

Pūrongo Rangahau | Study Paper 24

He Poutama

Te Aka Matua o te Ture | Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of Aotearoa New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the values and aspirations of the people of Aotearoa New Zealand.

Te Aka Matua in the Commission's Māori name refers to the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother Karihi find their grandmother Whaitiri, who guards the vines that form the pathway into the sky. Karihi tries to climb the vines first but makes the error of climbing up the aka taepa or hanging vine. He is blown violently around by the winds of heaven and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua or parent vine, reaches the heavens and receives the three baskets of knowledge.

Kia whanake ngā ture o Aotearoa mā te arotake motuhake

Better law for Aotearoa New Zealand through independent review

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He mihi

Rukutia, rukutia!

Rukutia ngā kākaho o tēnei whare hei rerenga tikanga kia ū, kia mau!

Rukutia ngā kaho o tēnei whare hei papa mō te ture kia ū, kia mau!

Rukutia ngā pīngao hei tuitui, hei whakahono, hei whakakotahi kia ū, kia mau!

Rukutia e Tāne kia ū, kia mau! Kei taea koe e hau nui, e hau roa, e hau pūkerikeri,

E ngā hau āwhiowhio, e ngā ua māturuturu, e ngā whiunga o te wā.

Rukutia tēnei whakaruruhau kia ū, kia mau, itaita mau tonu!

Ko tō manawa e Tāne, ko tōku manawa e Tāne ka whakairihia

Whano, whano, hara mai te toki! Haumi e! Hui e! Tāiki e!

Whāia te ara tapuwae o Tāne ki a Ranginui e tū nei. Waewae takamiria ngā huarahi i runga i a Papatūānuku e takoto nei. He ara pū, he ara weu, he ara rito, he ara take, he ara pūkenga, he ara wānanga, he ara taunuku, he ara taurangi, he ara whakaputa i te ira tangata, e Rangī, e Papa, e te ira atua, ki te whaiao, ki te ao mārama.

E koutou, e te tini whāioio, e te mano tuauriuri, e ngā whakapakokotanga kei ngā whare whakairo, tēnei mātau ko ā koutou nei uri e tuohu tonu ana ki tā koutou i waiho mai hei arataki i a mātau. Tāpiri hoki ki a koutou e te hunga kua riro ki te pō nōna tata nei, mai i te raki ki te tonga, mai i te rāwhiti ki te uru. Haruru tonu nei ō koutou kupu, haruru tonu nei ō koutou tapuwae i muri nei. Taiaha! Taiaha!

Ko te akaaka o te rangi ki a rātau, ko te akaaka o te whenua ki a tātau, e te hunga ora, e takatū nei i te mata o te whenua. Mauriora ki a tātau e hika mā.

Mokori anō kia rere a mihi ki ngā ruānuku, ki ngā ruahine, ki ngā pūkenga, ki ngā mātanga, ki ngā ngaio, ki a koutou katoa i taunaki mai i te kaupapa nei o He Poutama.

Mataatua waka, Mataatua ihi, Mataatua wehi! Ka wana katoa tēnei kaupapa i te ninihitanga o te moana o whakaaro i rukuhia e koutou. E kore e mutu ngā mihi ki a Tā Hirini Moko Mead koutou ko Tā Pou Temara, ko Taiarahia Black, ko Turuhira Hare, ko Hiria Hape, ko Waitangi Black, ko Mera Penehira, ko Puhī Iopata, ko Haturini McGarvey, ko Kaiwhakawā Layne Harvey, ko Wiremu Doherty, ko ngā ringaringa me ngā waewae hoki o Te Whare Wānanga o Awanuiārangi - mei kore koutou i tiki ai ngā kete mātauranga i ngā pakitara o ngā pātaka iringa kupu, iringa kōrero. Āe, he tipua, he taniwha!

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E rua pea ngā kōrero ka noho hei tūāpapa mō te pūrongo nei o He Poutama, hei tōna pānuitanga. Tuatahi atu, ka tīkina i ngā wānanga tawhito o mua tēnei whakataukī, arā, nā te hinengaro te whakaaro, nā te whakaaro te kōrero, nā te kōrero te wānanga, nā te wānanga ka poua he tikanga. He tikanga ārahi, he tikanga arataki hoki i ngā matapakinga mō tēnei taniwha ko te ture.

Ko te tuarua o ngā kōrero e hāngai ana ki te kaupapa o tēnei pūrongo, 'mā te ture anō te ture e patu'. Heoi anō, mā te rapu i ngā ōritenga, i ngā hononga, i ngā rerekētanga o te tikanga me te ture e whai māramatanga ai tātau ki te noho tahi, aha rānei, o ēnei mea whakahirahira i roto i ngā mahi o ia rā o ngāi tāua te tangata.

Nō reira, tūramatia ngākau o tama i te ao mārama, pūtake runga, pūtake raro, pūtake ira pou tangata whakaputa atu ki te whaiao, ki te ao mārama. Haumi e! Hui e! Tāiki e!



Foreword

In 2001, Te Aka Matua o te Ture | Law Commission published its Study Paper *Māori Custom and Values in New Zealand Law* to examine the impact of tikanga on state law and consider ideas for future state law reform projects that might give effect to tikanga. The Study Paper has had an enduring influence on the consideration of tikanga in both legal and policy contexts and remains one of our most frequently cited publications.

As we note in the Introduction, since 2001 there have been many developments in the ways that tikanga and state law intersect. Tikanga is increasingly being woven into statute and the common law while, at the same time, gaining wider recognition within state law as being an independent source of rights and obligations. Yet tikanga is not well understood outside of Māori communities. The breadth and depth of tikanga is often overlooked and misunderstood. This has potential implications both for the integrity of tikanga and the coherent development of state law.

In October 2021 the Minister of Justice asked the Commission to review the role of tikanga concepts in state law. We identified two main goals. One was to provide an account of what tikanga is. The second was to address how tikanga and state law might best engage.

In approaching the first goal, we have been acutely conscious of the immense significance of tikanga to Māori. We sought the assistance of pūkenga (experts) to guide us. Their directive was clear — any account of tikanga must occur from “the inside”, grounded in mātauranga (Māori knowledge). Early in the project, we also identified that mainstream consideration of the legal dimensions of tikanga was sparse. This paper attempts to fill this gap.

In approaching the second goal, we outline the evolution of state law as it relates to tikanga. This then sets the scene for the final part of our paper, in which we provide guidance on how state actors might engage with tikanga in a way that maintains the integrity of both tikanga and state law.

While much work is still to be done, we are hopeful the paper will provide a sound basis for future interaction between tikanga and state law.

In our opening mihi we express our deep gratitude to the many people from outside of the Commission who have contributed their expertise to this project. I also acknowledge Justice Christian Whata’s leadership of the project and thank his team of advisers and clerks who have worked on this paper at different times during the project’s lifetime. I wish to thank, in particular, Tāneora Fraser, Morgan Dalton-Mill, Briar Peat, Claire Browning and Caitlin Hollings. I finally wish to acknowledge Dame Joan Metge for her enduring support of our work in this area. Dame Joan contributed to our 2001 Study Paper, and, for this one too, has been an invaluable sounding board.



Amokura Kawharu

Tumu Whakarae | President

Contents

HE MIHI	III
FOREWORD	V
CHAPTER 1: INTRODUCTION	8
Tikanga: our starting point.....	9
Tikanga and Māori society	11
The modern reality and vitality of tikanga.....	14
Tikanga and state law	15
A metaphor for future engagement: tukutuku	16
Our approach	19
Externally commissioned work	19
Review processes.....	20
How the Study Paper is organised.....	21
Part One: Tikanga	21
Part Two: Interaction between tikanga and state law	21
Part Three: Future engagement	22
Reo Māori terms	22
PART ONE: TIKANGA	23
CHAPTER 2: TE WHARENUI THE MEETING HOUSE	25
Introduction.....	25
The metaphor of the wharenui.....	26
Te poutuaroro: Māori knowledge systems	27
Te poutokomanawa: Māori creation and existence.....	28
Te Kore, Te Pō, Te Ao Mārama	30
Ngā kete mātauranga	32
Hineahuone, Hinetītama, Hinenuitepō.....	33
Māui	33
Summary: creation narratives’ significance	34
Te poutuarongo: explaining the significance of the wharenui and marae ātea	35

Ātea, an open area in front of the whareniui	36
Exterior front-facing features — kōruru, maihi, amo and raparapa	38
Porch, window and doorway features — mahau, matapihi, tatau, whakawae and pare	39
Interior structural features — tāhuhu, heke, pou and poupou	40
Wall panel designs — tukutuku	41
Te tāhuhu: how whareniui connect with the kaupapa of this Study Paper	42
Conclusion.....	44
CHAPTER 3: TIKANGA AS A SYSTEM OF NORMS	45
Introduction.....	45
Understanding tikanga as a system.....	46
Using jural language	48
Tikanga concepts — our approach	49
Te whareniui and awareness of wairua	50
Structural concepts of connection: whakapapa and whanaungatanga	51
Whakapapa.....	52
Whanaungatanga	56
Whakapapa and whanaungatanga in action.....	59
Summary: whakapapa and whanaungatanga.....	62
Prescriptive concepts that maintain balance: mauri, utu and ea.....	62
Mauri.....	62
Utu and ea.....	66
Summary: mauri, utu and ea	71
Relational concepts connected with status: mana, tapu, noa	71
Mana.....	71
Tapu	77
Noa	82
Mana, tapu and noa in action	84
Summary: mana, tapu and noa	85
Concepts of responsibility	86
Kaitiaki and kaitiakitanga	86
Manaakitanga.....	89
Aroha and atawhai.....	91
A jural perspective: kaitiakitanga, manaakitanga, aroha and atawhai	92
Summary: responsibilities as associated norms.....	93
Processes and procedures (kawa).....	93
Pōwhiri.....	94

Rāhui.....	95
Muru	95
Karakia.....	96
Summary: significance of kawa in normative and jural terms.....	96
Norms bounded by whakapapa.....	97
Conclusion.....	98
CHAPTER 4: A GUIDE FOR ENGAGING WITH TIKANGA.....	99
Introduction.....	99
Using this guide	99
How we developed this guide and the case studies.....	101
A guide for engaging with tikanga	102
Case study 1: a tono for a tūpāpaku.....	103
The facts.....	103
Applying the guide to case study 1.....	104
Case study 2: custodianship of taonga and ōhākī.....	108
The facts.....	108
Applying the guide to case study 2	109
Case study 3: whanaungatanga and breach of contract for supply	112
The facts.....	112
Applying the guide to case study 3	114
Case study 4: mana moana and consultation regarding the regulation of a pipi bed	117
The facts.....	117
Applying the guide to case study 4.....	118
Case study 5: creating a whānau through surrogacy	122
The facts.....	122
Applying the guide to case study 5	123
Case study 6: a rāhui and an assault.....	128
The facts.....	128
Applying the guide to case study 6.....	129
PART TWO: INTERACTION BETWEEN TIKANGA AND STATE LAW	133
CHAPTER 5: TIKANGA AND THE COMMON LAW	135
Introduction.....	135
Early developments: tikanga as customary law.....	135
Property rights.....	137

Rejection of proprietary rights	137
Acknowledgement but not enforcement	138
Recognition of customary proprietary rights	139
Modern approach: <i>Ngati Apa</i> and <i>Trans-Tasman Resources</i>	139
General custom	141
Modern approach to custom: <i>Loasby</i> overruled	143
Further developments: tikanga values and tikanga as law	144
Tikanga values	144
Tikanga as law	149
Conclusion	151
CHAPTER 6: TIKANGA AND STATUTE LAW	152
Introduction.....	152
Engagement with tikanga in statutes before 1975.....	152
Providing for matters to be determined according to “native customs”	154
Recognising “native rights” to certain resources.....	155
Attempting to recognise specific customs through prescriptive drafting	156
Establishing processes that enabled tikanga to operate.....	157
Establishing geographic areas where Māori custom operated in some limited form	158
Providing that custom is of no legal effect	158
Ignoring tikanga.....	159
Some observations about statutory engagement before 1975	159
Engagement with tikanga after 1975	161
Increasing use of kupu Māori within statutes	162
Provisions requiring Māori groups to be involved in decision making.....	162
Principles provisions	163
Provisions requiring statutory bodies to have Māori representation	165
Allowing courts to obtain cultural reports.....	165
Treaty settlement Acts	165
Recognition of places as legal persons.....	166
Conclusion	167
CHAPTER 7: TIKANGA AND STATE LAW TODAY	168
Introduction.....	168
Tikanga and environmental law.....	168
The Resource Management Act 1991.....	169
Engaging with the spiritual dimension of tikanga	170

Measuring environmental impacts by reference to tikanga.....	172
Assessing oral evidence of tikanga.....	172
Resolving issues of mana.....	173
Tikanga and criminal law	174
Arguments made for recognising tikanga as an alternative criminal justice system.....	175
Consideration of tikanga in sentencing.....	175
Tikanga and specific areas of the criminal law	179
Tikanga and family law.....	179
Care and protection of young people.....	180
Guardianship outside the care and protection framework	183
Whāngai and family law	184
Surrogacy	186
Taonga and family law.....	186
Tikanga and the law of judicial review	188
The impact of the Treaty on the law of judicial review	188
The development of tikanga as a factor in judicial review proceedings	190
Tikanga and the Treaty settlement process	191
Tikanga and the New Zealand Bill of Rights Act 1990	192
Section 19: freedom from discrimination.....	192
Section 20: rights of minorities	193
Section 5: justified limitations.....	194
Tikanga and evidence	195
The hearsay rule	195
The opinion rule.....	196
Agreed statements of fact.....	196
How tikanga is established in practice	196
Other evidential rules: Māori Land Court, Environment Court, Family Court and claims under the Takutai Moana Act.....	198
A moving landscape	198
Tikanga and Māori land: Te Ture Whenua Maori Act 1993	199
The background to TTWMA	199
TTWMA philosophy and significant parts	201
Cases	203
Tikanga in the Marine and Coastal Area (Takutai Moana) Act 2011.....	206
History	206
Purpose.....	207
Key rights and interests recognised under the Takutai Moana Act.....	208

Establishing the relevant tikanga.....	209
Conclusion.....	210
PART THREE: FUTURE ENGAGEMENT.....	211
Introduction to Part Three	213
CHAPTER 8: PRINCIPLES FOR COMMON LAW ENGAGEMENT	214
Introduction.....	214
The common law method	214
Defining the common law and the common law method.....	215
The guardrails of the common law	217
The common law method and tikanga.....	219
The need for caution – kia tūpato	221
The current law on engagement.....	222
General principles for engaging with tikanga.....	223
Three categories of tikanga claims	224
Category One: claims based on tikanga as custom.....	225
Category Two: tikanga values.....	227
Category Three: tikanga as law	229
Uncertainty about the role of tikanga and when it may be relevant.....	230
Developing expertise in engaging with tikanga	232
Strategies for engagement.....	232
Commencing with a tikanga lens	233
Te ao Māori.....	233
A tikanga framework.....	233
A guide and case study illustrations.....	235
Examples from case law.....	235
Tools for judicial engagement	240
Pūkenga	241
Te Ture Whenua Maori Act 1993, section 61	244
Case management tools	245
Enhancing processes for tikanga dispute resolution	246
A specialist tikanga panel in the High Court.....	246
Pūkenga as commissioners of the High Court.....	247
An expanded Māori Land Court jurisdiction	248
The use of arbitration to resolve tikanga disputes	251
Conclusion.....	253

CHAPTER 9: TIKANGA PROFICIENCY IN THE PUBLIC SECTOR.....	255
Introduction.....	255
Reasons for public sector engagement with tikanga: impetus and opportunities	255
Relevance to local authorities	257
Building capability and capacity to engage with tikanga	258
Capability-building initiatives: the Public Service Act and Whāinga Amorangi.....	258
Supporting capability and capacity development and putting it in systemic context.....	259
Developing procedural guidance: prompts to consider tikanga	261
The LDAC Guidelines.....	262
Guidance supporting the development of Cabinet papers.....	262
External expert advisory processes	266
Legislation Design and Advisory Committee — role in policy and legislative design.....	267
The roles of Te Arawhiti and Te Puni Kōkiri	268
The Treaty provisions oversight group.....	269
Establishing a tikanga expert advisory group.....	269
Kupu Māori in legislation.....	273
Te Kāhui o Matariki Public Holiday Act 2022: an Act engaging with tikanga.....	276
Conclusion.....	278
CHAPTER 10: CONCLUSION.....	280
INDEX OF TIKANGA CONCEPTS.....	283
APPENDIX 1: TIKANGA	
APPENDIX 2: KEI RARO I NGĀ TARUTARU, KO NGĀ TUHINGA O NGĀ TUPUNA BENEATH THE HERBS AND PLANTS ARE THE WRITINGS OF THE ANCESTORS	
APPENDIX 3: INTERLEGALITY, INTERDEPENDENCE AND INDEPENDENCE: FRAMING RELATIONS OF TIKANGA AND STATE LAW IN AOTEAROA NEW ZEALAND	
APPENDIX 4: TIMELINE OF STATUTORY AND COMMON LAW ENGAGEMENT WITH TIKANGA	

CHAPTER 1

Introduction

- 1.1 In 2001, Te Aka Matua o te Ture | Law Commission (the Commission) published *Māori Custom and Values in New Zealand Law*, a study paper focused on tikanga. The Study Paper reflected on how Māori custom and values can influence the law and discussed ideas for future law reform to “give effect to Māori values in the laws of New Zealand”.¹ As the Commission said:²

If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Māori is, how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Māori, still encapsulated within a dominant culture in New Zealand society.

However, it is critical that Māori also develop proposals which not only identify the differences between tikanga and the existing legal system, but also seek to find some common ground so that Māori development is not isolated from the rest of society.

The differences do not need to be seen as overwhelming. Māori and the courts each have a love of law, precedent and forebears, and these are commonalities that can be built upon.

- 1.2 Since then, there have been many developments in the way that tikanga is addressed by state law.³ Tikanga concepts are prevalent in legislation. Tikanga “has been and will continue to be recognised” in the development of Aotearoa New Zealand’s common law in cases where it is relevant.⁴ Tikanga has been judicially described as the first law of

¹ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 1.

² Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 95–96.

³ See generally: Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1; Arnū Turvey “Te ao Māori in a ‘sympathetic’ legal regime: the use of Māori concepts in legislation (2009) 40 *Victoria University of Wellington Law Review* 531; Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Victoria University of Wellington, 2012); Natalie Coates “The recognition of tikanga in the common law of New Zealand” [2015] 1 *New Zealand Law Review* 1; Christian Whata “Biculturalism and the law: the i, the kua and the ka” (2018) 26 *Waikato Law Review* 24. For critical analyses of the treatment of tikanga in Aotearoa New Zealand law see: Annette Sykes “The myth of tikanga in the Pākehā law” (2021) 8 *Te Tai Haruru Journal of Māori and Indigenous Issues* 7; Mihiata Pirini and Anna High “Dignity and mana in the ‘third law’ of Aotearoa New Zealand” (2021) 29 *New Zealand Universities Law Review* 623; Natalie Coates “The rise of tikanga Māori and te Tiriti o Waitangi jurisprudence” (forthcoming); Sarah Down and David V Williams “Building the foundations of tikanga jurisprudence” (2022) 29 *Canterbury Law Review* 27.

⁴ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [19]; and see generally *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801; *Proprietors of Wakatu v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116; *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

Aotearoa New Zealand,⁵ a “free-standing legal framework”,⁶ and a “third source of law”.⁷ The largest cohort of courts, Te Kōti ā Rohe | District Court, has begun a process of incorporating tikanga into the fabric of its operation.⁸

- 1.3 In consequence, demands have become pressing for legal and policy practitioners to engage more authentically with tikanga. Tikanga is still not well understood outside of the Māori communities where it is practised and lived, raising many questions. What is tikanga? Where do we find it? To whom does tikanga apply? As state law and tikanga engage, how and where are proper boundaries set — and by whom? How will risks and challenges be managed, enabling these systems to interact well? Our work has been done in a context where engagement between tikanga and state law is actively occurring, heightening the urgency.
- 1.4 Given these pressures, paths forward are needed to guide those approaching tikanga and assure all concerned that state law and tikanga are able to engage with one another with integrity. These two systems are already interacting. In this Study Paper, we have taken the view that there is little utility in the Commission readdressing whether or why state law and tikanga should engage. Instead, we have focused primarily on identifying ways in which they may properly do so, that are respectful of both systems’ parameters. The Study Paper’s purpose is to offer guiding frameworks that will enable the coherence and integrity of both tikanga and state law to be maintained. To legitimately address tikanga, an authentic understanding of it is also needed. The Study Paper aims to build understanding of tikanga that is both grounded in mātauranga (Māori knowledge) and connected with the law.

TIKANGA: OUR STARTING POINT

- 1.5 As Tā Edward Taihakurei Durie says, tikanga “is the set of values, principles, understandings, practices, norms and mechanisms from which a person or community can determine the correct action in te ao Māori”.⁹ Tikanga has long been recognised as having “the character and authority of law” and continues to shape and regulate the lives of Māori as it always has.¹⁰ Some aspects of tikanga are already a part of state law as a

⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [22].

⁶ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [355].

⁷ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [111].

⁸ District Court of New Zealand “Transformative Te Ao Mārama model announced for District Court” (11 November 2020) <www.districtcourts.govt.nz>.

⁹ E T Durie “Will the settlers settle? Cultural conciliation and law” (1996) 8 Otago Law Review 449 at 452. For academic writing on the definition of tikanga see Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996); Moana Jackson “Where does sovereignty lie?” in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 196; Ani Mikaere “The Treaty of Waitangi and recognition of tikanga Māori” in Michael Belgrave, Merata Kawharu and David V Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 2005) 330; Robert Joseph “Recreating legal space for the first law of Aotearoa-New Zealand” (2009) 17 Waikato Law Review 74.

¹⁰ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [22]; and see Dispatch from Lord John Russell to Governor Hobson, 9 December 1840 in “Correspondence respecting the colonization of New Zealand” Great Britain Parliamentary Papers relating to New Zealand, No 17 at 27.

result of being incorporated, as described above, by courts through the common law and by Parliament in legislation.¹¹

- 1.6 At the same time, tikanga scholars acknowledge the “immense” ambit of tikanga, encompassing philosophical, ethical and social frameworks, processes and norms.¹² As Dr Carwyn Jones for instance considers, tikanga has aspects of ritual and custom and spiritual and socio-political dimensions that go far beyond the legal domain, as well as being Māori legal knowledge and Māori legal tradition.¹³ Distinguished Professor Hirini Moko Mead describes the importance of precedent and procedure, saying that tikanga provides “procedures to be followed in conducting the affairs of a group or an individual” that are “established by precedents through time ... validated by usually more than one generation”. He also says that:¹⁴

Tikanga are tools of thought and understanding. They are packages of ideas which help to organise behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions and help steer us through some huge gatherings of people and some tense moments in our ceremonial life. They help us to differentiate between right and wrong with built-in ethical rules that must be observed. Sometimes tikanga help us survive.

- 1.7 When addressing tikanga in this Study Paper, we accordingly have preferred to use the word “tikanga” over other choices such as “Māori law”.¹⁵ The label “law” is unduly narrow, even while tikanga without doubt has legal quality. Reference to “Māori” in the phrase “Māori law” also tends to mask the reality of localised and variable expressions of tikanga among iwi, hapū, marae, whānau and other hāpori Māori (“hāpori” meaning section of a kinship group, society or community). For similar reasons, we do not use the terms “Māori custom law” or “custom law” — although, as will be explained in Parts Two and Three,

¹¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [19].

¹² Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 1; E T Durie “Will the settlers settle? Cultural conciliation and law” (1996) 8 Otago Law Review 449 at 452; Joseph Williams “He aha te tikanga Maori” (unpublished paper for Te Aka Matua o te Ture | Law Commission, 1998) at 2: “[t]ikanga Maori is essentially the Maori way of doing things — from the very mundane to the most sacred or important fields of human endeavour”; David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name, dated 10 November 1998 with minor update 2020) at 8; Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 23.

¹³ Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 23.

¹⁴ Hirini Moko Mead “The nature of tikanga” (paper presented to Mai i te Ata Hāpara conference, Te Wānanga o Raukawa, Ōtaki, 11–13 August 2000) at 3–4; see Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 16; and see generally Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016).

