accordingly, the Court struck out all three causes of action pursued by Mr Smith against several corporate defendants, each with a strong link to the production or supply of greenhouse gas emissions. Mr Smith alleged that each defendant was liable in public nuisance, negligence and a breach of an inchoate duty of care, which would "make corporates responsible to the public for their emissions".

While Mr Smith has sought leave to appeal to the Supreme Court, the case is nevertheless Aotearoa's leading authority against climate change claims being actionable in tort. We summarise the key points and set out our general observations, in our comprehensive FYI available here.

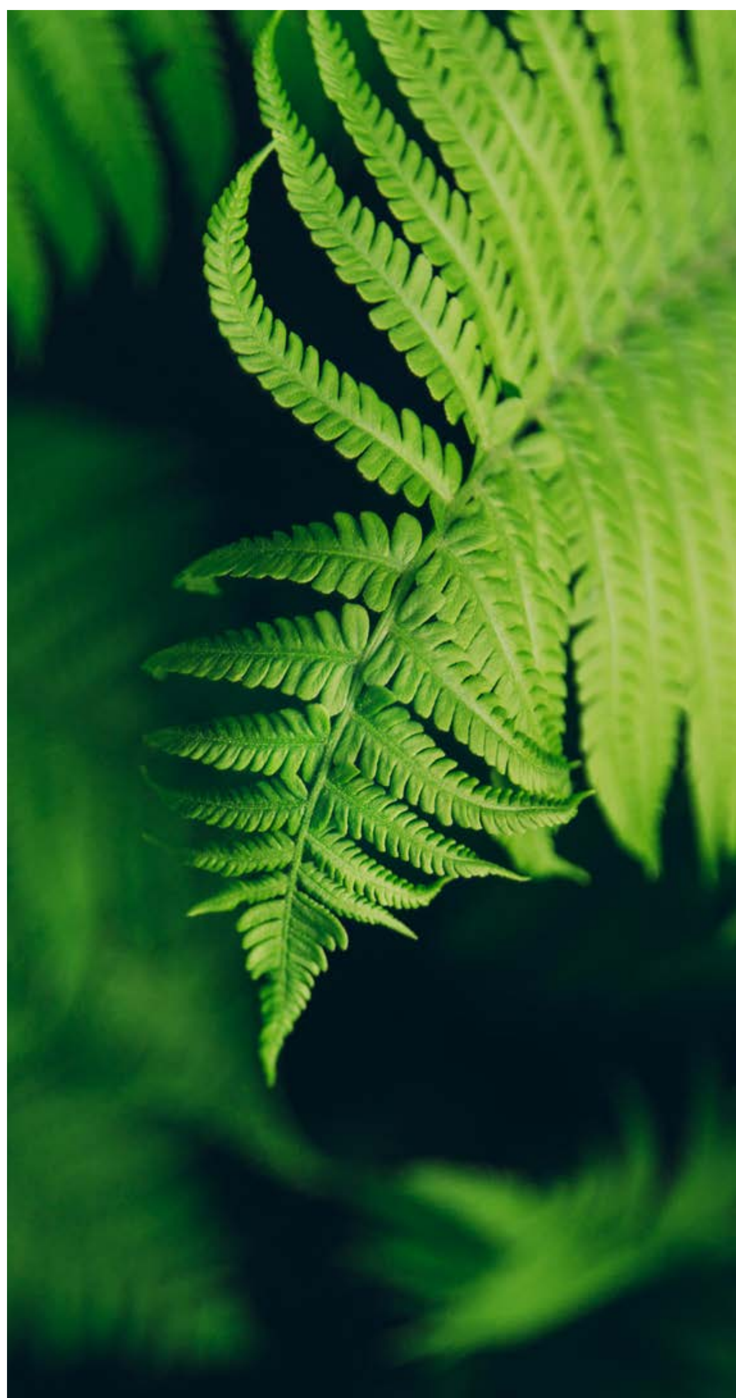
Poutama Kaitiaki Charitable Trust Fails to Claim Tangata Whenua Status

The Poutama Kaitiaki Charitable Trust (**Poutama**), following their failed attempt to claim tangata whenua status in relation to the Mt Messenger bypass, have again been unable to prove tangata whenua status of land near the coast of Tongaporūtu.

In *Poutama Kaitaiaki Charitable Trust v Heritage New Zealand Pouhere Taonga* [2021] NZEnvC 165, Poutama appealed the decision of Heritage New Zealand Pouhere Taonga to grant First Gas Limited an Archaeological Authority in relation to work to remove 270 metres of a redundant and asbestos-laden section of the Kāpuni gas pipeline. The adjoining land to the pipeline is owned by trustees of the Gibbs family (two of three who are Pākehā) on behalf of a family trust. They are also the sole members of Te Ahuru hapū, which is part of a collective that describes itself as Ngā Hapū o Poutama.