¹⁵ See for example usage of “Māori law” to denote tikanga by Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand’s Bachelor of Laws Degree: Phase One — Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Ngā Pae o te Māramatanga, supported by the Michael and Suzanne Borrin Foundation, August 2020) at 7, also describing “Māori law” as the first law of Aotearoa; Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 Taumauri | Waikato Law Review 1 at 32; and see originally E T Durie “Custom law: address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 Victoria University of Wellington Law Review 325 at 326; E T Durie “Will the settlers settle? Cultural conciliation and law” (1996) 8 Otago Law Review 449 at 451.

custom law is a phrase accurately used to describe one common law category of tikanga recognition.¹⁶ In this Study Paper, we simply call tikanga: tikanga.

TIKANGA AND MĀORI SOCIETY

- 1.8 Tikanga is lived and practised every day on the more than 700 marae spanning the length and breadth of Aotearoa New Zealand. Tikanga is also well established in other places: in iwi and hapū corporate entities, in Māori incorporations and trusts, in urban Māori authorities, in homes and businesses, in public agencies and institutions such as local authorities, schools and hospitals, and now in the courts. Some understanding of the Māori communities that tikanga serves contributes to understanding tikanga. Although tikanga is widely found today, it remains particularly important to appreciate the extent to which the roots of tikanga hold fast to their marae, hapū and whakapapa-connected origins, even as the outward forms of Māori society change.
- 1.9 The Commission in its 2001 Study Paper explained the principal traditional units of Māori society, focusing on whānau, hapū, iwi and waka:¹⁷
- (a) Whānau, the basic social unit of Māori society, refers to both extended family and birth.¹⁸
 - (b) Hapū, a group bound by their descent from a common ancestor for whom the groups are named, are summarised by Durie as “groups large enough to be effective for such purposes as war, gift exchange, hosting and harvesting resources”.¹⁹ Political power was located primarily at the hapū level in pre-contact Māori society.²⁰
 - (c) Iwi, a term also meaning “bones”, identifies the wider district or sometimes regionally based kin group. During the nineteenth century, “iwi” became more regularly used to mean the several ancestrally connected hapū of a region.²¹

¹⁶ Compare Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 1–2 and 15. See particularly: custom law may be used both “to describe the body of rules developed by indigenous societies to govern themselves” and “in a legalistic and narrow manner to refer to ... indigenous or aboriginal laws and customs that have met particular legal tests and thus are enforceable in the courts” (at 1) and “tikanga” is the closest Māori equivalent to concepts of both “law” and “custom” (at 15).

¹⁷ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 41–44.

¹⁸ Joan Metge *New Growth from Old: The Whanau in the Modern World* (Victoria University Press, Wellington, 1995) at 291.

¹⁹ E T Durie “Will the settlers settle? Cultural conciliation and law” (1996) 8 *Otago Law Review* 449 at 450; E T Durie “Custom law: address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 *Victoria University of Wellington Law Review* 325 at 327–328; Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 41–44.

²⁰ E T Durie “Will the settlers settle? Cultural conciliation and law” (1996) 8 *Otago Law Review* 449 at 450; E T Durie “Custom law: address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 *Victoria University of Wellington Law Review* 325 at 327–328; Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 41–44; Natalie Coates and Horia Irwin-Easthope “Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors: tikanga as expressed in evidence presented in legal proceedings” (paper prepared for Te Aka Matua o Te Ture | Law Commission, 2023) from [6.21]. Coates and Irwin-Easthope’s paper is published in Appendix 2 and subsequent references to it in this chapter are abbreviated: Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2.

²¹ Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 from [6.21]. As Durie considers, “iwi” may also be a term extending to unrelated hapū or individuals when several hapū embarked on a common venture: see Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.44].

- (d) Waka, the Māori word for canoe, refers to the descendants of one of the migration canoes, usually a collection of iwi and hapū claiming descent from the captain or crew of the waka.²²
- 1.10 Some have viewed such descriptions of Māori society as “simplistic and incomplete” and find them mistaken in suggesting that “the social units in Māori society were static, that the tribal polities were immutable and that kinship was the ‘only’ basis for association”.²³ However, the Reverend Māori Marsden summarised the importance of these groups, each deriving from kinship and blood relations:²⁴
- Each individual was conditioned to regard his social grouping to which he belonged as an organism rather than organisation. In other words, he was a member of an organ with a body sharing a common life. That was the basic thesis on which the Māori social structures were founded.
- 1.11 As Durie further says, the sense of kinship embraced all life forms:²⁵
- ... Maori saw themselves not as masters of the environment but as members of it. The environment owed its origins to the union of Rangi, the sky, and Papatuanuku, the earth mother, and the activities of their descendant deities who control all natural resources and phenomena. The Maori forebears are siblings to these deities. Maori thus relate by whakapapa (genealogy) to all life forms and natural resources.
- 1.12 Māori society and life were also characterised by dynamic change and pragmatism, as they continue to be.²⁶ Kāinga or village communities would form for reasons less concerned with whakapapa (genealogical connection) than mutual advantage and survival.²⁷ Hapū would frequently form and reform as social and political circumstances required.²⁸ Alliances were entered into and dissolved just as quickly.²⁹ Māori society was therefore never static, and this natural capacity to evolve was vital during the contact period of the nineteenth century given the grave impacts of warfare, disease and land loss. It is a period characterised by the increased prominence of larger hapū aggregations

²² Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 42.

²³ Ranginui Walker First affidavit, 28 January 1998 at [4.1a], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.64].

²⁴ Māori Marsden Statement of evidence, #F25 at 3, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.1].

²⁵ E T Durie “Custom law: address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 *Victoria University of Wellington Law Review* 325 at 328.

²⁶ Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.23]–[6.36] and [6.61].

²⁷ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 43; Mason Durie “Letter to the Law Commission commenting on the draft ‘Māori Custom and Values in New Zealand Law’” (19 February 2001) at 2.

²⁸ Joseph Williams “He aha te tikanga Maori” (unpublished paper for Te Aka Matua o te Ture | Law Commission, 1998) at 17; E T Durie “Custom law: address to the New Zealand Society for Legal and Social Philosophy” (1994) 24 *Victoria University of Wellington Law Review* 325 at 327; E T Durie “Will the settlers settle? Cultural conciliation and law” (1996) 8 *Otago Law Review* 449 at 450; Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 43; Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.62]–[6.63] and [6.72].

²⁹ Māori Marsden Statement of evidence, #F25 at 3, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.70].

- at iwi or waka level as well as the emergence of pan-Māori collectives, including the Kīngitanga.³⁰
- 1.13 This evolution continued in the post-colonial period as Māori underwent a major urban migration.³¹ Pan-Māori collectives of a different kind emerged, including Māori communities within large urban centres who (while not directly whakapapa-connected) were unified through their Māori identity and shared kaupapa (values and purposes).³² As Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal has for example discussed in respect of the West Auckland urban Māori collective Te Whānau o Waipareira Trust, these new communities adopted many of the values of traditional groupings.³³
- 1.14 Marae have been a constant throughout this evolution in Māori society, identified by Tā Pou Temara as “the central aspect of the base of hapū decision making structures”.³⁴ Marae remain the place where tikanga is actively practised and mana (authority) is expressed and maintained. Marae are, as Tā Pita Sharples has said, “the focal point in the social, cultural, political and spiritual development and wellbeing of the Māori people”.³⁵
- 1.15 The values underpinning tikanga are another constant. Tikanga values sustain the identity of Māori communities and support their survival. Māori collectives maintain their mana, their independence and responsibility for their own tikanga. At the same time, they uphold tikanga values of interdependence and inter-relationship, which in turn are driven by underlying tikanga of whakapapa and whanaungatanga (kinship). Many of these values reflect practical considerations. For example, in communities that were traditionally both small and autonomous, helping others and allying with others was important.³⁶ This closeness gives rise to tikanga such as reciprocity to those who have helped in the past and generosity (manaakitanga). It has been said that, in Māori communities, “[p]ower flowed from the people up and not from the top down” and that “[c]ontrol from a centralised or super-ordinate authority was antithetical to the Maori system”.³⁷ The independent identity of Māori groups and their control of their own tikanga are expressions of such a preference for localised autonomy over centralised authority. These are fundamental features of Māori society that continue to shape and define tikanga. Such underlying tikanga values remain essential to understanding tikanga today.

³⁰ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 44; Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.73]–[6.74].

³¹ Campbell Gibson “Urbanization in New Zealand: a comparative analysis (1973) 10 *Demography* 71 at 82, as cited in Karyn Paringatai “Kua riro ki wīwī, ki wāwā: the causes and effects of Māori migration to Southland” (PhD Thesis, Te Whare Wānanga o Ōtākou | University of Otago, 2013) at 42.

³² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 37–38.

³³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 39–40 and 76.

³⁴ Pou Temara Affidavit, 24 January 2022 at [12], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.54].

³⁵ Pita Sharples Affidavit, 28 January 1998 at [43], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.15].

³⁶ Edward Taihakurei Durie (wānanga held at Wellington, May 2023).

³⁷ E T Durie “Will the settlers settle? Cultural conciliation and law” (1996) 8 *Otago Law Review* 449 at 449–450; Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.33] and [6.36].

THE MODERN REALITY AND VITALITY OF TIKANGA

1.16 Tikanga has always been pragmatic and responsive to the needs of the communities that it serves.³⁸ As the situation demands, tikanga will change to meet it. In 2001, the Commission referred to “a continuing review of fundamental principles in a dialogue between the past and the present”.³⁹ As it said:⁴⁰

... judges and decision-makers invited to give recognition to tikanga Māori should bear in mind that the vitality of custom law is being continuously replenished within the fora of te ao Māori.

1.17 Accordingly, judges and decision makers engaging with tikanga today will find variations. They should also be aware that tikanga is rebuilding after a time of massive disruption affecting both tikanga itself and Māori society. Dame Joan Metge, who has written on tikanga throughout her career, notes for example that the word “tikanga” as a concept did not itself reassume prominence until the 1980s.⁴¹

1.18 Examples are readily found of tikanga actively adapting in answer to modern realities. However, such change will be “effected with adherence to fundamental principles and beliefs”.⁴² Even while there can be major changes in response to altered circumstances, tikanga remains grounded in stable underlying values and principles that have always been and continue to be shared.⁴³

1.19 Later in the Study Paper, we give more attention to the implications for those engaging with tikanga in a modern and secular context of its connection with the non-ordinary realms that some may term “magico-religious”, or others “tapu”. In the end, though, while tikanga touches upon “the most sacred or important matters” it also addresses “the very mundane” concerns of everyday life.⁴⁴ Tikanga responds, as Mead says, to the need to simply help people survive.⁴⁵ The right way of navigating any situation will be actively debated, particularly situations that are new. All of these features of tikanga are relevant as we navigate this Study Paper. They will arise for anyone engaging with tikanga. We mention them because being mindful of them will assist in understanding tikanga when engaging with it on an everyday level.

³⁸ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 10.

³⁹ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 3, citing Michael Belgrave “Māori customary law: from extinguishment to enduring recognition” (unpublished paper for the Law Commission, 1996) at 51.

⁴⁰ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 5; see generally at 2–5.

⁴¹ Joan Metge (personal communication, kōrero February and March 2023).

⁴² Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 10 and 104–105.

⁴³ Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [2.3]–[2.21]; Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 2–5.

⁴⁴ Joseph Williams “He aha te tikanga Maori” (unpublished paper for Te Aka Matua o te Ture | Law Commission, 1998) at 2.

⁴⁵ Hirini Moko Mead “The nature of tikanga” (paper presented to Mai i te Ata Hāpara conference, Te Wānanga o Raukawa, Ōtaki, 11–13 August 2000) at 3–4; see Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 16.

TIKANGA AND STATE LAW

- 1.20 Tikanga and state law now co-exist in Aotearoa New Zealand’s legal landscape.⁴⁶ Within the category of state law, we include legislation, other regulation, judge-made common law and state-based institutions, conventions and norms that underpin state law.⁴⁷ As such, our scope includes laws developed by the public agencies and local authorities empowered to regulate our lives. It is not confined to the work of courts.
- 1.21 Tikanga is influencing state law. Reflecting the ongoing interaction of state law with tikanga, Figure 1 (which follows) identifies three spaces: tikanga, state law, and a space within the state law circle where tikanga and the state are interacting, producing a body of laws that reference tikanga. Our Study Paper considers how they can do so with integrity, so that the resulting body of laws is sound.
- 1.22 Alongside these developments, tikanga continues to function and to retain its separate identity. The separate circle, tikanga, in our figure has aspects termed “Māori” and “ā-iwi”.⁴⁸ “Ā-iwi” (language adopted in our figure for brevity) refers to the localised expressions and application of tikanga by any Māori kinship group. For instance, referring to the groupings earlier introduced of waka, iwi, hapū, whānau and marae: in addition to tikanga ā-iwi, there may be tikanga ā-waka, tikanga ā-marae, tikanga ā-hapū or tikanga ā-whānau.⁴⁹
- 1.23 The ways in which state law might influence expressions of tikanga are not the focus of this Study Paper. However, the separate circle, tikanga, does imply one important way in which the state can acknowledge tikanga — aside from recognising its potential relevance for state law. That is by simply acknowledging the independent legitimacy of tikanga and supporting its ongoing function within Māori communities.
- 1.24 Overall, Figure 1 reflects the three parts of this Study Paper. As the paper proceeds, we discuss in turn:
- (a) tikanga;
 - (b) how, to date, state law has interacted with tikanga; and
 - (c) the processes for their future engagement.
- 1.25 For reasons we now turn to explain, the space representing the nascent process of tikanga-state law engagement in our figure shows a tukutuku pattern.

⁴⁶ Compare Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 32: “the first law of Aotearoa, the second law of New Zealand”.

⁴⁷ For a “constitutional sketch”, see Matthew SR Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 5–9.

⁴⁸ See generally Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at Section One.

⁴⁹ See particularly Hirini Moko Mead Affidavit, 25 February 1998 at [101], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.21]: “In my opinion, the concept of iwi cannot be fully appreciated or understood without considering the units which underpin iwi, namely the whānau and the hapū and their critical importance to the entire structure.”

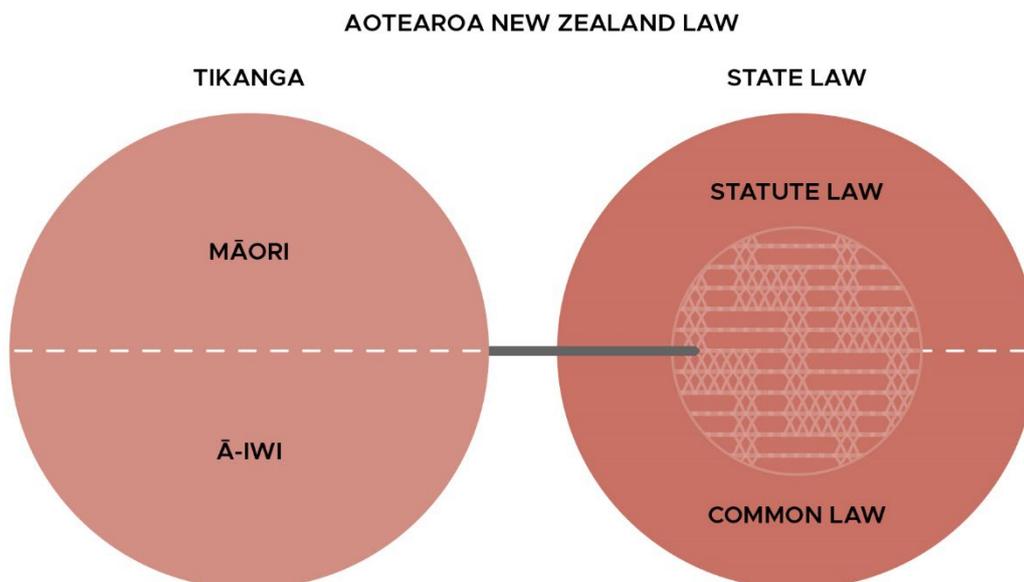


Figure 1: Aotearoa New Zealand law – tikanga, state and an interactive space

A METAPHOR FOR FUTURE ENGAGEMENT: TUKUTUKU

1.26 The specific tukutuku design, poutama, that is shown in Figure 1 and on our front cover represents steps towards knowledge. As Adele Holland and Mary Silvester explain, poutama is:⁵⁰

... a metaphor for the time spent consolidating new knowledge, represented by the plateau at each step; and for the period of engaging strenuously with the new knowledge, represented by the vertical step. These lead to continuing progress as people journey upwards together.

1.27 More generally, tukutuku involves a process of two people working together that we consider to be an appropriate metaphorical way of considering the future engagement between tikanga and state law.

1.28 Tukutuku are latticework panels, formed of vertical stakes (kākaho) and horizontal rods (kaho) stitched with traditional patterns. They were historically part of the wall construction of the meeting houses, whareniui. Although in modern times tukutuku are largely decorative, their symbolism remains undiminished.⁵¹ Their makers, originally known as “tuitui workers” (“tuitui” meaning to lash or bind), work in pairs. One person stands in front of the panel and another behind, threading fibre through spaces in the lattice to each other and binding the stakes and rods together.⁵² Puhanga Patricia Tupaea (Ngāti

⁵⁰ Adele Holland and Mary Silvester “The poutama tukutuku metaphor and how it adds value to the tertiary learning journey” (paper presented to Annual International Conference of the Association of Tertiary Learning Advisors of Aotearoa/New Zealand (ATLAANZ), Wellington, November–December 2011) 16 at 18, citing Arapera Royal Tangaere. See also John C Moorfield *Te Aka Māori-English English-Māori Dictionary and Index* <maoridictionary.co.nz>; Kahutoi Te Kanawa “Te raranga me te whatu — tāniko and tukutuku” (22 October 2014) *Te Ara — The Encyclopedia of New Zealand* <teara.govt.nz>.

⁵¹ Christchurch City Libraries | Ngā Kete Wānanga-o-Ōtautahi “Pūawaitanga o te ringa | Fruits of our busy hands: the tradition of tukutuku” (booklet compiled by Christchurch City Libraries | Ngā Kete Wānanga-o-Ōtautahi, Christchurch, 2003, accessed at <christchurchcitylibraries.com>).

⁵² Makereti Papakura *The Old-Time Maori* (Victor Gollancz, London, 1938) at 305–306. See also Erenora Puketapu-Hetet *Maori Weaving* (Longman, Auckland, 1999) at 29–30.

Koata) describes giving and receiving back the thread, away from oneself and towards oneself: “tuku atu, tuku mai”.⁵³ Tukutuku thus implies values of reciprocity and connection.⁵⁴ As wharenuī were constructed in the past, the tukutuku work to complete their walls would involve a tohunga (Māori knowledge expert) and another assistant outside.⁵⁵ Within the house, the tohunga was responsible for the pattern.

1.29 Metaphorically, if tikanga were considered as the vertical stakes (kākaho) of a tukutuku, state law might be considered as the horizontal rods (or kaho). Tukutuku then represents a metaphorical process of connecting and binding together the kākaho of tikanga and the kaho of state law. The participants, Māori and state, might be considered as the people working on each side of the panel.

1.30 Tukutuku has synergy with the way in which the Commission’s earlier reports have reflected on the intersection of tikanga with state law. Rather than merely incorporating tikanga into a pre-existing legal model written around dominant norms, laws developed by the state should seek to:⁵⁶

... weave new law that reflects tikanga Māori ... We think this is a deeply important approach to law-making in Aotearoa New Zealand to support a nation that is grounded in the commitments of te Tiriti, to the benefit of all New Zealanders.

1.31 Tukutuku conveys other associated values. Tukutuku, connecting two people, expresses an ideal of balance. Importantly, those who explain the meaning of a “tuku” have considered that while it is a process of giving (and in return receiving), it does not involve “letting go” or a relinquishment of mana or rangatiratanga.⁵⁷ Instead, tuku are described as creating obligations,⁵⁸ as an aspect of utu (reciprocally responding),⁵⁹ and as an invitation “to share ... life and community”.⁶⁰ As the tukutuku metaphor may help to understand, the thread is passed anticipating that either it will be returned to its giver to continue the pattern or that the person behind can be entrusted to make the proper customary tie.

⁵³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008, vol 1) at 37.

⁵⁴ Wiremu Doherty, in wānanga with Te Aka Matua o te Ture | Law Commission (9 February 2023); Wiremu Doherty, peer review comments to Te Aka Matua o te Ture | Law Commission (14–15 February 2023).

⁵⁵ Te Rangi Hiroa (P H Buck) “Maori, decorative art: no 1, house-panels (arapaki, tuitui, or tukutuku)” (1921) 53 *Transactions and Proceedings of the Royal Society of New Zealand* 452 at 455. Tohunga were often men — their assistant in likelihood a woman, not allowed to enter the wharenuī herself until tapu was lifted on the completed house. This implies a gender balance in tukutuku making, as do the materials of a tukutuku panel (involving both wood work and weaving). However, some also refer to wāhine as tohunga: see Te Riaki Amoamo Affidavit, 21 February 2022 at [29], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.111].

⁵⁶ Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person’s property on death* (NZLC R145, 2021) at 80.

⁵⁷ See Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.222].

⁵⁸ Vivian Tāmami Kruger Statement of evidence, 2 June 2020 at [121]–[124] and [126], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.217]; Merata Kawharu “Kaitiakitanga: a Maori anthropological perspective of the Maori socio-environmental ethic of resource management” (2000) 109 *The Journal of the Polynesian Society* 349 at 361.

⁵⁹ Margaret Anne Kawharu Statement of evidence, 2 June 2020 at [30]–[33] and [35], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.276].

⁶⁰ Rima Eruera Statement of evidence, #F23 at 9, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.222].

1.32 At the present time, interactions between tikanga and state law do not fully realise such values. They occur in forums where there is unequal power, where state actors assert authority and decide what is authoritative according to orthodox rules. As Dr David V Williams (now Professor Emeritus) has put it:⁶¹

Once ‘rules’ of custom are incorporated into the mainstream of the state legal system as precedents they may then be treated in the same way as all other legal norms. They can be modified, distinguished or even over-ruled.

1.33 As Williams suggests, the story of the shark and the kahawai is apt:⁶²

... when the shark met the kahawai, the shark suggested that they should join together and be as one. Perceiving that this would occur by the shark swallowing the kahawai, the kahawai demurred — preferring a continuing existence as a kahawai rather than ‘assimilation’ into unity with the larger fish.

1.34 We therefore remain mindful that a “delicate balance and a sense of wariness” is required.⁶³ Those who are wary of the realities of tikanga-state interaction and who see hazards in the engagement between tikanga and state law have historical evidence to draw on. As the Commission explained in its 2001 Study Paper:⁶⁴

... the systems of introduced laws and settler policies were geared towards the eclipse of Māori custom law ... A process of denial, suppression, assimilation and co-option put Māori customs, values and practices under great stress.

1.35 Even today, encounters between tikanga and state law have tended to favour the dominant system of legal norms.⁶⁵

1.36 There is, however, another perspective. That is that tukutuku anticipates a continuing process — of statute by statute, case by case, making tikanga connections and incorporating aspects of tikanga. Given time, as this continues, the smaller circle enlarges within state law. As Justice Joseph Williams (writing extra-judicially) has considered, in time we may find that an emergent third law of Aotearoa New Zealand “has come to change both the nature and culture of the second [state-imposed] law” by perpetuating the first law of tikanga.⁶⁶ Such a re-emergence contrasts with the “eclipse” that the Commission’s 2001 Study Paper observed.⁶⁷

1.37 In our view, tukutuku represents essential tikanga values or ideals that, now and into the future, can guide those working at the interface of tikanga with state law. The metaphor, tukutuku, is important because its tikanga-associated meanings are reminders of the

⁶¹ David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name for Te Aka Matua o te Ture | Law Commission, 1998, dated 10 November 1998 with minor update 2020) at 4.

⁶² David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name for Te Aka Matua o te Ture | Law Commission, 1998, dated 10 November 1998 with minor update 2020) at 4–5.

⁶³ David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name for Te Aka Matua o te Ture | Law Commission, 1998, dated 10 November 1998 with minor update 2020) at 4–5.

⁶⁴ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 22.

⁶⁵ See for example *Takamore v Clarke* [2012] NZSC 116, [2013] NZLR 733 at [169]; Natalie Coates “What does *Takamore* mean for tikanga?” [February 2013] *Māori Law Review* 14; and see also Te Aka Matua o te Ture | Law Commission *Te Aka Matua o te Ture | Law Commission He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person’s property on death* (NZLC R145, 2021) at [2.128].

⁶⁶ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 12.

⁶⁷ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 22.

correct values as tikanga and state law engage. Its underlying expectations — such as reciprocity, balance, holding a matter on trust and correctly repeating the pattern, an awareness that mana is reinforced and strengthened, not given away by *tuku* — ought always to be at the forefront of state actors' minds as they seek to engage with tikanga. Such values are one way of supplying tikanga-given guardrails for the interaction of tikanga with state law.

OUR APPROACH

- 1.38 This project has presented some significant challenges. Tikanga, like state law, is vast and complex. While anchored in broadly shared values, those values are expressed and performed in a multiplicity of ways. Another source of complexity for us has been the diversity of audiences we are addressing. We want the Study Paper to be accessible to people without significant prior knowledge of tikanga, or even of state law. But it has also been a significant concern for us to communicate our account of tikanga in an authentic way that maintains the integrity of tikanga.
- 1.39 Against this backdrop, we commenced our task by seeking the assistance of renowned *pūkenga tikanga* (tikanga experts) and legal professionals who specialise in the study of tikanga or are actively engaged in tikanga-related legal practice. This has enabled us to properly ground our account of tikanga, to draw on a broader range of expertise than is currently available within a small organisation such as the Commission, and to undertake an ambitious task within the tightly confined timeframes of the project.

Externally commissioned work

- 1.40 We commissioned three external research papers that have each substantially contributed to shaping the Study Paper. They have assisted us with how to approach tikanga, with how to ground our explanations of tikanga in *mātauranga Māori*, and with conceptualising, on a more philosophical level, the nature of tikanga and its interaction with state systems.
- 1.41 “Tikanga”, a paper prepared for us by Professors Wiremu Doherty, Tā Hirini Moko Mead and Tā Pou Temara of Te Whare Wānanga o Awanuiārangi, is published in Appendix 1.⁶⁸ We have worked collaboratively with the Awanuiārangi *pūkenga* throughout our project. Their paper has helped to ensure our own approach is tikanga-consistent. It orients tikanga within what the Awanuiārangi *pūkenga* identify as systems of Māori knowledge and provides an account of tikanga including discussion of the symbolic importance of *wharehenui* and an overview of tikanga concepts. The Awanuiārangi paper has closely supported the development of Part One of this Study Paper.
- 1.42 A challenge we encountered in this project was the inability, given limited time and resources, to engage directly with *hapū* and *iwi* about their tikanga perspectives. Mindful of that limitation we engaged two law firms that specialise in tikanga-related legal practice, Kāhui Legal and Whāia Legal, to review tikanga evidence given in Waitangi Tribunal and court hearings. The resulting paper prepared by Natalie Coates and Horiana Irwin-Easthope and published in Appendix 2 reviews more than 800 briefs of tikanga

⁶⁸ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023).

evidence providing hapū and iwi perspectives from throughout Aotearoa New Zealand.⁶⁹ The paper synthesises themes which the evidence suggests are important to hapū and iwi. We have drawn on this paper throughout our work and use the expressions of tikanga that it documents particularly in Chapter 3.

1.43 Finally, to inform our thinking on a potential new framework for engagement between tikanga and state law, we commissioned Associate Professor Nicole Roughan of the University of Auckland Law Faculty to examine approaches to engagement between indigenous and state legal systems. Roughan’s paper, “Interlegality, interdependence and independence: framing relations of tikanga and state law in Aotearoa New Zealand”, is published in Appendix 3. It envisages a domain of independent tikanga operation and a domain of interdependent operation of tikanga with state law.⁷⁰ This paper may particularly appeal to those who are interested in a more philosophical perspective. In addition, we had the benefit of two research notes produced by Dr Max Harris and Professor Claire Charters of the University of Auckland.⁷¹ Their research gave further theoretical grounding to the approach taken in Part Three of the Study Paper.

1.44 We have ourselves found all of these papers helpful and stimulating. We expect others will share our view. That said, in each case, they represent their authors’ views and not necessarily those of the Commission. Some qualifications should also be noted:

- (a) The “Tikanga” paper provides the perspective of the Awanuiārangi pūkenga and strongly reflects “Tūhoetanga” or a “Mataatua waka” perspective. While it provides rich tikanga Māori information, it should not be assumed that others, whose own accounts differ, will endorse its explanations. Others may have differing perspectives on tikanga. It is important to understand this diversity of approach.
- (b) The tikanga explanations given in the paper by Coates and Irwin-Easthope are largely drawn from post-1980s legal materials and will have been influenced by their recency and legal context. Given this, it may be beneficial to read this paper alongside other publications that reference older sources.⁷² That caveat aside, this study by Coates and Irwin-Easthope brings to light iwi and hapū explanations that we think will greatly benefit future research and aid understanding of tikanga.

Review processes

1.45 Consistent with our regular processes, we have been guided by:

- (a) An Expert Advisory Group appointed specifically for the project with the following membership: Tā Edward Taihakurei Durie (Ngāti Raukawa, Ngāti Kauwhata), Robert Joseph (Tainui, Tūwharetoa, Ngāti Kahungunu and Ngāi Tahu), Annette Sykes (Ngāti

⁶⁹ Natalie Coates and Horiana Irwin-Easthope “Kei raro i ngā tarataru, ko ngā tuinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors: tikanga as expressed in evidence presented in legal proceedings” (paper prepared for Te Aka Matua o Te Ture | Law Commission, 2023).

⁷⁰ Nicole Roughan “Interlegality, interdependence and independence: framing relations of tikanga and state law in Aotearoa New Zealand” (paper presented to Te Aka Matua o te Ture | Law Commission, 2023).

⁷¹ Max Harris “Pacific insights: approaches to indigenous legal systems and other bodies of law in Pacific jurisdictions” (research note, 2023); Max Harris “The common law method, tikanga Māori, and the law of Aotearoa New Zealand: a discussion note” (research note, 2023).

⁷² For example Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauriki Research Institute, Victoria University Press, Wellington, 2013); The Legal Māori Resource Hub <www.legalmaori.net>.

Pikiao, Ngāti Makino), Jacinta Ruru (Ngāti Raukawa, Ngāti Ranginui), Paora Tapsell (Te Arawa, Ngāti Raukawa), Kerensa Johnston (Ngāti Tama, Ngaruahine, Te Atiawa, Ngāti Whawhakia) and Tania Hopmans (Ngāti Kahungunu, Ngāti Marangatūhetaua).

- (b) The Māori Liaison Committee, a standing committee established to assist the Commission to take into account te ao Māori when making its recommendations for reform and development of the law.⁷³

1.46 We also considered that this project would benefit from having an Internal Advisory Group to assist with the scope and direction of the Study Paper and to provide feedback on early drafts. We appointed Tai Ahu (Waikato-Tainui, Ngāti Kahu), Carwyn Jones (Ngāti Kahungunu, Te Aitanga-a-Māhaki), Māmari Stephens (Te Rarawa) and David V Williams for this purpose. The Internal Advisory Group also reviewed and provided feedback on the papers in Appendices 1 and 2.

1.47 The Awanuiārangi pūkenga reviewed and were consulted extensively on the chapters in Part One: Tikanga. The authors of the papers in Appendices 2 and 3 likewise reviewed drafts of the chapters that draw upon their research. We have further benefited from comments provided on drafts by members of the judiciary, including members of the senior courts and the Māori Land Court.

HOW THE STUDY PAPER IS ORGANISED

1.48 This Study Paper is divided into three parts, which respectively consider tikanga, the history of interaction between tikanga and state law, and their future engagement.

Part One: Tikanga

1.49 Part One is concerned with understanding tikanga from within mātauranga Māori:

- (a) Chapter 2 begins by describing some steps towards understanding tikanga. It connects tikanga with mātauranga and explains the Māori creation narratives called pūrākau, identifying them as sources of tikanga. This chapter then suggests that the marae meeting houses, whareniui, represent a useful starting point for tikanga exploration.
- (b) Chapter 3 introduces core tikanga concepts. The explanation developed in this chapter provides a bridge to understanding tikanga concepts as a unified system of norms, drawing upon explanations by mātauranga experts.
- (c) Based upon the framework of tikanga concepts that Chapter 3 has outlined, Chapter 4 gives a guide for tikanga engagement, illustrated with six hypothetical case studies.

Part Two: Interaction between tikanga and state law

1.50 Part Two provides a thematic overview of the interactions since 1840 between tikanga and state law:

- (a) Chapter 5 reviews how the common law has engaged with tikanga.
- (b) Chapter 6 examines the evolving approach taken by the state to recognition of tikanga in legislation.

⁷³ For terms of reference generally for the Māori Liaison Committee, see Māori Liaison Committee <www.lawcom.govt.nz>.

- (c) Chapter 7 considers the way specific areas of the law in the modern legal landscape interact with tikanga, including family law, ture whenua Māori (Māori land law), environment law and criminal law.

Part Three: Future engagement

- 1.51 Part Three looks to the future and considers pathways to appropriate engagement between tikanga and state law:
 - (a) Chapter 8 proposes principles for proper engagement with tikanga by the courts consistent with the “common law method”.
 - (b) Chapter 9 discusses ways in which government agencies could approach engagement with tikanga when developing policy and legislation.
 - (c) Chapter 10 completes the Study Paper. It briefly reflects on the key contributions made, acknowledges perspectives that have been beyond our scope and notes that other future pathways for tikanga recognition remain open.

REO MĀORI TERMS

- 1.52 We are endeavouring to strike a balance in the Study Paper between Māori readers highly fluent in the Māori language and in tikanga, and other readers who may have no knowledge of either of these. In Aotearoa New Zealand today some common Māori terms (such as whānau, marae and tangihanga) are very widely used and have meanings that are sufficiently understood. We therefore have not defined all Māori words that are used in the Study Paper. However, we endeavour to provide simple explanations for the majority of Māori terms. Where Māori words are less well known, we have used simple in-text definitions or explained the meaning in the surrounding text to assist readers with understanding the meaning of the word in the relevant context.
- 1.53 These simplified definitions are given the first time that a word appears in each chapter. While they are intended to improve the accessibility of the Study Paper for those with limited knowledge of the Māori language, importantly they may not necessarily reflect the depth and breadth of the Māori meaning of these words. At the back of the Study Paper, an index of tikanga concepts is provided, indicating where important concepts in the Study Paper have been discussed and defined. In addition, we invite readers to use the online Māori language dictionary: Te Aka Māori Dictionary to assist their comprehension.⁷⁴

⁷⁴ Te Aka Māori Dictionary <maoridictionary.co.nz>; see also John C Moorfield *Te Aka Māori-English, English-Māori Dictionary and Index* (3rd edition, Longman/Pearson Education New Zealand, 2011), the text on which the online version of Te Aka Māori Dictionary is based.

Part One

Tikanga

It is not possible, or appropriate, to outline the depths of the philosophies which governed Maori life. However, their beliefs and the rules of behaviour which flowed from them can be compared to the parts of a sheltering whare. They were the foundations which supported the society, the walls which enveloped its members in security, and the roof which protected them from disorder and imbalance.

Moana Jackson¹

¹ Moana Jackson *The Maori and the Criminal Justice System: A New Perspective / He Whaipanga Hou* (Department of Justice, Study Series 18, 1987–1988, part 2) at 43.

CHAPTER 2

Te wharenuī | the meeting house

Fundamental to any discussion of tikanga is the necessity to appreciate its placement and functioning within te ao Māori. Understanding tikanga requires a journey through the Māori world, one that outlines the knowledge systems, values and beliefs, and that locates tikanga into its natural environment. To try and build an understanding of tikanga outside of that framework runs the risk of it becoming de-contextualised and abstract, and where its authentic meaning becomes distorted.

Professor Wiremu Doherty, Tā Hirini Moko Mead and Tā Pou Temara¹

INTRODUCTION

- 2.1 It is important for those wishing to build their understanding of tikanga and to engage authentically with it to consider tikanga within a Māori world view.² Exploring aspects of te ao Māori (the Māori world) and the Māori knowledge systems underpinning tikanga provides a basis for better understanding.³ In this chapter, we explain what we mean by Māori knowledge systems and describe how they influence the distinction between tikanga Māori and tikanga ā-iwi. We then use Māori narratives and the concept of te wharenuī (the meeting house) to lay further foundations.
- 2.2 The analysis in this chapter has been guided by explanations from Te Whare Wānanga o Awanuiārangi pūkenga (experts), Professors Wiremu Doherty, Tā Hirini Moko Mead and Tā Pou Temara (Awanuiārangi pūkenga), which we attach in full as Appendix 1.⁴ The Awanuiārangi pūkenga explain the importance of orienting tikanga within mātauranga (Māori knowledge) and use creation narratives to illustrate the origins of tikanga. They also describe the importance of wharenuī as places of knowledge and as portals to a Māori world view. The wharenuī reveals a connected world and enables us to begin to learn about tikanga principles.⁵

¹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [1.2]. Subsequent references to this paper in this chapter are abbreviated as follows: Doherty, Mead and Temara “Tikanga”, Appendix 1.

² Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.3].

³ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.60].

⁴ Doherty, Mead and Temara “Tikanga”, Appendix 1.

⁵ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.7].

THE METAPHOR OF THE WHARENUI

- 2.3 The metaphor of the wharenuui in this chapter offers a way to invite readers into a mātauranga-immersed space. In te ao Māori the use of metaphor is common. The wharenuui, in particular, is a widely chosen metaphor. According to the Awanuiārangi pūkenga, wharenuui represent the first striving for knowledge. In this respect, our use of the wharenuui metaphor is one way of positioning the reader within a Māori world view for the purpose of explaining mātauranga and tikanga. We wish to emphasise that our use of the wharenuui is as an explanatory tool that can aid understanding of an ao Māori perspective and frame engagement with tikanga, rather than to explain wharenuui. There are many sources available to assist readers who are interested in researching wharenuui further.⁶ Importantly, these will include the specialised and unique accounts of iwi and hapū in regard to their own marae (both published and unpublished).⁷
- 2.4 Adopting a technique from whaikōrero (formal speech) and karanga (a ceremonial welcome call), the structure of the wharenuui frames our discussion. The chapter is divided into four sections, each represented in our account by a part of the wharenuui. Each of the first three sections represent one of three central posts or pillars called pou. As the pou are said to do, each holds a kete or basket of knowledge.⁸ The three pou hold up the sheltering roof of the wharenuui. They are connected by the ridge pole, te tāhuhu.
- 2.5 Te poutuaroro is the pou in the middle of the front wall of the wharenuui.⁹ In this first section of the chapter, we outline two Māori knowledge systems, each providing the basis for tikanga. We do so drawing upon explanation from the Awanuiārangi pūkenga, who differentiate mātauranga from what they call “generic” or non-Māori knowledge.
- 2.6 Te poutokomanawa is the pou at the centre of the wharenuui.¹⁰ In this second section of the chapter, we provide a further entry point to tikanga through the Māori narratives called pūrākau, which describe Māori existence and creation. Pūrākau are sources of knowledge of core tikanga Māori concepts and Māori histories.¹¹ Tikanga is found in them, as we explain.
- 2.7 Te poutuarongo is the pou that is part of the rear wall. In this third section of the chapter, we describe some physical aspects of a wharenuui and marae ātea, showing how they represent a Māori world view and help to visualise the wharenuui as a portal between the present day and other te ao Māori realms. These ways in which traditional designs of wharenuui encode Māori narratives provide another insight into where mātauranga and tikanga may be found.
- 2.8 Te tāhuhu, the ridge pole, is the section that completes the chapter. Metaphorically beginning in times preceding us, te tāhuhu symbolises continuation to times that will come

⁶ We recommend for example Muru Walters, Robin Walters and Sam Walters *Marae — Te Tatau Pounamu: A Journey Around New Zealand’s Meeting Houses* (RHNZ Godwit, Auckland, 2021).

⁷ See for instance Hirini Moko Mead, Layne Harvey, Pouroto Ngaropo and Te Onehou Phillis *Mātaatua Wharenuui: Te Whare i Hoki Mai* (Huia Publishers, Wellington, 2017).

⁸ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.20].

⁹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.28].

¹⁰ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.28].

¹¹ As Māori Marsden says in Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 56: these are not mere “fireside stories”, they encapsulate knowledge. See also Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.93] and [4.10].

after.¹² In this last section of the chapter, we focus more directly on the tikanga values that the wharenuī represents, and reflect on why imaginatively positioning oneself within the wharenuī is a helpful standpoint from which to engage with tikanga. We draw together the prior three pou and establish an aho or genealogical line of connection to Chapter 3, which draws further on the wharenuī when discussing tikanga concepts.

TE POUTUARORO: MĀORI KNOWLEDGE SYSTEMS

- 2.9 It is not possible to engage authentically with tikanga without some appreciation of the nature of the Māori knowledge systems that underpin it. Advice from the Awanuiārangi pūkenga regarding the importance of orienting tikanga within a Māori world view has been influential in our account of tikanga and the way in which we propose it can be engaged with authentically. We therefore begin by considering their outline of two knowledge systems before considering what we mean when we speak about Māori knowledge.¹³
- 2.10 The Awanuiārangi pūkenga describe two interconnected knowledge systems.¹⁴ The first is mātauranga Māori, which is the knowledge broadly shared by all Māori. The second is mātauranga ā-iwi, which is localised knowledge based on Māori kinship groups' own experience and whakapapa (in this context, meaning connections). As a first step towards considering tikanga, the Awanuiārangi pūkenga suggest that knowledge of these two systems is helpful — particularly for those much more accustomed to a third system comprising knowledge that does not originate from Māori, which they term generic knowledge.¹⁵
- 2.11 Tikanga also reflects this way of classifying Māori knowledge. It can similarly be divided into the following two categories:
- (a) Tikanga Māori, which covers the core beliefs, values and principles broadly shared among Māori and is informed by mātauranga Māori.
 - (b) Tikanga ā-iwi, which refers to the localised expressions of tikanga that are shaped by different Māori groups' knowledge and experience. Tikanga varies between different Māori groups. Their own knowledge (or mātauranga ā-iwi) explains such variation.
- 2.12 When engaging with tikanga, the Awanuiārangi pūkenga consider that it is essential to bear in mind and maintain the distinctions between these three systems. Rather than simply applying the generic knowledge with which they will be most familiar, it is important that people who are not knowledgeable about tikanga locate it within the context of the Māori world view and the relevant mātauranga.¹⁶ It is also important that tikanga Māori and tikanga ā-iwi are not conflated. Observing the boundaries of these different systems is fundamental to safeguarding the integrity of tikanga.
- 2.13 This advice from the Awanuiārangi pūkenga has shaped our own perspectives on how to structure this Study Paper. Consistent with their advice, we are opening our own account

¹² Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.68].

¹³ See generally Doherty, Mead and Temara “Tikanga”, Appendix 1 at Section One.

¹⁴ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [1.18]–[1.19] and [1.36]–[1.39].

¹⁵ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [1.12] and [1.54]–[1.55].

¹⁶ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [1.31]; and see too Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Zed Books, London, 2012) at 201.

by orienting it within mātauranga. We have chosen to do so by using the wharenuī metaphor as one way into a Māori world view.

- 2.14 Because of the extent to which both te ao Māori and mātauranga are heavily influenced by metaphysics and spirituality, some further explanation is required. Although it is not necessary to ascribe to this symbolism to understand tikanga, it is necessary to engage with it. We have ourselves found an explanation from Te Ahukaramū Charles Royal particularly helpful. Royal follows Reverend Māori Marsden, who explained:¹⁷

Cultures pattern perceptions of reality into conceptualisations of what they perceive reality to be; of what is to be regarded as actual, probable, possible or impossible. These conceptualisations form what is termed the ‘worldview’ of a culture. The worldview is the central systematisation of conceptions of reality to which members of its culture assent and from which stems their value system.

- 2.15 Referring to āronga (a concept used by him to stand for world view), Royal points out the way in which a people’s values or principles (kaupapa) arise from their ways of seeing their world.¹⁸ Values and principles in turn will give rise to the things we understand to be correct and actually do.¹⁹
- 2.16 In other words, the way people understand their world shapes their values and in turn their perspective on how to regulate and conduct their society. This is our starting point for consideration of tikanga in a legal context. When we are talking about knowledge, we mean, like Royal, world view. Metaphysics and spirituality are intrinsic to an ao Māori perspective. An understanding and genuine appreciation of this world view will pave a path towards a clearer understanding of tikanga.

TE POUTOKOMANAWA: MĀORI CREATION AND EXISTENCE

- 2.17 In this section we make connections between tikanga and a Māori view of creation and existence. Pūrākau, traditional forms of Māori narrative that recount creation, contain tikanga.²⁰ Passed down from generation to generation through oral tradition, these accounts hold philosophical thought, constructs relating to knowledge, cultural codes and

¹⁷ Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 56; Te Ahukaramū Charles Royal “An organic arising: an interpretation of tikanga based upon the Māori creation traditions” in Ngā Pae o te Māramatanga *Tikanga Rangahau Mātauranga Tuku Iho | Traditional Knowledge and Research Ethics Conference Proceedings 2004* (Ngā Pae o te Māramatanga, Auckland, 2005) 206 at 223.

¹⁸ Te Ahukaramū Charles Royal “An organic arising: an interpretation of tikanga based upon the Māori creation traditions” in Ngā Pae o te Māramatanga *Tikanga Rangahau Mātauranga Tuku Iho | Traditional Knowledge and Research Ethics Conference Proceedings 2004* (Ngā Pae o te Māramatanga, Auckland, 2005) 206 at 223–225. As Royal explains, āronga is “a term not often used in common parlance”, less widely understood than the concepts with which he connects it: kaupapa and tikanga.

¹⁹ Te Ahukaramū Charles Royal “An organic arising: an interpretation of tikanga based upon the Māori creation traditions” in Ngā Pae o te Māramatanga *Tikanga Rangahau Mātauranga Tuku Iho | Traditional Knowledge and Research Ethics Conference Proceedings 2004* (Ngā Pae o te Māramatanga, Auckland, 2005) 206 at 223–224.

²⁰ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.93] and [4.10]; Māori Marsden in Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 66. Pūrākau may also be called “pakiwaitara”: see Doherty, Mead and Temara “Tikanga”, Appendix 1; Edmond Carrucan “Ko tikanga te mātāmua: ngā pūrākau, ngā pakiwaitara, me mihi, ka tika” (LLM Thesis, Te Whare Wānanga o Waikato | University of Waikato, 2021).

world views fundamental to identity.²¹ They are an example of the important concept within mātauranga Māori of looking to the past to inform the present.²² The kupu (word) itself — “pūrākau” — holds clues to their importance. “Te pū” refers to the base of a tree from which the growth cycle starts. “Rākau” refers to the growth and development of the upper tree. “Pūrākau” therefore alludes to the beginning and growth of all things.²³

2.18 A brief account of Māori creation according to these narratives reveals both the inception of tikanga concepts and the significance of the whareniui. In the account which follows, we have been guided by what the Awanuiārangi pūkenga have told us and recount the version of pūrākau that they shared.²⁴ We emphasise that the narratives repeated here are only one version. Other iwi and hapū have different understandings of aspects of the pūrākau. It is not possible for one account to capture this diversity. Even so, although some details may vary, core elements of the pūrākau tend to be constant.²⁵ We group the narratives as follows, discussing only selected aspects:

- (a) The phases of creation: Te Kore, Te Pō and Te Ao Mārama.
- (b) The journey to knowledge, provided in three baskets: ngā kete mātauranga.
- (c) The decision by Hinenuitepō to live in the afterworld.
- (d) Māui.

²¹ See Jenny Lee “Decolonising Māori narratives: pūrākau as a method” (2009) 2 MAI Review. For in-depth discussion of the significance of pūrākau, see Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016); Edmond Carrucan “Ko tikanga te mātāmua: ngā pūrākau, ngā pakiwaitara, me mihi, ka tika” (LLM Thesis, Te Whare Wānanga o Waikato | University of Waikato, 2021) at 12–17 and from 66.

²² Doherty, Mead and Temara “Tikanga”, Appendix 1 at [4.4].

²³ Wiremu Doherty, peer review comment to Te Aka Matua o te Ture | Law Commission (25 November 2022).

²⁴ Doherty, Mead and Temara “Tikanga”, Appendix 1.

²⁵ Mason Durie Statement of evidence, #K14 at [2.4], as cited in Natalie Coates and Horiana Irwin-Easthope “Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors: tikanga as expressed in evidence presented in legal proceedings” (paper prepared for Te Aka Matua o Te Ture | Law Commission, 2023) at [2.14]. According to Durie, there are “common denominators that surpass the tribal and dialectical differences” to provide a generalised view of how te ao Māori began.