Rather than actual or potential damage to the site, the appeal turned on who holds tangata whenua status over the site and the affected area by the works. Poutama argued they were tangata whenua of the site and therefore should have been consulted.

Ultimately, the Court found that Poutama did not have tangata whenua status. This aligned with the views of Ngāti Tama and Ngāti Maniapoto, and the public authorities involved in granting the Archaeological Authority and related resource consents, who all acknowledge Ngāti Tama as mana whenua of the relevant site. In reaching its decision, the Court drew attention to the definition of the term tangata whenua which, in this context, means more than identifying as Māori. It requires a whakapapa connection to the land. The witnesses for Poutama admitted that the hapū do not have a whakapapa connection to the land. This, alongside the fact that there is little or no corroborating evidence to support the claim that there was historically, or is in contemporary times, a recognised hapū or iwi collective known as Ngā Hapū o Poutama, meant tangata whenua status was not found. The appeal was dismissed.



Ministry of Health agrees to conditional release of Māori vaccination data to Whānau Ora following second successful court challenge

The Ministry of Health (**Ministry**) will release data about unvaccinated Māori in Te Ika-a-Māui to the Whānau Ora Commissioning Agency (**Whānau Ora**), following a second successful High Court challenge.

Whānau Ora is a Māori health commissioning agency, overseeing 81 general practice clinics and over 200 vaccination sites across Te Ika-a-Māui. In August 2021, Whānau Ora asked the Ministry to provide the details of unvaccinated Māori in Te Ika a Māui through a data sharing arrangement. Whānau Ora requested the data to better tailor their Covid-19 vaccination roll-out. This request was refused by the Ministry twice, but High Court ordered the Ministry to reconsider their decision, following successful legal challenges.

Initially, the Ministry refused to provide the information, citing privacy concerns under the Health Information Privacy Code 2020 (**Code**). The Court however ruled that the Ministry had erred in interpreting the Code and had disregarded their Te Tiriti o Waitangi and tikanga obligations. The Ministry subsequently released *limited* data about unvaccinated Māori in Waikato and Tāmaki Makaurau, but refused to share North-Island wide Māori health information. The Ministry then agreed to work with Whānau Ora to identify rohe where Māori vaccination outreach is vital and "identify the necessary and appropriate scope of data sharing in each case". Again, the Court ruled this decision was an incorrect interpretation and application of the Code.

Whānau Ora narrowed their request to the data of all Māori in the Bay of Plenty, Hawke's Bay, Lakes, Northland, Wairarapa and Whanganui District Health Board areas (**DHBs**) who were unvaccinated or who had only received a single vaccine dose. In a 9 December 2021 letter, the Director General of Health stated that the Ministry would release the relevant data for Northland, Hawke's Bay and Whanganui DHBs and more limited data from the Wairarapa, Lakes and Bay of Plenty DHBs. Limited data is being released in rohe where iwi oppose releasing data to Whānau Ora or prefer a data-sharing agreement with the Ministry.

Data of unvaccinated Māori will be released in two tranches. First, the data of Māori who are not enrolled with a primary care provider will be released, if they have not booked in for their second dose of the vaccine 3-4 weeks after their first dose. For Māori who are enrolled with a primary care provider, their data will be released if they have not booked in for their second dose 6 weeks after their first dose. The two tranche process is designed to co-ordinate between service providers so that Māori are less likely to be contacted by multiple service providers.

The letter set out several requirements for this release. Among them is that data may only be used to support Covid-19 vaccination service planning, delivery and quality improvement for Māori who are not fully vaccinated. The data may only be retained until 30 June 2022. The letter does not state when this data will be released.

Waitangi Tribunal: Government Covid-19 response actively breaching Treaty of Waitangi

The Waitangi Tribunal recently held an urgent hearing into whether the Government has breached the Treaty of Waitangi and has only just released its findings in Haumaru: The COVID-19 Priority Report. The hearing focused on the Government's vaccination strategy and the shift to the traffic light system. The Tribunal found that the Government is "actively breaching" the Treaty principles through both its vaccination rollout and rapid transition into the traffic light system. In particular, the Government breached Treaty principles of active protection, equity and tino rangatiratanga. The Tribunal says that the Government failed to prioritise Māori despite the known inequitable health outcomes due to "political convenience" and "fear of a racist backlash against Māori".