Te Kore, Te Pō, Te Ao Mārama

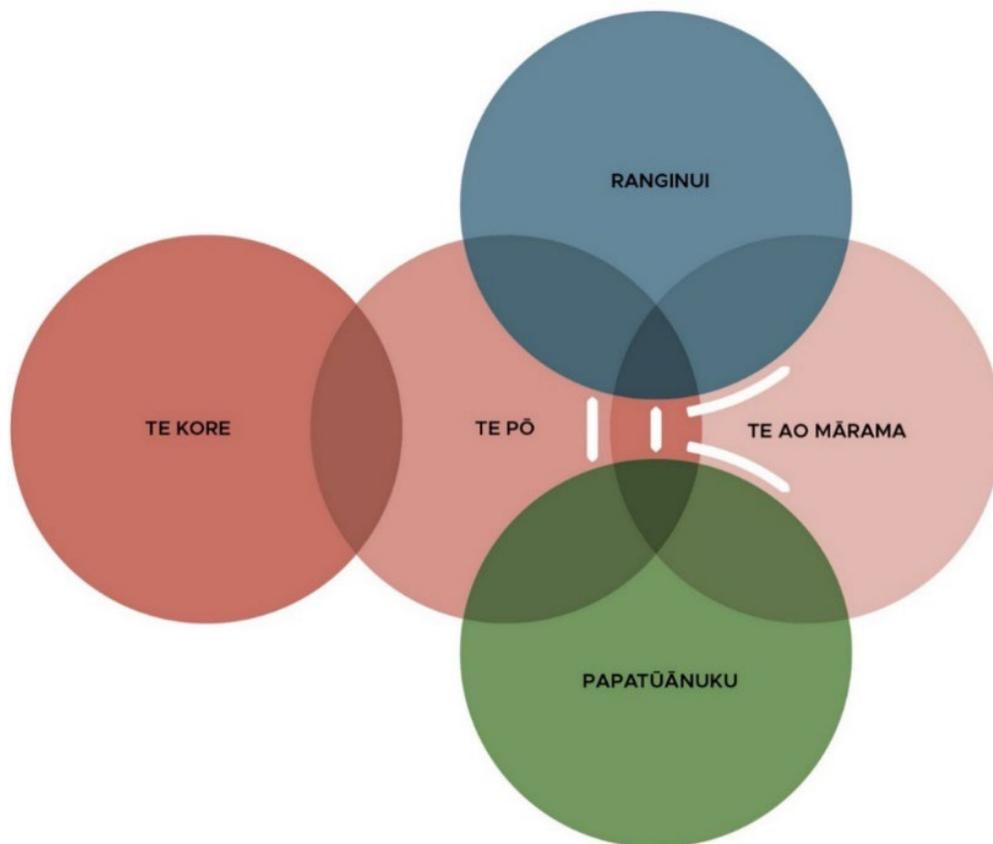


Figure 2: The phases of creation and emergence of Te Ao Mārama, the world in which we live

- 2.19 In te ao Māori, Te Kore, Te Pō and Te Ao Mārama describe three co-existing, continuous phases of the creation of all things. Te Kore is the time of nothingness as well as a time of unlimited potential. Te Pō refers to a period of darkness and ignorance — yet it is also the period that marks the emergence of the atua Māori (ancestor-gods) Ranginui, Papatūānuku and their children. Te Ao Mārama is the time of enlightenment and acquisition of knowledge and refers to the present-day world.²⁶
- 2.20 In the time of Te Pō, Ranginui and Papatūānuku lay in a close embrace. While in this embrace, they imbued the world with **mauri** or life essence, beginning with their children.²⁷ Their children, all atua, are responsible for and creators of various domains of the natural world. Prominent among the atua are Tangaroa (atua of the sea), Tāne (atua of the forests), Tāwhirimātea (atua of the elements), Rongomatāne (atua of kūmara), Tūmataunga (atua of man), Haumia (atua of fern root), Rūaumoko (atua of volcanoes and earthquakes) and Whiro (atua of evil, disease and pestilence).²⁸ In each domain, all elements and life forms descend directly from the atua.

²⁶ Other names for Te Ao Mārama include Te Aotūroa, the world of standing tall: compare Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.10].

²⁷ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1991) at 83. Barlow refers to Io as the source of mauri within the universe.

²⁸ See Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1991) at 11–12 for this account of the atua.

- 2.21 Already, this brief beginning illustrates the close connection in tikanga Māori between relationships and responsibilities. Implicitly, core tikanga concepts of **whakapapa**, **whanaungatanga**, **mana**, **kaitiakitanga** and **tapu** are present. These are the first of a core group of concepts around which we will continue to shape our explanation of tikanga in later chapters. The responsibility of each of the atua to care for their respective domains is an expression of their **whakapapa** (genealogical connection), **mana** (authority and responsibility) and **kaitiakitanga** (guardianship). The identification of elements and life forms as children of each atua highlights their inherent **tapu** or sacredness, together with the value of **whanaungatanga** (kinship) connecting all.
- 2.22 Within the embrace of Ranginui and Papatūānuku conditions were cramped and miserable for their children. Tāwhirimātea excepted, they resolved to separate their parents. The task was no easy feat. Only Tāne managed to achieve it by placing his back on Papatūānuku and his feet under Ranginui and thrusting upwards. He completed the task using poles to keep his parents apart.²⁹ The separation that followed was cataclysmic. It ushered in the time of Te Aotūroa (the world of standing tall) but also a time of great conflict.³⁰ Tāwhirimātea was furious with his siblings for their hara (wrongdoing). Harnessing the elements, he exacted a heavy price for what they had done to his parents in an onslaught that reshaped the world. Only Tūmatauenga withstood the destruction. However, he was also angered by his siblings and their failure to acknowledge Tāwhirimātea's wrath. He too took a heavy toll, including consuming some of his siblings' children.
- 2.23 This part of the narrative illustrates concepts of **utu**, **mana**, **tapu** and **noa**, and **ea**.³¹ Separating Ranginui and Papatūānuku was a violation of their **mana** and **tapu**. This violation demanded **utu** (reciprocation) to restore **ea** (resolution or balance), as did the siblings' failure to withstand Tāwhirimātea's assault. For Tūmatauenga, utu involved nullifying the tapu of his siblings' children. By eating them, Tūmatauenga made them **noa** (ordinary, or free from tapu) and thus available for future human consumption.
- 2.24 While peace was restored among the siblings (at least for a time), Papatūānuku and Ranginui remained inconsolable.³² Ranginui showered Papatūānuku with tears of rain, and she sent mists skyward. In desperation, Tāne turned Papatūānuku over so that she was unable to see her husband, but in her sadness she began to die. Tāne resolved then to restore his parents' views of each other at a place in Te Ao Tukupū (the universe) called Mataaho. It has since been known as Te Hurihanga-nui-i-Mataaho, or the Great Turning Over at Mataaho. This pūrākau manifests the core value of love or concern, **aroha** — ka aro te hā o Papa ki a Rangi, ka aro te hā o Rangi ki a Papa, ka whānau ko te aroha.³³

²⁹ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.10]; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 24.

³⁰ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.10].

³¹ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 13.

³² For this pūrākau, we draw on the account in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 25. We understand that this recounting was authored primarily by Pou Temara.

³³ The breath of Papa drifted upwards towards Rangi and his breath descended down towards Papa and it is from this act that aroha was born: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 25, citing Chris Winitana.

- 2.25 These pūrākau regarding the separation of Ranginui and Papatūānuku provide an example of how pūrākau reveal founding tikanga concepts and values still living and practised today.

Ngā kete mātauranga

- 2.26 Following their parents' separation, Tāne and his older brother Whiro each set about securing knowledge. The knowledge system, mātauranga, was packaged into three kete (baskets) and two stones, accessed from the creators of our known universe.³⁴
- 2.27 Tāne's journey to seek the kete and the stones of knowledge involved moving between levels of consciousness, often referred to as heavens.³⁵ Tāne, with the assistance of his brothers, passed through each level of consciousness by accessing the whareniui located at each level and exiting through a hole in the roof intended for smoke. This hole is called the pūmotomoto. In this way, Tāne succeeded in climbing between successive heavenly whareniui and reaching the requisite level of consciousness, Te Toi-o-ngā-Rangi, while his brother Whiro fell short.³⁶ There, Tāne received the three kete of knowledge (named kete uruuru-matua, kete uruuru-rangi or tipua, kete uruuru-tau or tawhito) and two stones (Hukātai and Rehutai).³⁷
- 2.28 After completing proper rituals or **kawa**, Tāne returned to the present-day world, climbing again through each of the pūmotomoto on his descent. He placed the kete and stones in a whareniui called Whare-Kura, which had been designed for this purpose.³⁸ The kete were housed within the three main pou that stand in the centre of the building: te poutuaroro (immediately to your right as you enter the house), te poutokomanawa (standing in the centre of the whareniui) and te poutuarongo (located in the centre of the rear wall).³⁹ The kete uruuru-matua, containing all the knowledge relating to good, lies within te poutuarongo, at the rear. The kete uruuru-rangi, holding knowledge of rituals and associated practices, is located at the door. The last kete, kete uruuru-tau, holds malevolent elements.⁴⁰ It is kept within te poutokomanawa, located at the heart of the whareniui.

³⁴ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.11]–[2.12]. While (reflecting the account given by Awanuiārangi pūkenga) the protagonist here is Tāne, this pūrākau offers an important example of iwi histories' variation. According to some iwi narratives (including that adopted by Te Aka Matua o te Ture | Law Commission, reflected in our ingoa Māori and its meaning as explained in the inside front cover of our published papers), the baskets containing knowledge were obtained by Tāwhaki. Some accounts, furthermore, refer to Tāwhaki and his brother's attempted ascent to the heavens by way of two vines — Tāwhaki choosing, correctly, Te Aka Matua, the deeply established parent vine.

³⁵ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.11].

³⁶ For a powerful alternative pūrākau about Whiro's journey, who (as retold by Edmond Carrucan) also received a kete, see: Edmond Carrucan "Ko tikanga te mātāmua: ngā pūrākau, ngā pakiwaitara, me mihi, ka tika" (LLM Thesis, Te Whare Wānanga o Waikato | University of Waikato, 2021) at 116–119.

³⁷ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.14]. The kete are also commonly referred to as te kete tuauri, te kete tuatea and te kete aronui: see for example "kete o te wānanga" in John C Moorfield *Te Aka Māori-English, English-Māori Dictionary and Index* <maoridictionary.co.nz>.

³⁸ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.14]–[2.15].

³⁹ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.15]–[2.20]. Other names such as "pouāniwaniwa" or "pou te āniwaniwa" for te poutuarongo or "pou tāhū" (a name for the post supporting the ridge pole in the front wall) may be used: see John C Moorfield *Te Aka Māori-English, English-Māori Dictionary and Index* <maoridictionary.co.nz>.

⁴⁰ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.17].

- 2.29 This pūrākau locates whareniui as the structures that house knowledge and helps us to understand the metaphor of the whareniui as a place to engage with mātauranga. Just as the kete are housed, one within each pou, our knowledge sharing in this chapter echoes the same approach: each pou framing another aspect of understanding.

Hineahuone, Hinetītama, Hinenuitepō

- 2.30 Pūrākau relating to Hinenuitepō (daughter of the first union of Tāne and Hineahuone, lover of Tāne and now guardian of the afterworld) are among the narratives most widely known and shared. Following his parents' separation and his success in acquiring the kete containing knowledge, Tāne turned his attention to the creation of human life. Using onetapu, the sacred clay from Papatūānuku, Tāne moulded the first female form.⁴¹ He breathed life into her nostrils, and Hineahuone was created.⁴²
- 2.31 The union of Tāne and Hineahuone produced a daughter, Hinetītama.⁴³ Later, Tāne took Hinetītama as his wife and continued humankind's procreation. However, Hinetītama did not know that Tāne was also her father. She inquired often of Tāne who her pāpā was. Eventually, Tāne told her to look to the walls of the whareniui where she would see her father.⁴⁴ When Hinetītama realised that this meant her father was her lover, in her shame, she said:⁴⁵

I will leave this realm of Te Aotūroa and relocate to Rarohenga and there await our offspring to ensure they safely make passage when they pass from this world into the next. There I will take the name Hine-nui-te-pō.

- 2.32 Hinenuitepō fled from Te Aotūroa to Rarohenga, gateway to the underworld of Hawaiki. There she resides, awaiting her descendants' passing, to ensure that all who have died are guided safely from this world into the next and come to Rarohenga as their final resting place.⁴⁶ Her question to Tāne and his response are further reminders that whareniui (in this pūrākau, the walls of the house) hold knowledge.

Māui

- 2.33 Numerous pūrākau recount subsequent key events, continuing to show pūrākau as the inspiration for core tikanga norms and values. For example, several of the pūrākau about the achievements and final transgression of Māui (who is an important figure in Māori oral history) illuminate the importance of proper process or **kawa** and of the ritual prayers **karakia**.

⁴¹ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 14. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011, vol 1) at 17.

⁴² An alternate spelling is Hine-ahu-one. See Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 14. See too Doherty, Mead and Temara "Tikanga", Appendix 1 at [3.38], expanding on the derivation of the names Tāne and Hine (meaning male and female in reo Māori). "Nehu" is pollen, "tā" is to insert and "hī" is to pick up. Thus Tāne(hu) implies to implant ne(hu), Hi to receive ne(hu). Combining Ta and Hi, tahi (meaning one) implicitly reminds of this first union. It also suggests one is not complete without the other.

⁴³ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 14.

⁴⁴ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.25].

⁴⁵ Doherty, Mead and Temara "Tikanga", Appendix 1 at [2.25].

⁴⁶ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 14.

2.34 The successful and essential snaring of Tamanuiterā (the Sun) by Māui is preceded by a powerful karakia.⁴⁷ Following his discovery of Te Ika a Māui (the fish of Māui, a name for the North Island of Aotearoa New Zealand), his brothers violated **tapu** by carving up Te Ika a Māui before proper karakia procedures were completed. According to some iwi histories, this resulted in the brothers being turned to stone.⁴⁸ Perhaps the most significant pūrākau relating to exploits by Māui commemorates his fatal attempt to secure immortality for humankind by entering the vagina of Hinenuitepō to retrieve her heart. His failure to do so is linked back to a mistake made by his father when reciting the sacred tohi rite (a karakia made at birth).⁴⁹ Before crushing him to death, Hinenuitepō cursed Māui, saying: “ka mate a ao ne koe”, which translates as “as a result of your actions you will from here ever after be born and perish — you will continue to die from here evermore”.⁵⁰

Summary: creation narratives’ significance

2.35 Tikanga principles of founding importance are therefore sourced in these creation narratives. The pūrākau we have touched on allude to the sacred importance of **kawa** as a process for navigating states of **tapu** and **noa**, respecting **mana** and mediating between spiritual and physical dimensions. Earlier in this chapter, we identified references in creation pūrākau to the **whakapapa** and **whanaungatanga** of all things commencing with Ranginui and Papatūānuku. These pūrākau explain the inherent **mauri** and **tapu** of the elements and living things, by observing their connections with the atua. They identify the responsibility that atua were given to **tiaki** and **manaaki** (safeguard and care for) their kin. They refer to the requirement of **utu** for hara or wrongdoing, to restore **ea** — a settled state. The pūrākau have explained the part played by wharenui in both acquiring and safekeeping knowledge. According to the Awanuiārangi pūkenga, the very creation of wharenui “is attributed to Tāne as a result of the activities performed in accessing the kete and kōhatu from Te Toi-o-ngā-Rangi and bringing them back to Te Aotūroa [our present world]”.⁵¹ In Chapter 3, we return to each of the concepts which have been identified above in bold to consider their meaning more fully.

⁴⁷ Te Tāhū o te Ture | Ministry of Justice *He Hināture ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 24.

⁴⁸ Te Tāhū o te Ture | Ministry of Justice *He Hināture ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 25–26.

⁴⁹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 26.

⁵⁰ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.81].

⁵¹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.18].

TE POUTUARONGO: EXPLAINING THE SIGNIFICANCE OF THE WHARENUI AND MARAE ĀTEA

- 2.36 In this section, our discussion explains how the physical design of the whareniui wraps those within its walls in mātauranga, helps them to understand relationships and connects them with a Māori world view.⁵² As the pūrākau have helped to show, whareniui are constructions that house knowledge and are connected to finding knowledge. Traditional forms of whareniui do this in physical ways such as through architecture and whakairo (carving). Just as we have shown how pūrākau encode tikanga, whareniui teach and share tikanga architecturally and visually. This demonstrates tikanga Māori ways of encoding mātauranga and tikanga beyond the written word.
- 2.37 Before we begin our discussion of the physical features of whareniui, it is important to recognise that neither the whareniui nor the marae where the building stands are defined by specific physical attributes. Certain physical features are widely found. However, it remains important to be aware of variation and that, above all, marae are meeting spaces with a function of managing those interactions.⁵³ Our discussion of the physical aspects of whareniui again draws closely on the account developed by the Awanuiārangi pūkenga. While they provide an essential account of the traditional elements of whareniui and their widely shared meaning, necessarily their explanation generalises and is illustrated by referring to the whareniui on one marae: Te Whaiatemotu at Ruatāhuna.⁵⁴ Their generalised explanation and depictions of their own marae may not be representative of all others.
- 2.38 For a range of historical and cultural reasons, the features of other whareniui vary. Location, people's diverse choices on how to decorate or represent their own perspective, a lack of money or carvers, or the development of new designs and materials all contribute to variation. For example, not all whareniui feature pou whakairo, the intricately carved pou and tāhuhu described by the Awanuiārangi pūkenga. We have been told, in particular, that whareniui in northern regions generally do not. In some whareniui, photographs are placed on and around the ancestral poupou (posts in the walls) instead of embellishing the poupou with carving. Iwi and hapū will have their own unique accounts of the important local relationships embodied by their own whareniui. In respect of these, the reader must be guided by the knowledge held by iwi and hapū.
- 2.39 However, while there is always what the Awanuiārangi pūkenga term “performative” diversity in how people choose to represent their own perspective, basic common components are largely consistent and have meaning that is widely understood and

⁵² Compare Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.34]: “all tikanga must be underpinned by Iho Atua ... as is represented in the creation of whare”.

⁵³ To illustrate broader perspectives on the way marae may be conceived non-physically, see for example: Paul Tapsell “Taonga, marae, whenua — negotiating custodianship: a Māori tribal response to Te Papa: The Museum of New Zealand” in Annie E Coombes (ed) *Rethinking Settler Colonialism: History and Memory in Australia, Canada, Aotearoa New Zealand and South Africa* (Manchester University Press, Manchester, 2006) 86 at 91; I H Kawharu “Sovereignty vs rangatiratanga: the Treaty of Waitangi 1840 and the New Zealand Māori Council’s Kaupapa 1983” in Andrew Pawley (ed) *Man and a Half: Essays in Pacific Anthropology and Ethnobiology in Honour of Ralph Bulmer* (Polynesian Society, Auckland, 1991) 573. As Kawharu, for instance, writes at 577: “[f]or political purposes, at least, any piece of ground would suffice as a marae”. Tapsell at 91 exemplifies the way in which marae may be evoked metaphorically and their protocols then followed, to support tikanga.

⁵⁴ See Doherty, Mead and Temara “Tikanga”, Appendix 1, Section Two from [2.21] and Figures 1–6.

shared.⁵⁵ For example, those inside the whareniui stand between the pou, in a way that is reminiscent of the world revealed as Ranginui and Papatūānuku were forced apart:⁵⁶

... with Tāne placing poles between them to keep the two separated. Having achieved this, it was the first time the siblings were able to stand tall, as is reflected in the name Te Aotūroa, commonly now used to describe the world we live in now, ‘the world of standing tall’.

2.40 Through features such as these, whareniui can be seen as structures connected with other realms, reminding those within their walls that they are at the interface between two worlds. To show this, we focus next on the significance of five key physical features of the whareniui:

- (a) The open area in front of the whareniui, called the marae ātea.
- (b) Exterior features visible facing the whareniui (kōruru, maihi, amo and raparapa).
- (c) Porch, window and doorway features (mahau, matapihi, tatau, whakawae and pare).
- (d) Interior structural features (tāhuhu, heke, pou and poupou).
- (e) Wall panel designs (tukutuku).

Ātea, an open area in front of the whareniui



Figure 3: The ātea

⁵⁵ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [1.3]–[1.4] and [1.94]; Tai Ahu (wānanga with Te Aka Matua o te Ture Internal Advisory Group, Wellington, 26 February 2023).

⁵⁶ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.10].

- 2.41 The ātea is the open space in front of the wharenuī where formal ceremonies are held, such as to welcome manuhiri (visitors) or farewell those who have passed on. This space, joined to the wharenuī, represents the realm of Tūmatauenga (the atua representing human unpredictability and public dispute). It contrasts with the domain of Rongo (the atua responsible for peace) inside the house.⁵⁷
- 2.42 The ātea is understood to be a three-dimensional space, reaching from ground to the heavens. It links the wharenuī with a sense of the wairua or spirituality that is integral to the Māori world view, involving being surrounded by another world. Since mistakes made on the ātea affect a spiritual space, ceremonies occurring there have deep meaning and significance. These kawa (protocols) are described by the Awanuiārangi pūkenga as “tikanga wrapped in tapu” and “a set of rules that are bound by sacred conditions”.⁵⁸
- 2.43 Pōwhiri (welcome ceremonies) comprising detailed rules addressing all aspects of welcoming people to a marae are one example of kawa that occur on the marae ātea. Pōwhiri include karanga (a ceremonial call) to call visitors onto the ātea, whaikōrero (formal speeches) to acknowledge whanaungatanga among other matters, hongī (sharing breath by pressing noses) and kai (sharing food). These protocols facilitate removal of tapu from the visitors.⁵⁹ Those issuing the karanga call forward those who have passed as well as those physically present.⁶⁰ While these procedures may appear simple, they are designed to manage complex relationships and great care must be taken to ensure that they are properly observed.
- 2.44 The connection between the physical structure of the wharenuī, which is joined to the ātea, and the spiritual realm that the ātea represents is indicative of how wharenuī bring people into proximity with other spaces with deep meaning in Māori terms. The wharenuī signifies stepping into a place having passed through a space that navigates transition and manages tensions (the ātea).

⁵⁷ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.32] and [3.62].

⁵⁸ Pou Temara (wānanga held at Te Whare Wānanga o Awanuiārangi, 30 June 2022); Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.104].

⁵⁹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.8].

⁶⁰ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.35]. See too Siena Yates in interview with Te Raina Ferris, explaining the karanga cry and its connection with creation narratives, pūrākau: “Karanga is the voice that resides in your womb” (12 March 2023) E-Tangata <e-tangata.co.nz>. “[Karanga is] the voice that resides not in our throat but in our womb ... it’s a powerful voice because your womb is connected to your mother’s womb which is connected to her mother’s womb and right back to Papatūānuku ... the Māori karanga sound is designed to activate the sorrow that you hold inside yourself. It opens the cavern inside yourself and lets it come out in tears.”

Exterior front-facing features — kōruru, maihi, amo and raparapa

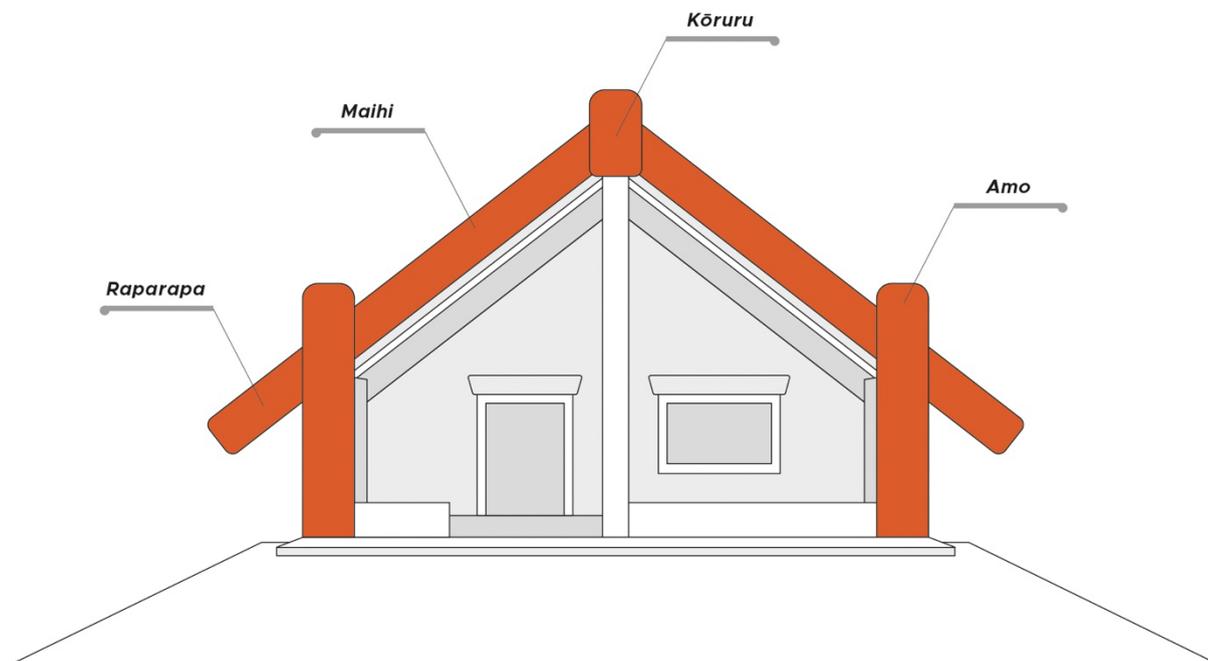


Figure 4: The kōruru, maihi, amo and raparapa

2.45 When facing the whareniui, a prominent kōruru (carved figure) can be seen at the apex. This is an ancestor and a sentry, which stands watch for the people within.⁶¹ Barge boards, called maihi, descend either side of the kōruru to meet the vertical amo, a concept connected with kaiamo (pallbearers). According to the Awanuiārangi pūkenga, the amo signify carrying the ancestors, who are represented for instance in the carvings or the name of the whareniui. This further illustrates the close connection between the living and the dead in the Māori world view.⁶² The parts of the barge boards that extend beyond the amo are the raparapa. In combination, these features of the whareniui are said to resemble a person with outstretched arms, with kōruru being the face, maihi the arms, amo the feet and raparapa the fingers.⁶³ The symbolism suggests both the importance of manaakitanga (extending generosity and care for others) and the identity of the whareniui as a revered ancestor. Traditionally, before the arrival of nails and modern fastening, the amo of the house would be built leaning in. In this way, the amo were critical in holding the house up and together.⁶⁴

⁶¹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.22]; and see Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuarua* (Wai 262, 2011, vol 1) at 35: “Almost everything about a whare tupuna was ancestral. It would be named after an ancestor, and the image of that ancestor would be placed at the apex and most forward point of the gabled roof.”

⁶² Wiremu Doherty, peer review comment to Te Aka Mata o te Ture | Law Commission (25 November 2022).

⁶³ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.22].

⁶⁴ Wiremu Doherty, peer review comment to Te Aka Mata o te Ture | Law Commission (25 November 2022). Although this is less often seen in whareniui today, some do continue this practice.

Porch, window and doorway features — mahau, matapihi, tatau, whakawae and pare



Figure 5: Mahau, matapihi, tatau, whakawae and pare

2.46 Those moving onto the wharenui veranda enter the mahau: the porch space beneath the matapihi (window) of the house, where special attention is again given to the relationship with those who have passed on. At some marae, tūpāpaku (deceased) may lie there in state during the tangihanga. The casket of a deceased may be passed through the matapihi, being the passageway for those who have left this world.⁶⁵ The tatau (door) to the wharenui is the passageway for the living. Carved pou surrounding the tatau are known as whakawae, and above them is the pare (the doorway lintel). Figures carved into the whakawae represent the intergenerational network of people and leaders, past, present and future.⁶⁶ Commonly there will be a figure at the centre of the pare with a thread from between its legs ending in the mouth of figures located at the edge of the pare. The figure is a reference to Māui’s fatal attempt at immortality.⁶⁷ It signifies the presence of Hinenuitepō, signalling that those passing beyond the doorway are entering an ancestral realm and “another world, a world that connects us to our gods and ancestors”.⁶⁸ Poupou (a word that can be used to mean “old folk” in addition to pillars or posts) standing in the wharenui walls provide a further example of ancestors’ presence. The mouths of these figures are cut off or obstructed from view, suggesting that these figures are looking into our world through portals.⁶⁹

⁶⁵ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.23].

⁶⁶ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.24].

⁶⁷ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.24].

⁶⁸ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.26] and Figure 3.

⁶⁹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.26].

Interior structural features — tāhuhu, heke, pou and poupou

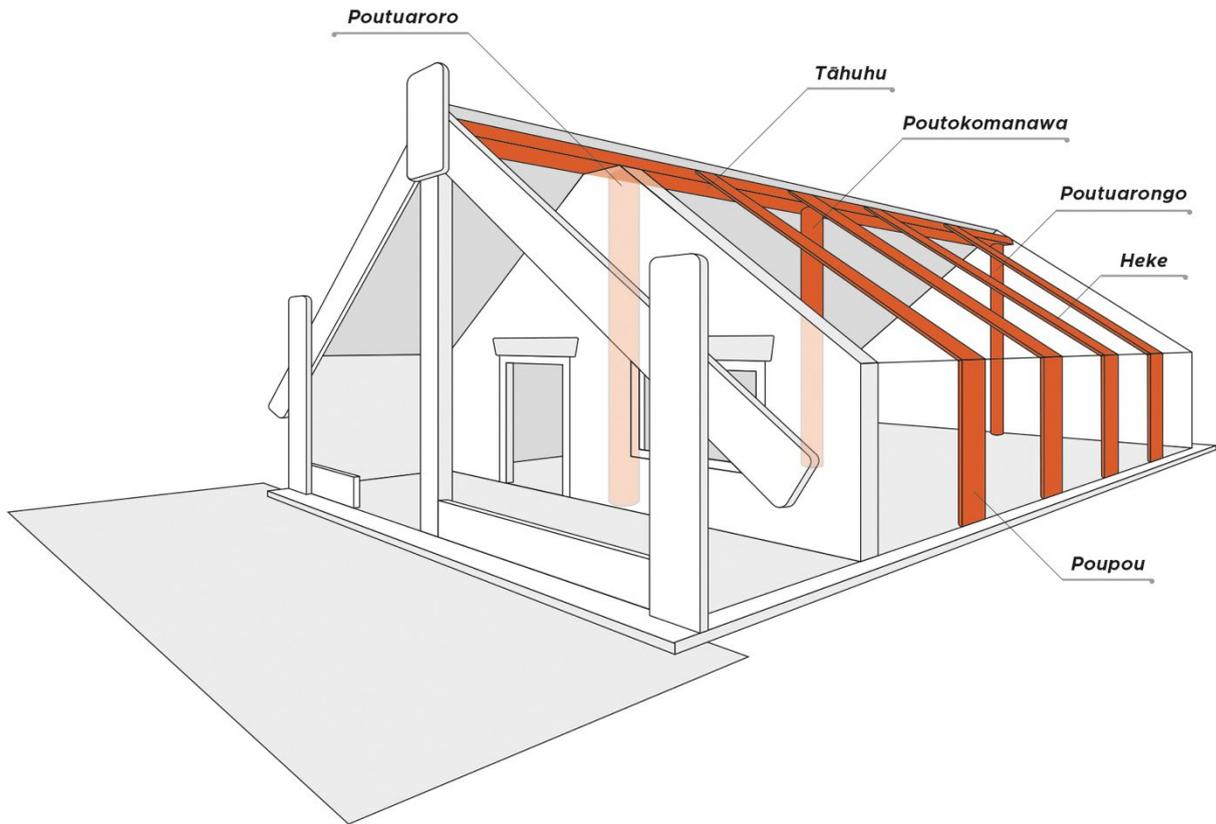


Figure 6: Tāhuhu, heke, pou and poupou

2.47 Proceeding through the whareniui doorway, those entering see before them a line of central pou, each joined to the ridge pole called tāhuhu. The tāhuhu begins outside, above the mahau, and is commonly carved with two figures representing Ranginui and Papatūānuku.⁷⁰ Within the whareniui, adornment of the tāhuhu with repetitive koru designs that disappear out the back end of the whareniui remind those present that there was a time before them and there will be a time after.⁷¹ The heke or rafters falling from the tāhuhu represent the children of Ranginui and Papatūānuku. The heke land on poupou, each representing key ancestors and connected to the ground and the living.⁷² Whareniui therefore structurally reiterate the connections between the known world and Ranginui and Papatūānuku, through ancestors and the atua.⁷³ The Awanuiārangi pūkenga explain that, within the whareniui:⁷⁴

Symbolically, we are located at the feet of our ancestors — the ancient ones will be represented in carvings, and the more recent will have pictures hung between the poupou.

⁷⁰ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.29].

⁷¹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.29].

⁷² Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.30].

⁷³ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.2].

⁷⁴ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.33].

- 2.48 The design of whareniui suggests that those within them are accountable to their ancestors and responsible for ensuring the practice and performance of mātauranga are correct. As the Awanuiārangi pūkenga write, “having the authors of the known world present changes the accountabilities”.⁷⁵

Wall panel designs — tukutuku

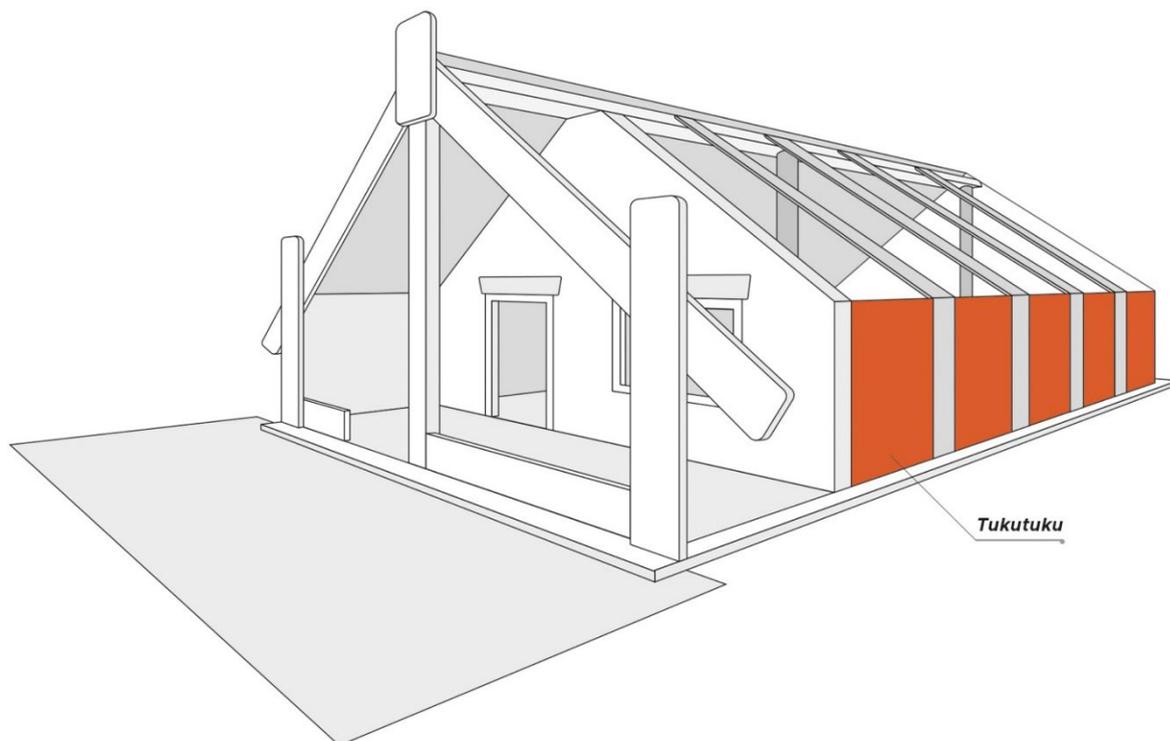


Figure 7: Tukutuku

- 2.49 As Chapter 1 explains, tukutuku panels are a traditional feature of whareniui interior walls. While tukutuku may not be present in all whareniui, when present these decorative panels are positioned between the poupou. Standing vertically, tukutuku also symbolically ascend from the ground towards celestial realms. In this way, the location of tukutuku within the whareniui makes links both to atua and to the ancestors. Tukutuku are made of laticework, lashed together with stitched patterns by two workers passing strands through the open spaces of the lattice that divides them. The tukutuku surrounding people in the whareniui therefore wrap them in ideals and imagery of connection and co-operation.⁷⁶ As Wiremu Doherty, one of the Awanuiārangi pūkenga, considers, “the tukutuku connect us”.⁷⁷ In te ao Māori, tukutuku signify connection with ancestors and other realities.

⁷⁵ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.3].

⁷⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims* (Wai 785, 2008) at 37; Erenora Puketapu-Hetet *Maori Weaving* (Longman, Auckland, 1999) at 29–30.

⁷⁷ Wiremu Doherty, peer review comments to Te Aka Mata o te Ture | Law Commission (14–15 February 2023).

TE TĀHUHU: HOW WHARENUI CONNECT WITH THE KAUPAPA OF THIS STUDY PAPER

- 2.50 Te tāhuhu is the ridgepole of the whareniui. In this final section, we consider how the whareniui expresses tikanga Māori values connected with the kaupapa (purpose) of this Study Paper. As Jackson considered, tikanga itself may be likened to the whareniui.⁷⁸ They are both structures protecting people from disorder and imbalance.
- 2.51 Our review of the features of whareniui has shown how they embody a space between past and present, this world and that of the ancestor-gods, atua. Symbolically, those positioned inside the whareniui therefore stand at the threshold of a portal to other realms. The Awanuiārangi pūkenga have described the significance of the whareniui as an in-between space, through which “[u]pon entering the whare, we are entering the portal that connects us to worlds, and levels of consciousness”.⁷⁹ As they emphasise, an orientation such as this surrounded by mātauranga and immersed in te ao Māori is a first move towards building understanding of tikanga. In the context of this Study Paper, the whareniui can serve as a reminder for those engaging with tikanga that (even if only metaphorically) they too are in such a space, touching te ao Māori and surrounded by watchful guardians.
- 2.52 More immediately, whareniui, which “hold the ancestral memory of the tribe”, are physical structures that implicitly link people’s present-day practice and decision making to the ancestors.⁸⁰ Their imagery reminds those within of their everyday obligation “to maintain the appropriate practices and relevant knowledge drawn from the walls of the house”:⁸¹
- The house is not only symbolic in that it is given by the gods, but it also contains the knowledge from them on how we should live our lives. This requires that great care must be taken to protect and maintain this knowledge and those who choose to access it. It was understood knowledge was power and care needed to be taken to ensure those that accessed it and use it were appropriately instructed on the duty of care required.
- 2.53 In this way, whareniui reflect a responsibility to ensure that mātauranga and tikanga are respected. They guide people’s conduct by underlining the care to be taken in relation to that knowledge.
- 2.54 To reiterate a point made earlier, acceptance of a Māori world view is not required to make sense of these responsibilities. Instead (provided their connection to a Māori world view is understood), they might be grasped at the level of a general principle of conducting oneself with both respect and caution whenever engaging with tikanga. Implicitly, positioning oneself within the whareniui also alludes to where the whareniui stands — that is, upon the marae where “[t]he entire system ... is governed by tikanga”.⁸²

⁷⁸ Moana Jackson *The Maori and the Criminal Justice System: A New Perspective / He Whaiapaanga Hou* (Department of Justice, Study Series 18, 1987–1988, part 2) at 43.

⁷⁹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.26] and illustration at Figure 5.

⁸⁰ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.60].

⁸¹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.34], [3.3] and [3.47].

⁸² Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.38].

- 2.55 The physical construction of wharenuui also expresses tikanga. Tikanga concepts represented in the physical design of the wharenuui include whakapapa,⁸³ whanaungatanga,⁸⁴ and kotahitanga (unity).⁸⁵
- 2.56 The familial connections that, according to Māori, formed the world, are represented with the tāhuhu standing for Ranginui and the heke (rafters) representing his children. The ancestral poupou, or posts, in the walls touch whenua (the ground, placenta) and their mother, Papatūānuku. In this way, wharenuui physically conceptualise whakapapa. Whakapapa is “[t]he rationale that defines what parts of the house fit together”.⁸⁶
- 2.57 Temara explains that wharenuui design can also be seen as an expression of the concept of collective unity, kotahitanga:⁸⁷
- ... the whare has a single room — there are no elevated sections or separate rooms. It is open and on the same level where everyone can see each other to support the singular collective of ‘kotahitanga’ (unity). This notion of kotahitanga is a fundamental component of te ao Māori — it speaks to the collective being united and being one.
- 2.58 Everyone from the collective, Temara emphasises, “can enter and be in the presence of the atua and ancestors that performed the historically important deeds for the collective ... all are welcome and have access”.⁸⁸
- 2.59 Again, these are further ways in which the wharenuui points to values that can guide behaviour. It expresses the “notion of things being connected”.⁸⁹ A widely sung waiata composed by Dr Hirini Melbourne illustrates the structural significance of wharenuui and the critical work that the house does to connect people:⁹⁰

Ko Ranginui e tū ake nei, hei tuanui	Ranginui stands above us, a roof
Ko Papatūānuku e takoto nei hei whāriki	Papatūānuku lies beneath us, a mat
Ko te reo me ngā tikanga hei tāhuhu	Language and tikanga forming the ridgepole
Ko te iwi hei poutokomanawa	And the people the main support
Ko te whare whakahirahira o te iwi e	This is the most important house of the people
Hei whakairi i ngā tūmanako	Is for hanging the hopes
I ngā wawata i ngā moemoeā	The aspirations and the dreams
Ko tēnei te wā o te wao nui tūtakitahi	This is a time of the forest to meet as one
Ko tēnei ko koe ko Tānewhakapiripiri	This is you, Tānewhakapiripiri

⁸³ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.17].

⁸⁴ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.7].

⁸⁵ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.36] and [3.76]–[3.77].

⁸⁶ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.17].

⁸⁷ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.36].

⁸⁸ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.76].

⁸⁹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.7].

⁹⁰ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [3.70]. We extend our gratitude to Dr Melbourne’s whānau for allowing us to share this waiata.

2.60 This chapter has described how, according to Māori narratives, whareniui are “created by the gods ... as anchor points for us”.⁹¹ We have focused primarily on connections that whareniui make in a metaphysical sense with an ao Māori world view — with wairua, creation stories, and the realms of the ancestors and the atua. However, as the waiata above suggests, whareniui embody relatedness in other ways, including expressing connections with the whole of the natural world by making the heavens (Ranginui) and the whenua (Papatūānuku) parts of their architecture. The wooden ancestral posts holding up the roof and rafters of the house remind people of being one with Tāne, as are the forests and all things of the forest. The heke, symbolising Tāne’s siblings, are implicit reminders of familial links to all other parts of the natural world and forces that shaped the world, such as the sea (Tangaroa), seismic events (Rūaumoko) and environmental winds and storms (Tāwhirimātea).⁹² In these multiple ways, the physical designs of whareniui stand as reminders about principles such as unity, ancestral connection and being as one with the natural world, relevant to managing relationships and understanding tikanga today.

CONCLUSION

- 2.61 While we have lent heavily in this chapter on the allegorical and symbolic relevance of whareniui, they are also places of important practical relevance. Whareniui remain today a customary place for wānanga (knowledge sharing) where important relationships are explained and past knowledge is available to draw on when contentious issues arise. Challenges are taken to the marae to resolve, where the thoughts and influence of past decision makers help inform the decisions that must be made for today.⁹³ For readers of this Study Paper, introducing themselves to the ideas held within the whareniui represents a step towards knowledge sharing and a Māori-centred shift. In summary, in this chapter we have shown three ways in which the metaphor of the whareniui can serve as an entry point into a fuller and more authentic understanding of tikanga.
- 2.62 First, the whareniui is, according to pūrākau, the place through which knowledge is gained and where it is housed. It is a purpose-built portal between two systems: the ground (Papa) and Ranginui’s many heavens. Therefore, it reaches to ancestral times and spaces.
- 2.63 Second, the whareniui shows how mātauranga and tikanga Māori might be expressed (for instance, visually or allegorically). Therefore, it holds knowledge for us now.
- 2.64 Third, the whareniui expresses tikanga principles capable of taking us onwards to the continuing work that this Study Paper aims to support of understanding tikanga and tying it into a legal context. Consistent with this, we rely upon the whareniui framework again in Chapter 3, where it continues to be an overarching frame around which to build knowledge as we turn to address tikanga concepts.

⁹¹ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.60].

⁹² Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.63].

⁹³ Doherty, Mead and Temara “Tikanga”, Appendix 1 at [2.39].

CHAPTER 3

Tikanga as a system of norms

[Tikanga Maori] needs to be more than just a grab bag of amorphous concepts and principles if it is to have credibility as a coherent, workable system of law within the Maori community and wider New Zealand society. It needs to be understood as having internal coherence and consistency. This in turn, requires the articulation of a structured framework within which tikanga principles can be applied. It also requires decision-makers capable of properly appreciating and applying those principles.

Associate Professor Nin Tomas¹

INTRODUCTION

- 3.1 In this chapter, we explain some important and common tikanga concepts, showing how they function as a coherent, integrated system of norms not a mere “grab bag” of principles or values.² We also explain how tikanga operates in Māori life in jural ways. By this, we mean that it relates to powers, rights, duties, liabilities and other interests or restrictions that govern relationships. By seeing tikanga as a system and by providing a jural analysis of the important purposes of tikanga concepts and how they may be grouped, our approach to tikanga in the chapter differs from most explanations. We have adopted this approach because, as Associate Professor Nin Tomas suggested, articulating a “structured framework within which tikanga principles can be applied” gives a foundation for engagement between tikanga and state law.³
- 3.2 We begin the chapter by explaining why recognising tikanga as a coherent system is important and using jural language is appropriate. We discuss the importance of beginning in Māori reality when considering tikanga and reiterate the significance of

¹ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 33. Whereas Tomas uses “tikanga Maori” and “Maori custom law” interchangeably in her thesis, we are, as identified in Chapter 1, preferring “tikanga” and “tikanga Māori”.

² Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 33.

³ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 33.

inviting readers to ground themselves within the whareniui to orient their thinking in a Māori world view. Then, comprising most of the chapter, we introduce some main tikanga concepts that are also in active legal use, describing them as categories of norms.

- 3.3 When explaining tikanga concepts, our priority has been to ensure that the explanations reflect mātauranga. We have used several methods for doing so.
- 3.4 First, as we outline the meaning of each concept, we draw on tikanga expertise from throughout Aotearoa New Zealand utilising sources that go beyond formal scholarship. Following a brief general explanation, we set out what we have termed “expressions” of each concept. These “expressions” sections are compiled from the review by Natalie Coates and Horiana Irwin-Easthope of tikanga expert evidence presented in court and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal (Waitangi Tribunal) proceedings, published in Appendix 2.⁴ Their research brings to light iwi and hapū perspectives that enrich our explanations of each concept. They also confirm the shared nature of these tikanga concepts, revealing a widely held and consistent understanding.
- 3.5 Second, as we explore the jural aspect of each tikanga concept, we rely on the ways in which Māori jurists and other eminent tikanga scholars describe the rights, powers, authority or obligations that are connected with the concept. Their explanations show the parts these tikanga concepts play in a system of norms.
- 3.6 Third, tikanga is ultimately concerned with the practicalities of how to provide order and justice in a complex, ever-changing landscape. Therefore, to ground the theoretical explanation of tikanga, we also provide examples of tikanga in action. These serve as illustrations of how the concepts can be practically understood.
- 3.7 Finally, the chapter reconnects with the whareniui, discussing how whakapapa (genealogical connection) sets boundaries around tikanga concepts. Implicitly, the whareniui structurally symbolises or embodies whakapapa, reinforcing its importance to an understanding of tikanga.

UNDERSTANDING TIKANGA AS A SYSTEM

- 3.8 It is important to understand that tikanga is a complete system of principles for “the right or correct way of doing things”.⁵ These principles order Māori affairs and so regularly influence behaviour that they have been referred to as Māori custom.⁶ Tā Edward Taihakurei Durie refers to tikanga principles as conceptual regulators.⁷ Reverend Māori

⁴ Natalie Coates and Horiana Irwin-Easthope “Kei raro i ngā tarataru, ko ngā tuhinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors: tikanga as expressed in evidence presented in legal proceedings” (paper prepared for Te Aka Matua o Te Ture | Law Commission, 2023). Subsequent references to this paper in this chapter are abbreviated as follows: Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2.

⁵ See: Bishop Manuhia Bennett quoted in Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 16; see also Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 421, citing seminar with Bishop Manuhia Bennett, Bishop Whakahuihui Vercoe and Te Arika Morehu (23 March 2000, unpublished transcript Te Pū Wānanga Transcript No 2, Te Mātāhauariki Research Institute).

⁶ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 3–4; David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name, dated 10 November 1998 with minor update 2020) at 8.

⁷ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 4–5.

Marsden considered them “first principles”.⁸ Te Ahukaramū Charles Royal refers to “kaupapa”, a term he identifies as representing “movement of a base of values into one’s understanding and perception of the world”.⁹ As Professors Tā Hirini Moko Mead and Tā Pou Temara have said:¹⁰

... when a new matter or issue arises for resolution, recourse is always had to the fundamental principles that underlie tikanga as well as drawing on historical precedent and how tikanga has been recognised in similar situations.