Importantly, the Tribunal recommended that the Crown urgently provide further funding, resourcing, data and other support to assist Māori providers and communities with:

- the continuing vaccination effort – including the paediatric vaccine and booster vaccine;
- targeted support for whānau hauaa and tāngata whaikaha;
- testing and contact tracing;
- caring for Māori infected with Covid-19; and
- self-isolation and managed isolation programmes.

The Tribunal also made a number of other recommendations, including that both the paediatric vaccine and the booster vaccine rollout should expressly prioritise Māori and be supported by adequate funding, data and resourcing for Māori providers. We look forward to seeing how the Government responds to the Tribunal's recommendations.

Ngā whakawhanake o ngā whakatureture

Three Waters reform: What the latest developments mean for Māori

Where we are so far

The Three Waters Reform (**Reform**), announced in June 2020, is a significant and controversial change to the management of Aotearoa's drinking water, wastewater and stormwater. Simpson Grierson's Transforming Three Waters report and previous Māori Legal Updates outline past developments. The Government has since then:

- Passed the Water Services Act 2021, which regulates the safe supply of drinking water.
- Proposed four Water Services Entities. The overall structure includes:
  - That the board of each Water Services Entity would be appointed by an *independent selection panel*, who in turn are appointed by the *regional representative group* which comprises representatives of the local authority owners and mana whenua representatives. This regional representative group will set strategic and performance expectations.
  - A mechanism for giving effect to Te Mana o Te Wai: Mana whenua will be able to produce Te Mana o Te Wai statements, which the Water Services Entity will have to respond to, through a Statement of Response.
- Established a working group to recommend a strengthened approach to reform, in particular the representation, governance and accountability of the proposed four Water Services Entities. The strengthened approach should be in light of the feedback from iwi/Māori and local government.

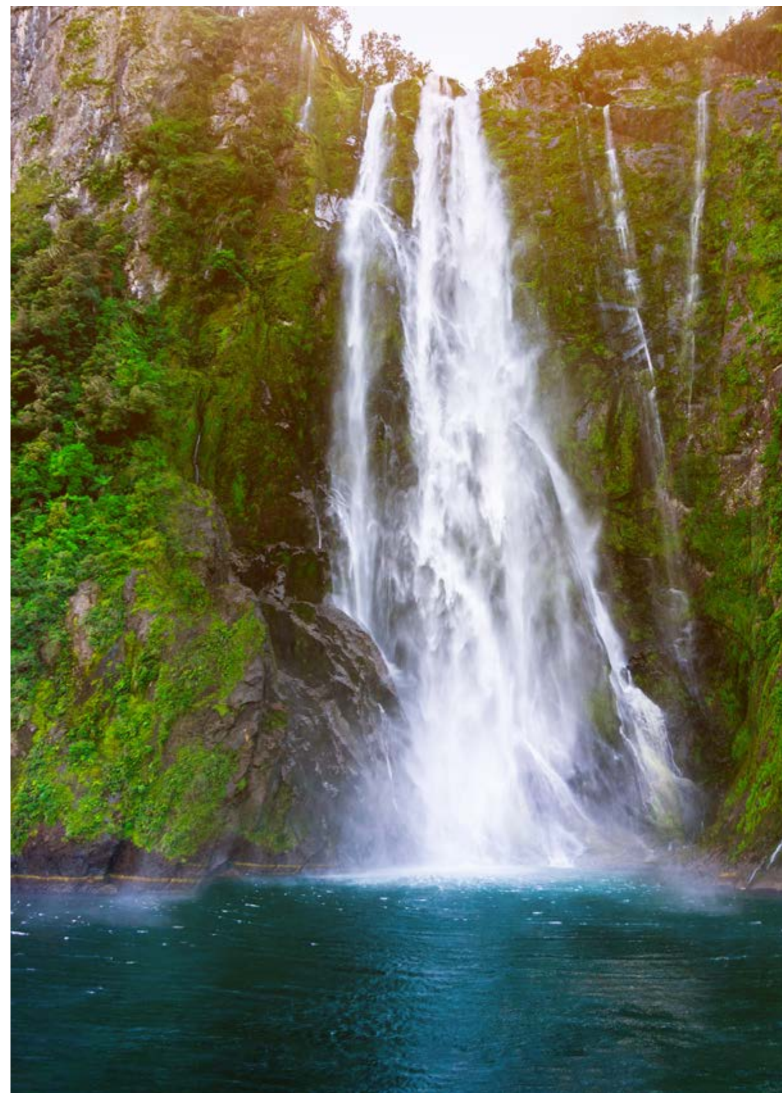
Where to next

In February 2022, the working group will report back to the Minister and the introduction of the Water Services Entities Bill to establish the four new Water Services Entities will follow. This represents a delay from the initial slated introduction of the Bill in December 2021, however the Government has confirmed the entities will be in place by July 2024. The Water Service Entities (Implementation) Bill to provide the Water Services Entities with relevant powers and duties was intended to be introduced in the second half of 2022. It is unclear whether it will also be delayed by the postponed introduction of the Water Services Entities Bill. A third bill will also be introduced to address the economic regulation of water services in 2023. The four entities will take responsibility for delivering water services by 1 July 2024.