- 3.9 We agree with Tomas that “there is a need for a better understanding of how [tikanga] fits together as a coherent, principle-based system of law”.¹¹ In this Study Paper, we are deliberately setting out a framework for understanding tikanga principles that reaches beyond the common description of tikanga as values-based and context-dependent.¹² Tikanga is sensitive to context and evolves according to circumstance. However, more can be said about how its concepts work together to govern and guide behaviour. Showing how core concepts are connected both explains tikanga as a normative system and safeguards tikanga by recognising that it functions as an integrated, comprehensive whole.¹³ As Te Aka Matua o te Ture | Law Commission (the Commission) noted in 2001:¹⁴

As always in tikanga Māori, the values are closely interwoven. None stands alone. They do not represent a hierarchy of ethics, but rather a koru, or a spiral, of ethics. They are all part of a continuum yet contain an identifiable core.

- 3.10 Perceiving the component parts of tikanga as integrated can safeguard tikanga by ensuring that it is not treated as simply a “grab bag” from which to extract isolated values.¹⁵ Those engaging with legal or legislative directives to consider individual tikanga

⁸ Māori Marsden in Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 66.

⁹ Te Ahukaramū Charles Royal “An organic arising: an interpretation of tikanga based upon the Māori creation traditions” in Ngā Pae o te Māramatanga *Tikanga Rangahau Mātauranga Tuku Iho | Traditional Knowledge and Research Ethics Conference Proceedings 2004* (Ngā Pae o te Māramatanga, Auckland, 2005) 206 at 221.

¹⁰ Hirini Moko Mead and Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [33], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [2.37]; see also David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name, dated 10 November 1998 with minor update 2020) at 9.

¹¹ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 34.

¹² David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name, dated 10 November 1998 with minor update 2020) at 9; Joan Metge “Commentary on Judge Durie’s ‘Custom law’” (paper presented to Te Aka Matua o te Ture | Law Commission, 1996, with errata 2020); Vivian Tāmami Kruger Statement of evidence, 2 June 2020 at [38], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [1.6]. See also *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [74] where the majority noted: “[i]t is dangerous to apply tikanga principles, even important ones, as if they are rules that exclude regard to context”; *Doney v Adlam* [2023] NZHC 363 per Harvey J at [103]: “tikanga will always be suspicious of unbending rules”.

¹³ See generally Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006); Caren Fox “Ko te mana te utu: narratives of sovereignty, law and tribal citizenship in the Pōtikirua ki Te Toka-a-Taiau district” (PhD Thesis, Te Whare Wānanga o Awanuiārangi, 2023); Māmari Stephens “‘Kei a koe, Chair!’: the norms of tikanga and the role of hui as a Māori constitutional tradition” (2022) 53 *Victoria University of Wellington Law Review* 463 (describing five legal norms of tikanga Māori and their interaction).

¹⁴ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 29.

¹⁵ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 33.

principles will benefit from engaging with tikanga holistically and understanding the work that tikanga concepts do within the overall structure of norms.

- 3.11 An appreciation of the analytical coherence and consistency of tikanga also helps to dispel continuing doubts about the legitimacy and efficacy of tikanga as a source of regulation and of identifiable rights and obligations.¹⁶ Tikanga has the coherence and consistency that are vital for any legitimate regulatory system. We agree with Tomas that this emphasis on tikanga as an integrated system is not inconsistent with the proposition that tikanga is also evolutionary and pragmatic. Perceiving tikanga as a framework does not alter its inbuilt flexibility.¹⁷

The fear that such a framework would lead to rigid application of tikanga principles as fixed rules, is to misunderstand the nature of principle-based decision making. Principles by their nature, are flexible tools that can be applied to a variety of different situations to produce significantly different outcomes.

USING JURAL LANGUAGE

- 3.12 In this Study Paper, we adopt the language of norms to describe tikanga. This is consistent with the approach of Associate Professor Māmari Stephens who argues:¹⁸

Māori processes and self-definition are perhaps better respected on their own terms by the word “norm” or “legal norm” (rather than “law”, “lore”, and “custom”) to describe behaviours in dynamic Māori communities.

- 3.13 We also explain how tikanga can be considered in orthodox jural terms. By “jural”, we mean that tikanga involves powers, rights, duties, liabilities and other interests or restrictions that govern relationships. There is nothing unusual about using jural language and concepts to describe tikanga. On the contrary, tikanga experts, authoritative texts and jurists often do so. Mana, for example, is commonly referred to as “authority”, “power” or “right”.¹⁹ There are frequent references to the “law” of tapu (prohibition,

¹⁶ See Anthony Willy “The Peter Ellis decision — and whether Maori customs have any place in the common law” (1 November 2022) New Zealand Centre for Political Research <www.nzcpri.com>; John Robinson “Tikanga in law: what does it mean?” (20 June 2021) New Zealand Centre for Political Research <www.nzcpri.com>; Graham Taylor “We need to talk about tikanga” (10 March 2023) Capital Letter <www.capitalletter.co.nz>.

¹⁷ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 33.

¹⁸ Māmari Stephens “‘Kei a koe, Chair!’: the norms of tikanga and the role of hui as a Māori constitutional tradition” (2022) 53 Victoria University of Wellington Law Review 463 at 470.

¹⁹ See for example Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 178–182; Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 69; David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name, dated 10 November 1998 with minor update 2020) at 11.

restriction).²⁰ Moana Jackson applied the concept of “tipuna title” to explain iwi and hapū relationships to whenua (land):²¹

Tipuna title may be described as the physical and spiritual interests that collectively vested in Iwi or Hapū as part of their mana or rangatiratanga in regard to whenua. It is title that exists within what may be termed “relational interests” that is the interests that inhered in the relationships of a particular whakapapa and the willingness of our people to develop existing or potential relationships with others.

- 3.14 That said, casual or careless use of jural language to describe tikanga can also be misleading.²² This is because terms such as “power”, “right” or “title” have different connotations in a Māori context. It is important not to simply presume that tikanga translates into norms exactly equivalent to those of non-Māori law. Tikanga is closely influenced by a Māori world view in which assumptions resting on notions such as the importance of individual rights or private ownership of whenua do not hold true. For example, as Jackson explained, individual alienable land ownership does not correspond with the tikanga-based relational interests in respect of whenua:²³

The relational rights that flow from tipuna title are not the same as Pakeha property rights. Those rights are predicated on an individual exclusivity. Relational rights presuppose individual entitlements within a collective exclusivity.

- 3.15 Accordingly, we caution against wrongly transplanting tikanga concepts directly into established common law categories to make sense of them. Tikanga concepts are grounded in norms that differ from dominant non-Māori norms. They may have broader relational, ethical, moral and spiritual elements. It is important to understand this complexity when seeking to engage with tikanga.

TIKANGA CONCEPTS — OUR APPROACH

- 3.16 In the sections below, we consider a core group of concepts that are central to tikanga as a system, grouping them in five categories:²⁴

(a) Concepts of connection: whakapapa and whanaungatanga, which we describe as **structural** norms. All of te ao Māori (the Māori world) is shaped by reference to these

²⁰ See for example Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 404; Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 5 and 174; Ani Mikaere *The Balance Destroyed* (Revised ed, Te Wānanga o Raukawa, Ōtaki, 2017) at 38; Makereti Papakura *The Old-Time Maori* (Victor Gollancz, London, 1938) at 25.

²¹ Moana Jackson “Tipuna title as a tikanga construct re the foreshore and seabed” (March 2010) <www.converge.org.nz>; see also Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 40–41.

²² Arnu Turvey “Te ao Māori in a ‘sympathetic’ legal regime: the use of Māori concepts in legislation” (2009) 40 *Victoria University of Wellington Law Review* 531. See also Catherine J Iorns Magallanes “The use of tangata whenua and mana whenua in New Zealand legislation: attempts at cultural recognition” (2011) 42 *Victoria University of Wellington Law Review* 259; Mihiata Pirini and Anna High “Dignity and mana in the ‘third law’ of Aotearoa New Zealand” (2021) 29 *New Zealand Universities Law Review* 623.

²³ Moana Jackson “Tipuna title as a tikanga construct re the foreshore and seabed” (March 2010) <www.converge.org.nz>.

²⁴ Given the depth in which each of these concepts is explained later in the chapter and also our wish to build a nuanced understanding of them in this chapter, we depart here from the Study Paper’s general approach of providing simple definitions for all of the concepts named. For each, a full explanation follows.

concepts, and the relationships that they describe establish an underlying normative frame.

- (b) Concepts of equilibrium or balance: mauri, utu and ea. In Māori society, these concepts function as **prescriptive** norms, which must be maintained.
- (c) Concepts relating to the status of an entity: mana, tapu and noa. These order Māori society and are significant in sustaining and protecting mauri (which refers to life force, or the essential quality and vitality of all things). We consider mana, tapu and noa are **relational** norms that achieve regulative purposes. Relationships are organised and interactions defined by reference to these concepts.
- (d) Concepts of responsibility, which can be identified as **associated** norms: kaitiakitanga, manaakitanga, aroha and atawhai. These are closely connected with the concepts of mana and whanaungatanga.
- (e) **Processes and procedures, or kawa.** These are significant in upholding all of the norms we refer to above. They administer tikanga as a system and are means of regulating mauri, mana, tapu and noa. We give four examples: pōwhiri (a welcome), rāhui (a restriction), muru (a ritual of claiming compensation) and karakia (ritual prayer).

3.17 This list of concepts is not intended to be exhaustive. We have needed to select a group of concepts on which to focus.²⁵ In the 2001 Study Paper *Māori Custom and Values in New Zealand Law*, the Commission explained five important values underpinning tikanga: whanaungatanga, mana, tapu, utu and kaitiakitanga.²⁶ In selecting the present list of concepts, we have been guided by a central set of tikanga concepts identified by Professors Wiremu Doherty, Tā Hirini Moko Mead and Tā Pou Temara of Te Whare Wānanga o Awanuiārangi (the Awanuiārangi pūkenga),²⁷ and the extensive review of expert tikanga evidence given in Waitangi Tribunal and court proceedings undertaken by Coates and Irwin-Easthope.²⁸ In particular, the latter has served to check that the concepts on which we focus below are broadly shared, widely present and in active use in modern proceedings.

TE WHARENUI AND AWARENESS OF WAIRUA

3.18 Before we turn to explore the tikanga concepts, we again ask the reader to make the mental shift to a mātauranga-immersed space. As Chapter 2 proposes, the wharenuī provides a useful anchor point for those seeking to engage with Māori knowledge and understand tikanga. We have reviewed how, according to Māori perspectives, wharenuī connect with other parts of Māori existence, surpassing the physical world. They reflect in multiple ways the notion of a multi-layered reality (wairua) which is intrinsic to te ao Māori and vitally important to understand. As Tomas puts it, “[t]he Maori worldview

²⁵ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

²⁶ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 28–40.

²⁷ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023), Section Three. See Appendix 1.

²⁸ See Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2.

stresses the importance of te Ao Wairua (the spiritual realm) as being the source of all things”.²⁹

- 3.19 In Chapter 2, we stress that it is not necessary to adopt this symbolism to engage with it. Nevertheless, for those engaging with tikanga, awareness that in a Māori world view “there is no rigid distinction between the physical and the spiritual realms” is needed.³⁰ Marsden explains that:³¹

... the Māori does not, and never has accepted the mechanistic view of the universe which regards it as a closed system into which nothing can impinge from without. The Māori conceives of it as at least a two-world system in which the material proceeds from the spiritual, and the spiritual (which is the higher order) interpenetrates the material physical world of Te Ao Mārama.

- 3.20 For readers who are new to tikanga, imaginatively orienting themselves within the wharenuī serves as a reminder to be aware of these other aspects of a Māori world view. Wairua — the constant sense of multiple, spiritually-imbued dimensions — is the context in which tikanga lives. Aspects of tikanga are concerned with sustaining wairua and the connections that it represents. To illustrate how this can have practical implications for those engaging with tikanga concepts in a legal context, in resource management proceedings the meaning of environmental “effects” from a Māori standpoint may include effects that arise in other dimensions.
- 3.21 Later in the chapter, we will also suggest that the whakapapa that wharenuī symbolise is important to hold in mind, because it sets parameters when interpreting and applying tikanga concepts.

STRUCTURAL CONCEPTS OF CONNECTION: WHAKAPAPA AND WHANAUNGATANGA

- 3.22 The closely related concepts of whakapapa and whanaungatanga, describing relationships, frame Māori existence. Each of these concepts reflects the importance in te ao Māori of all things being connected.³² By establishing connections, whakapapa and whanaungatanga define identity, status and the terms of relationships. They prescribe standards and behaviours designed to maintain relationships. We consider them to be structural norms of foundational importance to tikanga. They provide the underlying normative frame.

²⁹ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 66 and 60 (“Wairua is Maori existence writ large”), and generally 53–60. For others’ consideration of the importance and meanings of wairua within te ao Māori, see further: Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1994) at 152; Māori Marsden in Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 47; Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 8; Rima Eruera Statement of evidence, #F23 at [112], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.70]; Khylee Quince s 27 report, 18 September 2018 at [9], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [2.58]; Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 10–11.

³⁰ Ani Mikaere *Colonising Myths — Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 318.

³¹ Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 20.

³² Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.7].

Whakapapa

3.23 In broad terms, whakapapa can be understood as a way of mapping knowledge. It connects all life, and is central to Māori society and to governing relationships in Māori society.³³ The most well-known aspect of whakapapa is that it records genealogical layers and notes connections to place and community, in ways that may reach beyond human ancestors. However, reflecting the fact that in addition to “genealogy” whakapapa may also mean to “recite in proper order”,³⁴ whakapapa is also a means of making other links between events and ideas and in this way providing explanations. For example:³⁵

When we map and track the exploits of our ancestors’ whakapapa it helps establish a chronology of events and practices that are critical to mapping the knowledge systems of the iwi. Here, whakapapa maps the epistemology of the collective. It maps when a particular practice occurred, where it occurred, and who were the pivotal participants.

3.24 Through this chronology, whakapapa “links the people and the practices of the people to the landscape” — for example, by noting significant sites where incidents occurred.³⁶ It is a means of mapping how significant events have been “wrapped into the knowledge system for the collective iwi”.³⁷ As Professor Tā Mason Durie considers, whakapapa is the fundamental basis of the Māori knowledge system.³⁸

EXPRESSIONS OF WHAKAPAPA

Māori connection with all things starts with the whakapapa (genealogy) of creation.³⁹

The world and everyone in it is part of a huge interlocking family tree.⁴⁰

³³ Te Tāhū o te Ture | Ministry of Justice *He Hinātoro ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 27.

³⁴ Te Aka Māori Dictionary <maoridictionary.co.nz>.

³⁵ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [2.37].

³⁶ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.66].

³⁷ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.66]; see too Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuarua* (Wai 262, 2011, vol 1) at 237–239 and *Te Taumata Tuatahi* (Wai 262, 2011) at 127.

³⁸ Mason Durie Statement of evidence, #K14 at [2.2], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.4].

³⁹ Tamati Waaka Statement of evidence, 4 January 2017 at [20], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.4].

⁴⁰ Hirini Moko Mead and Pou Temara Statement of tikanga, 31 January 2020 at [91], as cited in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

Whakapapa connects us spiritually to our past and defines the present.⁴¹

Whakapapa necessitates a focus on relationships: between people and their non-human relatives; between past, present and future generations. It reminds us that relationships must be carefully managed because everything in our world is interconnected.⁴²

Whakapapa, the cultural template through which we understand our descent and ancestral relationships, refers to a process of placing in layers, which reminds us that relationships between and amongst us individuals and social groupings, are layered upon each other and extend as wide as our whānau and intergenerational connections reach ...⁴³

Everything from weather events, the stars, planets and clouds, fish, birds, trees and flowers, stones and volcanic events, wellbeing, life, illness and death can be explained as a result of the creation narrative interlinking all of these components in a web of whakapapa.⁴⁴

... we use the concept of whakapapa both to analyse into separate parts and to bind the parts together as a whole entity of creation, of which we see ourselves are also a part ... our cultural concept in the land begins in Papatuanuku and her resources seen as a whole ... but we go on to categorise the parts of the whole in respect to their uses and functions. But when we go out to make use of the resources of nature, we do not forget the whakapapa binding all together, at the same time as we distinguish the resources of land and sea.⁴⁵

Whakapapa is the common thread that weaves the hapū together to form the iwi.⁴⁶

Reliance on a whakapapa framework to make sense of our existence requires us to value every person as part of an endlessly expanding whole. This is not to be confused with some feel-good notion of equality or sameness; rather, it recognises that the particular qualities of every person contribute to the vitality of the whakapapa network in its entirety.⁴⁷

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- ⁴¹ Moe Milne Statement of evidence, #A62 at [131], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.4].
- ⁴² Ani Mikaere Statement of evidence, #A17 at [45], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.4].
- ⁴³ Leonie Pihama Statement of evidence, #A19 at [18], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.2].
- ⁴⁴ Tahu Potiki Statement of evidence, 23 December 2016 at [4.6], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.11].
- ⁴⁵ Henare Rakiihia Tau Affidavit, 24 November 1989 at [74], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.11].
- ⁴⁶ Tipene O'Regan Statement of evidence, #B9 at [4]–[5], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.29].
- ⁴⁷ Ani Mikaere Statement of evidence, #A17 at [44], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.41].

Whakapapa: a jural perspective

- 3.25 Ani Mikaere describes the importance of whakapapa in two ways. Whakapapa is a way of making sense of the world. It is also a behavioural guide:⁴⁸

... whakapapa embodies a comprehensive conceptual framework that enables us to make sense of the world. It allows us to explain where we have come from and to envisage where we are going. It provides us with guidance on how we should behave towards one another and it helps us to understand how we fit into the world around us. It shapes the way we think about ourselves and about the issues that confront us from one day to the next.

- 3.26 According to Tomas, whakapapa has three primary functions:⁴⁹

First, it provides an ordered process within which other ideas and concepts can be structured into a coherent format; second, it acts as a vehicle for the conveyance of wairua to the rest of creation, and third, it establishes a hierarchy of authority as a guideline to the formation of all relationships.

- 3.27 Explaining the normative significance of whakapapa, Mikaere says:⁵⁰

Whakapapa necessitates a focus on relationships: between people; between people and their non-human relatives; between past, present and future generations. It reminds us that relationships must be carefully managed because everything in our world is connected. Failing to nurture key relationships will result in imbalance which will ultimately be to the detriment of all.

- 3.28 As Jackson argued:⁵¹

The ties of whakapapa which bound the collective together provided the precedents and jurisprudential framework that rationalised the rules for individual and collective behaviour as well as the various sanctions used to ensure compliance ... Whakapapa also provided precedents for the exercise of political power which was essential to the law's effective functioning.

- 3.29 Jackson also connected whakapapa to relational interests or “rights”:⁵²

Our law is a way of maintaining relationships, where processes and entitlements are based upon kinds of obligations associated with the receipt of any gift. We sometimes define these entitlements as “rights”, however these do not stem from the grant of a political body but from the rites of our birth and the whakapapa that makes us unique. They began at the moment of birth, as the first act in every child's life was the burying of his or her whenua ... a means of proclaiming their right to stand on their land and proclaiming the reciprocal relationships they would have within their whānau, Hapū and Iwi.

⁴⁸ Ani Mikaere *Colonising Myths — Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 285–286.

⁴⁹ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 69.

⁵⁰ Ani Mikaere Statement of evidence, #A17 at [45], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.5].

⁵¹ Moana Jackson Brief of evidence, 10 January 2005 at [93]–[94], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.6].

⁵² Moana Jackson Statement of evidence, 24 April 2012 at [19], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.6]. The usage of inverted commas above in respect of “rights” reflects Jackson's own.

- 3.30 Mead, speaking in the context of competing claims to fisheries Treaty settlement assets, gives examples of whakapapa-based birth rights:⁵³
- (a) The right to be a Māori and the attributes of being Māori.
 - (b) The right to an identity and whakapapa as a member of the whānau, the hapū, the iwi and the waka.
 - (c) The right to share in the tribal estate, including rights to succeed to interests of the parents.
 - (d) The right to use marae.
 - (e) The right to be buried in the urupā.
 - (f) The right to be listed on the hapū and iwi beneficiary roll.
 - (g) The right to share in the benefits of any settlement to the hapū or iwi.
- 3.31 While Mead’s list of whakapapa-based rights is not complete, it illustrates both the practical and jural importance of whakapapa. Whakapapa confirms a person’s membership within the kin group from which that person’s mana and tapu is derived.⁵⁴ Whakapapa may also determine a person’s standing to perform certain roles.⁵⁵
- 3.32 Consequently, whakapapa has direct implications for how people should behave and are entitled to behave — in other words, for people’s rights and duties. Whakapapa confers an entitlement to belong and identifies those who do not.⁵⁶ As Professor Tamati Muturangi Reedy stated:⁵⁷
- ... in Māori terms, one is defined by one’s ancestors. To translate a common Māori phrase — “Ko tātou ngā kanohi me ngā waha kōrero o rātou ma kua ngaro ki te pō — we are but seeing eyes and speaking mouths of those who have passed on”. The reverence for the bones and indeed the memory of the ancestors is directly reflected in the centrality of whakapapa or genealogy to all structures within Māori society.
- 3.33 However, importantly, whakapapa can also be flexible. As Durie says:⁵⁸
- Whakapapa were not used to constrain individual or group status but to enlarge it, and did not limit future direction but expanded on the possibilities.

⁵³ Hirini Moko Mead Brief of evidence, 25 February 1998 at [22], in *Te Runganui o te Upoko o Te Ika Association (Inc) & Ors v The Treaty of Waitangi Fisheries Commission & Others* CP 122/95.

⁵⁴ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 27–28; Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 111–120.

⁵⁵ See Te Riaki Amoamo Affidavit, 25 January 2022 at [9], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.4]: Amoamo (Te Whakatōhea) refers to tikanga being “the law in our area [which is] underpinned by whakapapa, because without whakapapa you have no right to claim, speak for or take care of the whenua or its resources”. See too McCully Matiu and Margaret Mutu *Te Whānau Moana: ngā Kaupapa me ngā Tikanga Customs and Protocols* (Reed Books, Auckland, 2003) at 164.

⁵⁶ McCully Matiu and Margaret Mutu *Te Whānau Moana: ngā Kaupapa me ngā Tikanga Customs and Protocols* (Reed Books, Auckland, 2003) at 164.

⁵⁷ Tamati Muturangi Reedy Brief of evidence, 25 February 1998 at [37(b)], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.34].

⁵⁸ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 5.

3.34 Dr David V Williams and Joseph Williams consider:⁵⁹

The most notable orators are always able to emphasise commonality of whakapapa and interconnectedness, thus playing down the separateness between groups.

3.35 Professor Ranginui Walker also explained that “Māori society was simply too dynamic to sustain rigid hapu collectives”.⁶⁰ Whakapapa therefore can expand or contract to deal with changing circumstances. In these ways, whakapapa illustrates the dynamic qualities of tikanga.

Whanaungatanga

3.36 Whanaungatanga, meaning kinship or a sense of familial connection and relationships, is a value reflecting “the intent of ensuring all things within te ao Māori are connected and understood” and that “maintaining the relational components with our environment is ... equally important as maintaining [them] with each other and our ancestors”.⁶¹

3.37 Whanaungatanga is closely linked with whakapapa, so that it can be difficult to distinguish between them. However, one explanation is that whakapapa maps lineal connections and layers of connection, while whanaungatanga demands that we maintain them. Whanaungatanga also makes and maintains connections beyond the genealogical descent lines of whakapapa. Tikanga scholars emphasise that the essence of whanaungatanga is its inter-relational breadth and inclusiveness. For example, Williams maintains that “the boundary between one hapu and the next or one iwi and the next is always broad and grey rather than black and white”.⁶² Connections which must be maintained extend to the living and non-living, to past and present, and beyond human to ecological domains. Clarifying the differences of whakapapa and whanaungatanga, Tomas considered that:⁶³

... whanaungatanga is widely used to refer to the responsibilities inherent in kinship relationships, while whakapapa is used to represent the genealogical connections that form the basis of those relationships.

3.38 She also noted the egalitarian nature of whanaungatanga, considering that it “highlights ‘belonging’ and ‘inclusiveness’ amongst members of a kin group, irrespective of authority

⁵⁹ David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name, dated 10 November 1998 with minor update 2020) at 14.

⁶⁰ Ranginui Walker Brief of evidence, 25 February 1998 at [4.1(b)], in *Te Runganui o te Upoko o Te Ika Association (Inc) & Ors v The Treaty of Waitangi Fisheries Commission & Others* CP 122/95.

⁶¹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.11].

⁶² Joseph Williams “He aha te tikanga Maori” (unpublished paper presented to Te Aka Matua o te Ture | Law Commission, 1998) at 11.

⁶³ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 78; see also Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 68; Margaret Anne Kawharu Statement of evidence, 2 June 2020 at 13–14, in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601.

or ranking”.⁶⁴ Dr Carwyn Jones likewise notes the tendency and capacity of whanaungatanga to embrace new relationships and new contexts:⁶⁵

The concept of whanaungatanga may be grounded in genealogical connections, but today the term is applied to other types of relationships where reciprocal obligations apply. Eminent anthropologist Dame Joan Metge has described how the root concept of whānau (extended family) has acquired new meaning over the course of the twentieth century: it is now widely applied to various types of communities and groups and no longer only to those with actual blood ties.

EXPRESSIONS OF WHANAUNGATANGA

Whanaungatanga is “the way we bring our whakapapa to life” and “the way we relate to our kin”.⁶⁶

... the defining principle is *whanaungatanga*, or kinship. In te ao Māori, all of the myriad elements of creation — the living and the dead, the animate and inanimate — are seen as alive and inter-related.⁶⁷

Whanaungatanga is focused on “the maintenance of relationships”.⁶⁸

The more inclusive kinship ethic of whanaungatanga offsets the more exclusive linear factional loyalties derived from the descent lines of whakapapa.⁶⁹

... [t]he whanaungatanga principle goes beyond just whakapapa and includes non-kin persons who become like kin through shared experiences.⁷⁰

Through the tikanga of whanaungatanga, iwi and hapū support each other and held reciprocal obligations to assist each other in maintaining their mana.⁷¹

⁶⁴ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 78.

⁶⁵ Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 68.

⁶⁶ Chris Winitana Statement of evidence, 4 June 2017 at [72], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.51].

⁶⁷ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 23.

⁶⁸ Walter (Wati) Ngakoma Ngamane Statement of evidence, 13 October 2020 at [21], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.51].

⁶⁹ Margaret Anne Kawharu Statement of evidence, 4 December 2020 at [6], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.50].

⁷⁰ Hirini Moko Mead and Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [97], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.58].

⁷¹ Tamati Waaka Statement of evidence, 4 January 2017 at [69]–[81], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.57].

Within Māori whānau, social control is modelled through the concept and practice of whanaungatanga — kinship or familial obligations. Boundaries and behavioural expectations are set and enforced by the collective, with particular roles and responsibilities for guidance and leadership vesting in parents, aunts and uncles and grandparents.⁷²

Whanaungatanga is “the glue that holds the Māori world together”.⁷³

Whanaungatanga is an essential principle of the Māori world.⁷⁴

Whanaungatanga is the idea that makes the whole system make sense.⁷⁵

Whanaungatanga: a jural perspective

3.39 As Jones explains, whanaungatanga encapsulates the centrality of relationships to Māori life and to Māori legal traditions:⁷⁶

Grounded in genealogical connections, whanaungatanga is central to individual and community identity and the rights and obligations associated with that identity.

3.40 Durie expresses the jural character of whanaungatanga in this way:⁷⁷

Whanaungatanga (kinship) was demonstrative of:

- the primacy of kinship bonds as determiners of action;
- the primacy of whakapapa (genealogical tables) in social reckoning and rights formulation;
- the right of individuals to determine, develop and validate their individual identity and status within the chosen group;
- the basis for hapu allegiance; and
- the interconnectedness of the Māori people.

⁷² Khylee Quince s 27 report, 18 September 2018 at [8], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.62].

⁷³ Hirini Moko Mead and Pou Temara Statement of tikanga, 31 January 2020 at [96], as cited in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239; see also Te Rua Rakuraku and Donald Kurei Joint affidavit, 21 January 2022 at [11], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.64] where Pou Temara says whanaungatanga is “the glue that holds the Māori world together and sets the parameters of the relationships between and amongst all things”.

⁷⁴ Walter (Wati) Ngakoma Ngamane Statement of evidence, 13 October 2020 at [21], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.63].

⁷⁵ Te Rua Rakuraku and Donald Kurei Joint affidavit, 21 January 2022 at [11], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.64].

⁷⁶ Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 66–68; see also David V Williams “He aha te tikanga Maori” (unpublished revised draft of Joseph Williams’ paper of the same name, dated 10 November 1998 with minor update 2020) at 11 and 13.

⁷⁷ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 5.

- 3.41 According to Tomas, the responsibilities associated with whanaungatanga are at the heart of its meaning.⁷⁸ Harry Mikaere also emphasises whanaungatanga-based responsibilities:⁷⁹

Whanaungatanga is the essence of being Māori, and connections between people and widespread relationships with the spiritual and natural worlds are linked through whakapapa. The relationships with the natural world (land, water, coastal marine area, air, plants, animals etc) are bound together by mutual responsibilities.

- 3.42 Whanaungatanga responsibilities drive tikanga behaviours, expressed in norms that we discuss later in this chapter such as kaitiakitanga (guardianship) and manaakitanga (generosity). Joseph Williams and David V Williams point out that individual and collective rights and standing are conditional on fulfilling one's responsibilities:⁸⁰

... tikanga Māori emphasised the responsibility owed by the individual to the collective. No rights enured if the mutuality and reciprocity were not understood and fulfilled.

- 3.43 The Awanuiārangi pūkenga give another example of the responsibilities that whanaungatanga creates between people, explaining that whanaungatanga involves collective responsibility for individual wrongdoing. According to Mead and Temara:⁸¹

... when a hara (wrong) is committed it not only impacts the individuals involved, both offenders(s) and victim(s), but the broader collectives of these individuals including whānau, hapū and iwi ... a community is always responsible for their wrongdoers because they are kin. It also means that a community is impacted as victims when offending occurs.

- 3.44 Their paper (found at Appendix 1) gives further examples of this principle, relating to responsibilities for fraud and responsibilities to intervene and redress domestic violence.⁸²

Whakapapa and whanaungatanga in action

- 3.45 The centrality of whakapapa and whanaungatanga to all Māori relationships is echoed in the way that these concepts can be seen at work every day on the marae. For example, identifying whakapapa connections and building whanaungatanga between manuhiri (visitors) and the haukāinga (the people of the marae) are important purposes of pōwhiri (welcoming) protocols.
- 3.46 To illustrate the significance of whakapapa and whanaungatanga, Temara shared with us an account relating to the Mātaatua marae in Rotorua, a Tūhoe marae built within the rohe (area) of Ngāti Whakaue (a Te Arawa group). It shows how the iwi of Te Arawa and Tūhoe are drawn together through whakapapa both in its narrow genealogical sense and in the events of their shared history. Events which had occurred between these two tribal

⁷⁸ Nin Tomas "Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present" (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 78.

⁷⁹ Harry Mikaere Brief of evidence, 13 October 2020 at 27, in *Ngāti Whātua Ōrākei Trust v Attorney-General* [2023] NZHC 74.

⁸⁰ David V Williams "He aha te tikanga Maori" (unpublished revised draft of Joseph Williams' paper of the same name, dated 10 November 1998 with minor update 2020) at 12. See also Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 40.

⁸¹ Hirini Moko Mead and Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [98]–[99], as cited in Coates and Irwin-Easthope "Beneath the herbs and plants", Appendix 2 at [4.61].

⁸² Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [5.2]–[5.6].

groups moved Ngāti Whakaue to gift land to Tūhoe as a place for them to build a marae in Rotorua:⁸³

Mātaatua is a Tūhoe marae in Rotorua. The land that it stands on is a gift from Ngāti Whakaue to Tūhoe. This happened in the early years of last century. During that time, the people of Tūhoe used to go to Rotorua Hospital for medical attention. They would arrive with nowhere to live while being treated, or waiting for treatment. Those admitted to hospital had whānau camped nearby the hospital so that they could visit their sick relations. Ko te pō kau anake. They were a sorry sight. They brought food, but cooking was a problem because of the health regulations of the Rotorua Council. The rangatira of Ngāti Whakaue saw their plight and discussed how they might mitigate the predicament of Tūhoe.

In coming to a decision about gifting some land to Tūhoe, the Ngāti Whakaue leaders recalled the whakapapa connections between Tūhoe and Ngāti Whakaue. They remembered the celebrated family of Te Tokotoru a Kōkāmutu, the Triumvirate of Kokamutu. They were Tamahore, Te Purewa and Tumatawhero. These three brothers were the great leaders of Tūhoe at that period. They led many successful battles against their foe to the east, to Taupo, and against their Te Arawa relatives at Pukekaikaahu in Rerewhākaitu. At that battle the brothers decided that the best course of settling differences was not through full scale war with their mother's people that would involve hundreds of warriors on both sides. They preferred to settle scores through a tūmatatahi, a duel of toa [warriors]. Te Purewa volunteered to fight for Tūhoe. He had such a reputation as a warrior that both his people and enemy alike regarded him as Te Pakihiwi Kaha or the strong shoulder. Te Arawa also had such a warrior called Te Wahakaikapua. However, the duel did not eventuate. The insults exchanged were too much to bear and they closed in battle ... Many warrior leaders of Rangitahi and supporting hapū were killed in that fight including Te Rangikatukua and others. They were decapitated and the heads were preserved and carried back to Ruatāhuna. It was a victory for Tūhoe and achieved in no small measure by the leadership of the sons of Kōkāmutu of Te Arawa.

In time Te Arawa practised for a return bout and then marched with an intimidating force to Ruatāhuna to avenge the defeat at Pukekaikāhu. They arrived at the pā of Te Aihurangi at Ruatāhuna and camped at the foot of that pā. Inside were the gathered hapū of Tūhoe. Other hapū were also on the march to join them against Te Arawa. Hineiturama, a woman of noble birth stood at the head of the force and cried out to the defenders to bring out the heads of the Arawa chiefs so that they may tangi over them. The heads were brought out and stuck on stakes on the ground. Te Arawa stood there before the heads in mournful tangi which moved the observing defenders. Then Hineiturama began a kaioraora, a free form haka of derision aimed at Tūhoe who were behind the parapets of their pā.

[haka omitted]

Such was the ferocity of the kaioraora that it attracted the admiration and respect of Tūhoe. They immortalised that kaioraora and the expertise of Te Arawa in that art form with the terse words *Whatitiri ki te rangi, ko Te Arawa ki te whenua* (Thunder in the heavens, Te Arawa on the land). That pepeha coined by Tūhoe has defined Te Arawa as great speakers, great haka people and great at karanga and waiata.

Meanwhile, Tūhoe who had left the safety of their pā and were outside watching and admiring the performance, approached the Arawa force with outstretched arms to show that there were no weapons. In the tradition of the tangi, they wept together and later set up a tatau pounamu [a metaphor for lasting peace]. All the preserved heads were returned to Te Arawa and the tatau pounamu was consummated with the exchange of gifts.

⁸³ Abridged from an account shared with us by Pou Temara (May 2023).

Having stayed awhile to enjoy the hospitality of the hosts, Te Arawa left to return to Rotorua. They had not long departed when the virulent and warlike Tamakaimoana of Maungapōhatu appeared ready to make war with Te Arawa. When told that a tatau pounamu had been made with Te Arawa, Tamakaimoana refused to recognise it and set off in pursuit. The Tūhoe leaders in the pā then did something that can only happen in Māori culture. They sent a swift runner called Te Rehe by a short cut to warn the retreating Arawa that Tamakaimoana were in pursuit of them. This act is called pūrahorua. At a place called Te Whatu o Mawake Te Arawa ambushed Tamakaimoana and defeated his force. Many leaders were lost in that fight. That defeat of Tamakaimoana could be viewed as the interest that Tūhoe paid Te Arawa, on top of the gifts of taonga of the tatau pounamu. Te Arawa did not forget.

...

These events of their shared history, drawing Te Arawa and Tūhoe together through whakapapa, are the reason that moved Ngāti Whakaue to gift the land to Tūhoe as a place for them to build a marae where they may stay when in Rotorua. Today, at the marae, Tūhoe maintain a continuing relationship with Ngāti Whakaue. At major hui Ngāti Whakaue and our Arawa uncles and aunties are always part of our paepae ... we regard them as part of us. We from Mātaatua are also invited by Ngāti Whakaue to be part of their paepae at their major hui on their marae. Tūhoe perform and keep alive that kaioraora composed by Hineiturama of Te Arawa even though it is a derogative haka aimed at Tūhoe ... Conversely, Te Arawa keep alive and perform the Tūhoe haka that challenged Te Arawa before the battle of Pukekaikāhu.

[haka omitted]

- 3.47 Illustrating the significance of whakapapa and whanaungatanga in a jural context, an excerpt below from an 1893 Native Land Court proceeding shows how whakapapa and whanaungatanga were relevant to determining entitlements to land:⁸⁴

Q. Why is it the list you are upholding have equal rights?

A. Because there are two claims, ancestry and conquest, the rights over the conquered land that is the eastern and southern parts are equal. The descendants of the ancestors who came here in the Mataatua canoe occupied from Tikirau (Cape Runway) to Ngā Kuri a Whārei at Tauranga — all are descended from Toroa and Awanuiārangi and derive their name from the latter. Ngāti Awa who are not descendant from Māhu whose ancestors took no part in the conquest are the persons to whom we have allowed an 1/8th share. Those who are descendant from Māhu and whose ancestors also took part in the conquest we have allowed 20 shares. All the persons who have no claim to the land except being called Ngāti Awa were put in by Penetito. When he gave his evidence at this Court he was unable to bring out these people in his genealogy — therefore I say all these people should be swept out of this land. The conclusion arrived at by Ngāti Awa committee was that all those who were not descendant from the ancestor and whose ancestor took no part in the conquest should each receive an 1/8th share also those of Hāmua and Warahoe who were put in by Rangitūkehu should receive the same proportion.

Those of Warahoe and Hāmua who married into Ngāti Awa let it be for Ngāti Awa to say. Penetito has said that the conquest of this land has been made by his hapū. I deny that emphatically. I say it was made by the hapū of Ngāti Awa i.e. by Te Pahipoto, Te Tāwera, Ngāti Tūwharetoa, Ngāi Tamaoki, Ngā Maihi, Ngāti Ahi and by certain persons of Ngāti Pukeko, two or three I think — Ngāi Te Rangihōuhiri, Ngāi Taiwhakaea, Ngāti Ikapuku, Ngāti Hinanoa, Ngāti Hokopū, Te Patuai and small

⁸⁴ 36 Judge Scannell MB 100–101.

hapū and the hapū called Ngāti Awa. Apanui was the principal man — another hapū of Apanui was called Ngāti Matewaru. They took part in the conquest. That was Te Putarera’s hapū also Te Patutātahi, Ngāi Tāpiki. These are all.

- Q. All of these are entitled to the conquered lands?
- A. Yes.
- Q. In equal shares?
- A. Yes, in equal shares.
- Q. Are there three classes in the owners? (1) Those entitled to a share in the whole block. (2) Those entitled to a share in the conquered land. (3) Those who have no claim at all except through “aroha”.
- A. Yes. The people of Warahoe, Hāmua and those who cannot claim from the ancestor or by conquest are the third.

Summary: whakapapa and whanaungatanga

- 3.48 Whakapapa and whanaungatanga ensure that the order of things is properly understood and that connections to the natural world, place and people are acknowledged, maintained and nurtured. In these ways, whakapapa and whanaungatanga function as underlying structural norms within tikanga. We see this as their primary normative and jural significance. The connections understood and upheld through whakapapa and whanaungatanga establish the framework and basis for interests in Māori society, including powers, rights and duties.

PRESCRIPTIVE CONCEPTS THAT MAINTAIN BALANCE: MAURI, UTU AND EA

- 3.49 In this section, we discuss the concepts of mauri, utu and ea. These are concepts that relate to equilibrium or balance and play a key role in Māori life. Mauri refers to the vitality and wellbeing of an entity. It is prescriptive to the extent that tikanga makes demands to protect and maintain this essence or wellbeing. Similarly, utu also demands action or behaviours to constantly restore and maintain balance. Utu may enable the settled state of ea to be achieved.

Mauri

- 3.50 Mauri has been variously explained as life essence,⁸⁵ “life force connection”,⁸⁶ and “the distinctive nature all things have”.⁸⁷ As Makereti Papakura explained:⁸⁸

Mauri believed that nothing in this earth existed without its mauri and that if this were violated in any way, its physical foundation was open to peril or exposed to great risk. If

⁸⁵ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 83; Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 239 and 241.

⁸⁶ Tahu Potiki Statement of evidence, 23 December 2016 at [8.1]–[8.10], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.326].

⁸⁷ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.23]; and see Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 83.

⁸⁸ Makereti Papakura *The Old-Time Maori* (Victor Gollancz, London, 1938) at 181; see also Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 86.

the mauri of the forest were violated, the trees and plants would not be able to produce in abundance, but fruits would be scarce, and there would be few birds. With the mauri ora of man, if this is violated in any way, the thought is that with the loss of spiritual mauri, he is left without protection.

- 3.51 The Awanuiārangi pūkenga consider that mauri reminds us “to look to the connections that bind us”.⁸⁹ If the connection that must be sustained is lost, mauri will be dormant or diminished, diminishing or altering one’s existential being.⁹⁰ Mauri can be given to objects. For instance, even today, Māori may still place a stone embodying mauri beneath a wharehau or other new building to reflect its kaupapa or purpose.⁹¹ In another example we will discuss below, rāhui pou (a post marking a restricted area) may be imbued with mauri.

EXPRESSIONS OF MAURI

All beings in this realm possess a mauri, or a life force, they have something to say and something to share, the sea, the fish, the shellfish, the crabs, the shells, the pebbles and gravel, the rocks and boulders, the sand and earth, the trees, the birds, and the winds. They speak to each other just as we communicate daily.⁹²

Mauri is the actual life force connection between the gods and earthly matter. It is stated that all things have a mauri including inanimate objects so it can be found in people, animals, fauna, fish, waterways, rocks, mountains. The mauri is ... also the generator of the health of a person or place.⁹³

[Mauri embodies] familiar notions of wellness, health, levels of vitality, energy, spirituality, awareness, identity, integrity and alertness and engagement beyond the self.⁹⁴

A flourishing mauri is evidenced by vitality, spiritual enlightenment, enthusiasm, emotional strength, a capacity to engage — all experienced within social and physical environments that align with human resilience.

A languishing mauri has the opposite associations: low energy, despondency, uncertainty, shame, a reluctance to engage, and environments that aggravate personal bleakness.⁹⁵

⁸⁹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [1.86].

⁹⁰ Makereti Papakura *The Old-Time Maori* (Victor Gollancz, London, 1938) at 180–181; Tahu Potiki Statement of evidence, 23 December 2016 at [8.1]–[8.10], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.327].

⁹¹ Nathan Kennedy and Richard Jefferies *Kaupapa Māori Framework and Literature Review of Key Principles* (2nd ed, International Global Change Institute, Hamilton, 2009) at 57–58.

⁹² Te Ringahua Hata Affidavit, 29 January 2020 at [65], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.328].

⁹³ Tahu Potiki Statement of evidence, 23 December 2016 at [8.1]–[8.10], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.326].

⁹⁴ Mason Durie Statement of evidence, 23 December 2016 at [22]–[24], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.327].

⁹⁵ Mason Durie Statement of evidence, 23 December 2016 at [22]–[24], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.327].

Mauri is also a metaphysical value that can be managed by karakia conducted by experienced tohunga.⁹⁶

... the significant habitats of our flora and fauna house the mauri and spiritual essence of our ancestors.⁹⁷

Hypothetically, the mauri of water could be negatively affected through human involvement. For example, by diverting water or extracting it so much that it is depleted.⁹⁸

... tikanga are in place to focus on the caring for the mauri (life force) of the waahi mataitai kai and to ensure various kaitiaki and descendants of the owners of the food gathering areas are alerted to any dangers.⁹⁹

Mauri: a jural perspective

- 3.52 Mauri is a complex concept to explain jurally. It is rarely referred to in statutes outside of Treaty settlement legislation.¹⁰⁰ However, it arises in the resource management context through association with the concept of kaitiakitanga as the foremost obligation of kaitiaki (guardians).¹⁰¹ Kaitiaki “have an intrinsic duty to safeguard the mauri of the environment”.¹⁰² Their responsibility is to “ensure that the mauri of ... taonga remains healthy and our ability to do that through generations reflects directly on our mana”.¹⁰³ If “mauri is diminished, or gone, the kaitiaki are not fulfilling their responsibility”.¹⁰⁴
- 3.53 Mauri therefore gives rise to obligation or responsibility, including the requirement to maintain a physical connection to whenua.¹⁰⁵ If the connection is not maintained through regular presence and resources are not drawn from the whenua, the mauri of the place

⁹⁶ Desmond Tatana Kahotea Statement of evidence, 28 October 2016 at [9.6], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.327].

⁹⁷ Haami Piripi Brief of evidence, #P3 at [36], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.327].

⁹⁸ Hemana Eruera Manuera Statement of evidence, 29 March 2019 at [46], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.328].

⁹⁹ Te Kou Rikirangi Gage Affidavit, 21 February 2020 at [123], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [2.28].

¹⁰⁰ But compare the Natural and Built Environment Bill 2022 (186–1), cl 5 (system outcomes).

¹⁰¹ Resource Management Act 1991, ss 7(a), 2.

¹⁰² David Topia Rameka Statement of evidence, 4 June 2017 at [21] as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.331].

¹⁰³ Agnes Te Haara Clarke Statement of evidence, August 2001 at [4], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.339].

¹⁰⁴ Hohepa Joseph Mason and Te Kei (O Te Waka) Wirihana Merito Brief of evidence, 29 April 2019 at [67]–[68], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.341].

¹⁰⁵ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.24].

will die.¹⁰⁶ Emphasising the way in which the mauri of (in this example) water and people are connected, “[the] mauri of the people remains as strong as the mauri of the wai”.¹⁰⁷ The responsibility to maintain mauri renders it a normative force. The Awanuiārangi pūkenga suggest the normative force of mauri when they explain that, when objects embodying mauri such as rāhui pou have been given a particular purpose, “that [purpose] must be honoured by all”.¹⁰⁸ They also describe the responsibility of Te Urewera descendants:¹⁰⁹

... to maintain a physical presence and be seen to draw resources from Te Urewera. If they do not, the mauri of Te Urewera will die. It will think it is no longer of value or importance to its people and therefore of no importance. There is an obligation being referred to here. While mauri describes the distinctive character of all things, it also notes the importance of what we are required to do to enhance and support the mauri of all things. That is, we must be present and be seen to be engaging in all manner of practice and processes of te ao Māori.

Mauri in action

- 3.54 To illustrate that mauri can be prescriptive in a practical way, the following three examples show how neglecting mauri was seen to result in doom, dire consequence or punishment.
- 3.55 Explaining that abuse of mauri creates imbalance and “would spell doom”, Marsden wrote:¹¹⁰

Allow me to conclude with a special reference to the ‘Mauri’ of the toheroa [a type of shellfish] ... I remember at a special meeting of Ngāitakoto where the elders expressed misgivings about the Mauri of the Toheroa being made ‘noa’ and being depleted in the near future because they were being [sic] commercialised, a grave ‘hara’ or sin against the Atua for a freely bestowed gift. They predicted that in less than 20 years the toheroa would disappear because the Mauri would remove itself, and the removal of Mauri or life-force, would spell doom to the toheora. For them, it was not so much the use or even over-use of the resource but rather the abuse and misuse of the mauri and its tapu. It would create an imbalance in the fragile network of the eco-systems of the Oneroa-a-Toohe and even the abundance of Schnapper and other seafoods would be seriously depleted.

- 3.56 Hemana Manuera describes how an ancestor named Kahungunu was punished for disrespecting mauri. Kahungunu faced immediate retribution, followed by ongoing consequences for his son:¹¹¹

Kahungunu, while fishing whakaaronui, disrespected tikanga by failing to throw the first catch back to Tangaroa by way of koha [an offering]. Kahungunu was slapped with a tāmure (snapper) by his brother. To resolve this misdeed, Kahungunu named his son

¹⁰⁶ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.24].

¹⁰⁷ Hohepa Joseph Mason and Te Kei (O Te Waka) Wirihana Merito Brief of evidence, 29 April 2019 at [40], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [5.46].

¹⁰⁸ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.29].

¹⁰⁹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.24].

¹¹⁰ Māori Marsden Brief of evidence, #C17 at 8, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.328].

¹¹¹ Hemana Eruera Manuera Statement of evidence, 29 March 2019 at [22], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [2.64].

Tūtāmure which means ‘pricked on the face by snapper fins’. Hemana uses this as an example of Kahungunu addressing his disrespect of the mauri of Tangaroa by the naming of Tūtāmure as perpetual living evidence of his misdeed and disrespect.