Our view

The new working group looks set to have a significant impact on the shape of the new Water Services Entities. It has 20 members, of whom nine are iwi/Māori representatives, and its terms of reference include ensuring that the new Water Services Entities give effect to the Crown's obligations under Te Tiriti. We consider that the working group has a significant task ahead in recommending a strengthened approach to governance and accountability, while ensuring that the Crown's Treaty obligations are met. We wait to see both the proposed strengthened approach and how the Government will respond to it.

Another area on which the Government is seeking feedback is the proposed boundaries of the Water Services Entities in the South Island, the Taranaki region and the Hauraki Gulf area. Notably, the boundaries of the South Island entity are proposed to align with the Ngāi Tahu takiwā, so that the northern part of the South Island is slated to be administered by the same entity that manages Wellington and the East Coast. It remains to be seen whether these boundaries will shift as a result of stakeholder feedback.



Climate-related financial disclosure legislation passed: what this means for Māori investors and businesses

In a world-first, the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill has passed its third reading with reporting requirements coming into force on 27 October 2022. The new regime makes it mandatory for certain entities (such as managers of investment schemes) to publicly report the risks and opportunities posed by climate change to their businesses.

The rationale of the regime is to increase transparency among organisations with high levels of public accountability, so that both physical and transitional climate change effects can be analysed and considered in business, investment, lending and insurance.

The External Reporting Board (**XRB**) is still developing what organisations will be required to report on through the proposed New Zealand Climate Standards. The Standards will cover governance, risk management, strategy and metrics and targets.

The departmental disclosure for the Bill notes that, while iwi KiwiSaver schemes fall within the FMC reporting obligations, none exceed the one million dollar threshold required for reporting. However, we consider, and the Departmental Disclosure Statement suggests, that this may change over time, so will be a key future consideration for the management of iwi funds.

Ngā Ngaru Raitahi O Aotearoa, The National Māori Authority Releases First Report on the Grocery Sector

The He Maara Tipua He Tangata Ora report (**He Maara Tipua**), issued by Ngā Ngaru Rautahi O Aotearoa (**National Māori Authority**) is the first of several reports focused on Māori aspiration in the grocery sector. The report's key aspiration is that Māori should be able to shift from roles as suppliers, producers and growers of grocery items to owners and shared governors of a third grocery sector entity.

The report comes in response to the Commerce Commission study where the Commission considered whether the competition in the grocery sector is working well. The Commission's preliminary draft report, issued in July 2021, found that it was not. He Maara Tipua highlights the National Māori Authority's concerns regarding the effective duopoly in the grocery sector as this potentially adversely affects Māori business and industry and consumers:

- the current grocery sector's arrangements have created a duopoly which is not fair and equitable for Māori suppliers and producers of goods;
- the large supermarket chains are failing to adhere to the Principles of Te Tiriti as it is not clear what their Māori engagement strategies are (specifically those related to Māori growers and producers);
- the banking of property by the two major chains prevents new entrants into the market;
- unfair and inequitable purchasing arrangements for Māori producers and suppliers; and
- the rise of imported cheaper goods from overseas which drive local prices down.

The National Māori Authority also urges the Commerce Commission to consider whether it is achieving its obligations on behalf of the Crown to ensure fair equitable market access for Māori suppliers, producers and growers. The next report by the National Māori Authority was due on 6 December 2021, with the Commerce Commission publishing its final report by 8 March 2022.

Changes to Rating of Whenua Māori

Local Government (Rating of Whenua Māori) Amendment Act 2021 came into force in July this year. It aims to promote the retention, use and development of Māori land by Māori and for Māori. The major changes to the rating of Māori land are:

Wholly unused land and Ngā Whenua Rāhui land is non-rateable

- Rates will only become payable once land comes into productive use. Rates cannot be charged on wholly unused land blocks. Any land protected by Ngā Whenua Rāhui cannot be charged rates and outstanding rate arrears have been written off.

Local authorities must write-off arrears

- Local authorities must write off outstanding rates on any land they consider unrecoverable, including rates debt inherited from deceased owners. This removes barriers for Māori landowners engaging, using and developing land, as well as administration costs for local authorities.

Rates remission for Māori freehold land under development

- Local authorities now have the ability to remit rates on Māori land in order to encourage development, regardless of what their policy states. All Māori landowners can apply for rates remission while their land is under development and if successful, they will receive rates relief while bringing their land into greater use.

Treating multiple blocks as one

- Māori landowners can make an application to have multiple Māori land blocks that come from the same parent block to be treated as one rating. This will encourage the development of unused land by reducing the overall rating liability for the blocks.

Rating individual homeowners on Māori land separately

- Local Authorities can rate individual houses on Māori land as separate rating unit. This allows people living in papakāinga to each individually be responsible for paying rates rather than the responsibility lying with a trustee who then needs to recover from parties living communally. It also ensures low income homeowners on Māori land are eligible for the rates rebate scheme (which is not possible if the land has more than one home or is used for a variety of reasons).

We anticipate that significant work will be required of councils to ensure that they comply with these new requirements. This may include revision of policies, in addition to procedures for assessing applications to rate differently, remit or postpone rates.

MFE Guide released for local climate change risk assessments

The Ministry for the Environment has released a guide for local climate change risk assessments (**Guide**) to show local councils and communities how to proactively manage climate risks at local scales.

While the Guide is intended for local authorities, it is appropriate for any organisation wanting to understand and plan for climate change risks. The Guide actively encourages a "co-design" approach to risk assessments with Māori, and suggests incorporating mātauranga Māori and robust engagement with iwi and hapū groups.

The Guide is available here, or get in touch if you or your organisation requires assistance from our dedicated Climate Change practice.

New additions to the SG Whānau

We have seven new additions to the SG Whānau this summer. All of whom can be extremely proud, given the calibre and impressive record number of applications this year. We welcome and introduce our new kaimahi:

Leeroy Coleman Edmonds (Ngāti Whātua o Kaipara) is a Ngā Maunga Whakahii o Kaipara Maori scholar at AUT. Leeroy is working with the Financial Services Litigation Team and Commercial Property Team in Tāmaki Makaurau.

Harrison Dowling (Ngāpuhi) is studying at the University of Auckland and working in the Commercial Litigation and Financial Services Litigation teams in Tāmaki.

Grace Mohi (Ngāti Kahungunu), studying at Otago University, is excited to be working within the Local Government & Environment (**LG&E**) and Commercial Litigation teams in Te Whanganui-a-Tara.

Joeli Filipo (Talievu and Rewa in Fiji, and Fakaofo in Tokelau), is a co-president for Pacific Island Law Student Association at the University of Auckland. Joeli is working in the Tāmaki office this summer.

Minerva Peters (Samoa) is studying at the University of Auckland and is working in the IPSSM and Commercial Litigation teams.

Liam Stevens (Kāi Tahu) from Otago University is working in Te Whanganui-a-Tara in public litigation and LG&E teams.

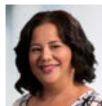
Oscar Wilson (Ngāi Tahu) is a Ngāi Tahu Matakahi Scholar and Tumuaki of Te Pūtairiki: Māori Law Society at the University of Canterbury. Oscar is in the Ōtautahi office working in Commercial and LG&E teams.

Congratulations to our new rōia

Grace Dimond (Ngāi Tahu, Ngāti Kahungunu) from the Ōtautahi office, and **Daniel Bowman** (Ngāi Tahu) and **Madeline Ash** (Ngāruahine, Taranaki Iwi) from the Te Whanganui-a-Tara office, were admitted as Solicitors and Barristers of the High Court this month!

Congratulations to you all on your fine achievements - E tū ki te kei o te waka, kia pakia koe e ngā ngaru o te wā.

Contacts



JO-ANNE KNIGHT
Hoa Rangapū (Partner)
T: +64 9 977 5340 M. +64 21 242 6821
E. jo-anne.knight@simpsongrierson.com

GERALD LANNING
Hoa Rangapū (Partner)
T: +64 9 977 5406 M. +64 21 660 466
E. gerald.lanning@simpsongrierson.com

NICK WILSON
Hoa Rangapū (Partner)
T: +64 9 977 5147 M. +64 21 825 416
E. nick.wilson@simpsongrierson.com

SANDY DONALDSON
Mātanga Ture (Special Counsel)
T: +64 9 977 5146 M. +64 21 766 866
E. sandy.donaldson@simpsongrierson.com

TAHA BROWN
Rōia (Solicitor)
T: +64 9 977 5249
E. taha.brown@simpsongrierson.com

AVARY PATUTAMA
Rōia (Solicitor)
T: +64 9 977 5140
E. avary.patutama@simpsongrierson.com

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