3.57 Implicitly, the consequences of the misdeed may be understood to pass on to following generations.

3.58 Bevan Taylor speaking from the perspective of Maungaharuru-Tangitū hapū says:¹¹²

The gathering of kai and resources has a reciprocal obligation on the Hapū as kaitiaki (guardians). Tangitū has a mauri (life force), so if we do not look after or respect Tangitū in accordance with our kawa and tikanga, its mauri will be detrimentally affected and there will be dire consequences for our Hapū.

3.59 As each of the above examples show, lapses in respect for mauri are “hara” or wrongs. They are understood to be followed by continuing consequences affecting people’s mana (authority, esteem) and their wellbeing.

Utu and ea

3.60 Utu is “the action undertaken for reciprocity”.¹¹³ Utu maintains harmony and balance and “conveys the ethic of striving to achieve balance in all things”.¹¹⁴ The action taken can either be positive or may take the form of retribution. Tāmami Kruger explains utu as:¹¹⁵

... a virtue that considers how one should respond, solve or acknowledge. At the heart of utu is the idea that balance must be achieved by reciprocity, whether by compensation or by revenge. Utu is usually proportionate to the action that has caused a particular state to be unbalanced, and is always directed at repairing and enhancing whanaungatanga.

3.61 According to the authors of *He Hinātore ki te ao Māori*:¹¹⁶

The manifestation of utu through gift exchange established and maintained social bonds and obligations. However, if social relations were disturbed, utu would be a means of restoring balance.

3.62 Utu thus plays a role in maintaining relationships and nurturing social cycles, which as Durie writes were “as critical to survival as the maintenance of the cycles of nature”.¹¹⁷ Utu is also linked to mana. To show and reciprocate generosity enhances mana and strengthens relationships. Conversely, “the failure to give or receive utu diminished the mana of both parties and placed the relationship in jeopardy”.¹¹⁸

¹¹² Bevan Maihi Taylor Affidavit, 11 August 2020 at [34], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.331].

¹¹³ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.85].

¹¹⁴ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 43; David V Williams “He aha te tikanga Māori” (unpublished revised draft of Joseph Williams’ paper of the same name, dated 10 November 1998 with minor update 2020) at 18.

¹¹⁵ Vivian Tāmami Kruger Statement of evidence, 2 June 2020 at [7]–[8], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.278].

¹¹⁶ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 74; see also Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 467–468.

¹¹⁷ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 6–7.

¹¹⁸ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 68.

- 3.63 The concept of *ea* refers to a resolved or settled state.¹¹⁹ Utu may contribute to facilitating *ea*. The authors of *Te Mātāpunenga* note the social and legal significance of *ea* as a state that arises once a process or series of transactions has been completed.¹²⁰ Mead, tying the concept to relationships, says that it is “a state of satisfaction where a sequence has been successfully closed, relationships have been restored, or peaceful interrelationships have been secured”.¹²¹
- 3.64 The Awanuiārangi pūkenga link *ea* principally to acceptance that certain issues have been resolved (more so than any actions taken). Illustrating this, a story was shared with us in wānanga showing the power of *ea*. One of those present recounted a childhood event in which a returned commander of the 28th Māori Battalion visited the narrator’s grandmother. Her sons had been among those who died under his command. The commander lowered himself to his knees and apologised to the *kuia* who had lost her sons. After a time, she said “*Kua ea – it is settled*”.¹²² As Mead writes, “it is important to be able to say: ‘*Kua ea*’”.¹²³

EXPRESSIONS OF UTU

The principle of reciprocity and the fulfilment of obligation underpins all Māori social interaction and exchange. The concept of *utu* encompasses both positive and negative reciprocity within a single holistic system in Māori thinking and a fundamental driver of Māori life. Emphasis is placed on maintaining relations.¹²⁴

For everything given and taken, a reciprocity and return of some kind is required. Those who give, gain *mana*, those who receive must restore the balance ... If the balance is not restored then compensation must be taken.¹²⁵

¹¹⁹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.78].

¹²⁰ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 58.

¹²¹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 374.

¹²² Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.79].

¹²³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 32.

¹²⁴ Margaret Anne Kawharu Statement of evidence, 4 December 2020 at [30]–[33], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.276].

¹²⁵ Margaret Anne Kawharu Statement of evidence, 4 December 2020 at [30]–[33], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.276].

In tikaka [tikanga], the process of utu, in the sense of reciprocal balance, is not finished until a solution is reached.

... all the parties have to work together to find a solution that can be digested by everyone who belongs at the table.

All those who are affected must be part of the process and ultimately accept the solution.

Negotiations must continue until all parties accept the process has concluded.¹²⁶

[Utu] invokes notions of payment, reciprocity, and balance in particular.¹²⁷

... sometimes to achieve that balance, it requires a greater response than what was the actual loss too ... it's a relative term ... the balance isn't just a 'one for one' balance, sometimes the balance, the restoration of balance, required more than the original hara to fix the scales in the proper place as it were.¹²⁸

[T]he cornerstones of a healthy Māori identity [are] the need for balance in the constituent elements of Te Taha Tinana (the physical aspect), Te Taha Wairua (the spiritual aspect), Te Taha Whanau (the family aspect) and Te Taha Hinengaro (the psychological aspect).¹²⁹

EXPRESSIONS OF EA

... who determines ea ... those who have suffered determine when kua ea.¹³⁰

In tikanga, a state of ea could not be reached unless all affected parties ... were involved in the process of resolution — this would otherwise be inconsistent with the principles of whanaungatanga and mana. In our opinion, a state of ea could not be reached where whenua is involved unless tangata whenua were involved and respected in the process.¹³¹

... reconciliation should never imply subordination of one by another... It was to recognise the place of both and seek a way to rebuild the relationships and so in that sense a specific hara, a specific wrong is part of that much wider context of the need for relationship building.¹³²

¹²⁶ Tipene Gerard O'Regan Affirmation, 17 September 2020 at [49]–[52], as cited in Coates and Irwin-Easthope "Beneath the herbs and plants", Appendix 2 at [4.277].

¹²⁷ Peter Addis and Paul Meredith Notes of evidence, undated at [21]–[22], as cited in Coates and Irwin-Easthope "Beneath the herbs and plants", Appendix 2 at [4.280].

¹²⁸ Peter Addis and Paul Meredith Notes of evidence, undated at [23], as cited in Coates and Irwin-Easthope "Beneath the herbs and plants", Appendix 2 at [4.281].

¹²⁹ Khylee Quince s 27 report, 18 September 2018 at [7], as cited in Coates and Irwin-Easthope "Beneath the herbs and plants", Appendix 2 at [4.287].

¹³⁰ Peter Addis and Paul Meredith Notes of evidence, undated at [69], as cited in Coates and Irwin-Easthope "Beneath the herbs and plants", Appendix 2 at [4.285].

¹³¹ Jacinta Arianna Ruru and Mihiata Rose Pirini Joint affirmation, 14 September 2020 at [81], [83] and [85], as cited in Coates and Irwin-Easthope "Beneath the herbs and plants", Appendix 2 at [4.291].

¹³² Moana Jackson Notes of evidence, 3 May 2012 at [12], as cited in Coates and Irwin-Easthope "Beneath the herbs and plants", Appendix 2 at [4.269].

The concept of “hara” at a simplified level means: the transgression of tapu; the commission of a wrong; and the violation of tikanga resulting in an imbalance. This requires a restoration of balance or the achieving of a state of “ea”.¹³³

Where a hara has been committed there is an intergenerational need for a state of ea.¹³⁴

Utu involves a process which seeks to find a way to restore equilibrium or balance. In tikanga, this process must continue until ea is reached. Ea may not result in all affected parties feeling happy with the outcome but there is an acceptance of the process and its outcome.¹³⁵

The ultimate point is to get to ‘ka ea’. If the utu does not meet the hara, and the mana has not been repaid, then whakamā will ensue.¹³⁶

Utu and ea: a jural perspective

3.65 Dame Joan Metge has explained that “[u]tu was one of the most important ordering principles in traditional Māori society”.¹³⁷ Explaining the normative significance of utu, Durie says that:¹³⁸

Utu concerned the maintenance of harmony and balance. It was fundamental to most Māori tikanga and thinking, governing social relationships, the creation and maintenance of reciprocal obligations, the conceptual avenging of death, the appeasement of killings, the punishment of wrongdoing, the maintenance of the cycles of nature, gift exchange, the formation of controls, the maintenance of alliances, the performance of fiduciary obligations and the like. Utu underpinned the essential ‘give and take’ nature of the Māori social and legal order.

3.66 Utu therefore demands action or behaviours to constantly restore and maintain balance:¹³⁹

Reciprocity protocols were formulated for commerce, social intercourse, behavioural controls, and peace-making, all encapsulated in utu. The weighting to reciprocity disclosed

¹³³ Hirini Moko Mead and Pou Temara Statement of tikanga, 31 January 2020 at [60]–[61], as cited in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

¹³⁴ Hirini Moko Mead and Pou Temara Statement of tikanga, 31 January 2020 at [68], as cited in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

¹³⁵ Jacinta Arianna Ruru and Mihiata Rose Pirini Joint affirmation, 14 September 2020 at [81]–[82], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.275].

¹³⁶ Maanu Paul Cultural advisor report, 5 July 2012 at [20], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.288].

¹³⁷ Joan Metge *Tuamaka: The Challenge of Difference in Aotearoa New Zealand* (Auckland University Press, Auckland, 2013) at 19.

¹³⁸ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 6.

¹³⁹ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 6–7.

the Māori worldview that life's basic needs and survival depended on co-operation and interaction between persons and peoples.

- 3.67 Mead helpfully outlines a three-stage framework for engaging with utu and ea — take-utu-ea.¹⁴⁰ A take (pronounced ta-ke) is a reason for action. Utu determines what action is necessary to achieve balance and maintain the relationships involved. Once the appropriate action is completed and balance is achieved, there will be a state of resolution or ea.¹⁴¹
- 3.68 What is needed to satisfy utu will vary, although there are well-known valid responses to particular take.¹⁴² It is important that an appropriate utu is chosen for the nature of the take. Choosing the wrong pathway to resolution could be deemed inappropriate and thus fall short of the desired outcome.¹⁴³

Utu and ea in action

- 3.69 Mead and Temara use a story from Tūhoe to explain and illustrate the steps taken to compensate for a hara (wrong) that had occurred and restore balance or settlement (ea) between the parties, achieving successful resolution:¹⁴⁴

One day a kuia (elderly woman) went and visited a family.

When the kuia got to the home, the dog of the family that she was visiting attacked her. The dog drew blood from her leg and tore her flesh.

The owners of the dog rushed outside, took the dog away and then tended to the injuries of the kuia.

It was a hara on behalf of the dog owners for the dog to have attacked the kuia. The shedding of blood is significant as it meant there was a transgression of tapu (as blood is sacred). The offence also resulted in mana became [sic] imbalanced.

The owners of the dog knew that they had committed a hara and that there had been a breach of tikanga.

In response, they went to their waka huia (treasure box) and brought out a pounamu (greenstone) that had significant value. They gave this to the kuia as compensation for the hara.

The kuia had every right to impose a muru (ritual plundering and restorative justice process that entails the redistribution of wealth). However, she accepted the pounamu as payment for the wrong that had been committed.

This meant that the issue became ea (satisfied, settled, mana rebalanced).

¹⁴⁰ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 31; see also Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 75.

¹⁴¹ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 35–36.

¹⁴² Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 35. See also Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.85]: Doherty gives examples of he hohou te rongo, muru, and pākuha as known examples of utu being taken.

¹⁴³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 35.

¹⁴⁴ Hirini Moko Mead and Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [60], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.271].

Summary: mauri, utu and ea

3.70 Mauri, utu and ea are each powerful prescriptive norms. They demand action or behaviours to sustain mauri (vitality and wellbeing), to maintain utu (reciprocity) and to achieve ea (a settled state). Together, they strive for equilibrium or balance in all things.

RELATIONAL CONCEPTS CONNECTED WITH STATUS: MANA, TAPU, NOA

3.71 In this section, we discuss three relational concepts that are concerned with status: mana, tapu and noa. These concepts identify the status of an entity and signal the ways in which others may engage with that entity. We use the term “entity” because mana and tapu are not confined to living humans.¹⁴⁵

3.72 Mana, tapu and noa are fundamental in managing and regulating Māori society.¹⁴⁶ We consider that they are important relational norms. In other words, they are norms that generate a type of jural status and a corresponding jural relationship. As the authors of *He Hinātore ki te ao Māori* state: “[i]n the Māori world virtually every activity, ceremonial or otherwise, has a link with the maintenance of and enhancement of mana and tapu”.¹⁴⁷

Mana

3.73 Mana is a broad concept “combining notions of psychic and spiritual force and vitality, recognised authority, influence and prestige, and ... power and ability to control people and events”.¹⁴⁸ Mana has also been described as the force of the ancestors at work in everyday matters.¹⁴⁹ It remains such a force in contemporary Māori society, connected “to every form of activity within Māori society and generated through collective relationships”.¹⁵⁰ The Awanuiārangi pūkenga note that mana includes authority given by the collective to individuals to maintain order for iwi, hapū and whānau. Those who have the people’s support and are recognised as having skills to maintain the integrity of the knowledge and processes of the people have mana.¹⁵¹ As others emphasise, mana is connected to whakapapa.¹⁵²

¹⁴⁵ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 51–52 and 57. See also Peter Addis and Paul Meredith Notes of evidence, undated at [25], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.161].

¹⁴⁶ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 1.

¹⁴⁷ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 55.

¹⁴⁸ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauriki Research Institute, Victoria University Press, Wellington, 2013) at 154. See also H W Williams *A Dictionary of the Maori Language* (GP Publications, Wellington, 1992) at 172; Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 36.

¹⁴⁹ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 1 and 58.

¹⁵⁰ Leonie Pihama Statement of evidence, #A19 at [13]–[14], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.156].

¹⁵¹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.32].

¹⁵² For accounts of mana placing principal significance on whakapapa: Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 52–53; Annette Sykes “The myth of tikanga in the Pākehā law” (2021) 8 *Te Tai Haruru Journal of Māori and Indigenous Issues* 7; compare also Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 306–311: mana whenua is a process of

- 3.74 There are different forms or aspects of mana.¹⁵³ For example, Cleve Barlow identifies the following four aspects:¹⁵⁴
- (a) Mana atua — mana of the various atua Māori (ancestor-gods), passed on to all whom they created.
 - (b) Mana tupuna — sourced from ancestry.
 - (c) Mana whenua — acknowledging the power and authority sourced in whenua (meaning both placenta and land). Today, mana whenua is used to describe hapū authority over a place. Barlow refers to another meaning: the ability or power of Papatūānuku through whenua to produce bountiful life.¹⁵⁵
 - (d) Mana tangata — a person’s mana.
- 3.75 This is not a complete list. For example, another form of mana is mana wāhine (mana of women).¹⁵⁶ Koroua (elder) McCully Matiu and Professor Margaret Mutu describe the essence of mana as “the power to sustain life”.¹⁵⁷
- 3.76 As explained by Royal, mana is also more nuanced than simple power and can arise from different sources, including “through acts of generosity and wisdom ... harmonising of life and the community”.¹⁵⁸ We discuss below how mana is linked to responsibilities and how it is conditional on responsibilities being fulfilled.

establishing one’s connections; Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn and others (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195.

¹⁵³ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 60–61. See further Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.162]–[4.170]; see also Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 90–95; McCully Matiu and Margaret Mutu *Te Whānau Moana: ngā Kaupapa me ngā Tikanga Customs and Protocols* (Reed Books, Auckland, 2003) at 157–158.

¹⁵⁴ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 60–61; Joseph Williams “He aha te tikanga Maori” (unpublished paper for Te Aka Matua o te Ture | Law Commission, 1998) at 11–12.

¹⁵⁵ Compare particularly Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 61–62 with regard to the nexus of mana with life-giving capability; see also McCully Matiu and Margaret Mutu *Te Whānau Moana: ngā Kaupapa me ngā Tikanga Customs and Protocols* (Reed Books, Auckland, 2003) at 167: “[t]here are many forms and aspects of mana, of which one is the power to sustain life”.

¹⁵⁶ See generally Ani Mikaere “Cultural invasion continued: the ongoing colonisation of tikanga Māori” (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 134 and see too the ongoing *Te Rōpū Whakamana i te Tiriti o Waitangi* | Waitangi Tribunal inquiry: *Mana Wāhine Kaupapa* (Wai 2700, commenced December 2018).

¹⁵⁷ McCully Matiu and Margaret Mutu *Te Whānau Moana: ngā Kaupapa me ngā Tikanga Customs and Protocols* (Reed Books, Auckland, 2003) at 167.

¹⁵⁸ Te Ahukaramū Charles Royal “A modern view of mana” in Raymond Nairn, Phillipa Pehi, Roseanne Black and Waikaremoana Waitoki (eds) *Ka Tū, Ka Oho: Visions of a Bicultural Partnership in Psychology: invited keynotes: revisiting the past to reset the future* (New Zealand Psychological Society, Wellington, 2012) 195 at 202–203: “People of mana usually have insight, they can see possibilities and understandings that others might not. People of mana are also harmonisers.”

EXPRESSIONS OF MANA

Mana is multi-dimensional and requires an understanding of wider tikanga Māori and the relationships within which we locate ourselves. Mana is connected to every form of activity within Māori society and generated through collective relationships.¹⁵⁹

Mana is both inherent to our being as Māori and can be enhanced or diminished through the ways in which we enact ourselves within the collectives that we affiliate to and with. Mana is therefore connected to both spiritual and earthly sources.¹⁶⁰

Mana as a concept is beyond translation from the Māori language. Its meaning is multi-form and includes psychic influence, control, prestige, power, vested and acquired authority and influence, being influential or binding over others, and that quality of the person that others know she or he has! The most important mana however is mana atua — divine right from Io Matua. Every person has mana atua — no more, no less. This form of mana recognises the absolute uniqueness of the individual. Everything across the universe has mana atua, in that everything was created by Io Matua within the ancient teachings of Hawaiki, a leaf, a blade of grass, a spider, a bird, a fish, a crustacean, all have the same divine right as a person. The challenge is to feel for what this really means.¹⁶¹

[Mana] ... is about speaking and behaving with integrity or looking after people and taonga with integrity. Mana is also something you earn and not something you demand.¹⁶²

... to Māori, mana is the most valued quality. Mana is the basis of personal and collective authority and is central to hapū and iwi identity and relationships to their rohe and each other.¹⁶³

In my opinion you cannot divorce responsibility from mana. When I go and reach for my trusty *Williams Dictionary* mana is straight away translated as power, authority and influence, which is true, but rather those things are the outcome of fulfilling your responsibilities. So I think they've gone straight to the end result of mana.¹⁶⁴

¹⁵⁹ Leonie Pihama Statement of evidence, #A19 referring to Marsden at [13]–[14], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.156].

¹⁶⁰ Leonie Pihama Statement of evidence, #A19 at [13]–[14], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.156].

¹⁶¹ Leonie Pihama quoting Rangimarie Rose Pere Statement of evidence, #A19 at [13]–[14], in Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Mana Wāhine Kaupapa Inquiry (Wai 2700), as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.156].

¹⁶² See David Wilson Brief of evidence, 13 October 2020 at [56], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.157].

¹⁶³ Tamati Waaka Statement of evidence, 4 January 2017 at [32], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.157].

¹⁶⁴ Tāmami Kruger Notes of evidence, undated at 1901, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.160].

Some people and some things have more mana than other people and other things depending on context and depending on the deeds ... of that particular person.¹⁶⁵

Mana wāhine in its simplest definition, refers to the inherent uniqueness, strength, power, influence and authority that is derived not only through whakapapa but to our potentiality.¹⁶⁶

It should be noted that the very term “mana wahine” is a product of the “patrifying” of Māori thought and practice. Our tūpuna are most unlikely to have felt the need to refer to “mana wahine” because it was simply the case that all people, female and male, had mana. It is only because the colonists regarded “mana” as an exclusively male characteristic — and because of the enthusiasm with which some Māori men embraced that belief — that it has become necessary to identify “mana wahine” as a phenomenon.¹⁶⁷

Seas do not belong to a people, they are entirely their own entity. People cannot claim an oceans mana, it is the oceans in its entirety. Who am I to make myself godlike and to cause the flow and ebb of the oceans? Who am I, a mere mortal, to espouse that my mana is greater than the mana of the guardian of the oceans?¹⁶⁸

Mana: a jural perspective

3.77 Some consider that the primary or basic meaning of mana is “spiritual authority and power”.¹⁶⁹ Mana is commonly referred to in jural terms as authority,¹⁷⁰ power,¹⁷¹

¹⁶⁵ Peter Addis and Paul Meredith Notes of evidence, undated at [25], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.161].

¹⁶⁶ Paula Ormsby Brief of evidence, #A55 at [12], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.178].

¹⁶⁷ Ani Mikaere Statement of evidence, #A17 at [56], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.178].

¹⁶⁸ Tama Te Waiwhakaruku Hata Affidavit, 14 February 2020 at [44], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.196].

¹⁶⁹ Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 4; see also Joan Metge *In and Out of Touch: Whakamaa in Cross-Cultural Context* (Victoria University Press, Wellington, 1986) at 63.

¹⁷⁰ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 154, 155, 161, 162 and 166.

¹⁷¹ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 154, 156 and 158; Annette Sykes “The myth of tikanga in the Pākehā law” (2021) 8 *Te Tai Haruru Journal of Māori and Indigenous Issues* 7 at 8–9.

jurisdiction,¹⁷² and right,¹⁷³ but these descriptions of mana reflect only one aspect of the concept. As Kruger explains, the power, authority and influence often given as meanings of mana are the end result of fulfilling responsibilities:¹⁷⁴

The concept of mana is often interpreted as involving ‘authority’, ‘influence’ and/or ‘power’. As a general proposition, I agree that is the case. However it is important to stress that mana must always have a source (whether in gods, ancestors, people or land), and that source must be established and maintained by discharging certain responsibilities to the source of that mana. In that way, mana is not something held or possessed by someone over their gods, ancestors or their land, rather that mana comes from the source and is preserved and fulfilled by living and practicing tikanga Māori.

- 3.78 Mana will rise or diminish depending on the extent to which the associated responsibilities are assumed and discharged. It may also be affected by external factors diminishing mana. Metge, drawing on the advice of numerous tikanga experts, describes the dynamic quality of mana in this way:¹⁷⁵

The individual store of mana is never fixed but as with water in a lake its level continually rises and falls. It rises as a result of the acquisition of new forms of mana, conscientious observance of the rules governing its use, successful completion of tasks attempted, and the recognition and respect given by others. It falls as a result of misuse of the delegated power, failure to complete the tasks successfully, and insults and injuries inflicted by others.

- 3.79 It is beyond this Study Paper’s scope to address each of the types of mana in depth. However, the following observations have general application. While precise categorisation of the sources of mana varies among tikanga jurists,¹⁷⁶ the four types named by Barlow (mana atua, mana tupuna, mana whenua and mana tangata) appear to be widely supported and to capture the primary sources and forms. Metge notes that:¹⁷⁷

These various forms of mana are not clearly distinguishable from one another. To a large extent they are all forms of mana tupuna, since rights to land, leadership capacity, artistic gifts and even direct access to the spiritual dimension are regarded as handed down ancestral lines. Nor are they mutually exclusive. Groups and most individuals typically hold several at once.

- 3.80 The common denominator among these categories is whakapapa and whanaungatanga: to atua, to tūpuna, to whenua and to people. As Jackson explained the connection of mana with whakapapa:¹⁷⁸

¹⁷² Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 159 and 162.

¹⁷³ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 164.

¹⁷⁴ Vivian Tāmāti Kruger Statement of evidence, 2 June 2020 at [42]–[43], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.158] and see further at [4.160].

¹⁷⁵ See also Joan Metge *In and Out of Touch: Whakamaa in Cross-Cultural Context* (Victoria University Press, Wellington, 1986) at 68–69.

¹⁷⁶ For example, see discussion in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.157]–[4.161].

¹⁷⁷ Joan Metge *In and Out of Touch: Whakamaa in Cross-Cultural Context* (Victoria University Press, Wellington, 1986) at 68.

¹⁷⁸ Moana Jackson Affidavit, 24 April 2012 at [29], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.168].

The whakapapa which ultimately links all Iwi and Hapū together provides the papa upon which mana is based because any mana which humans might exercise as a political power could only be legitimised in concert with mana whenua, mana moana, and mana atua.

- 3.81 Illustrating how responsibilities are as important as “genealogical seniority” in determining mana, Mutu explains the role of rangatira (Māori leaders) as follows:¹⁷⁹

The role of tribal leaders was, very basically, to ensure the well-being of the tribe. Leadership was passed from one generation to the next with the extent of a chief’s mana determined not only by genealogical seniority but also by his or her own personal qualities and abilities to maintain the support and confidence of his/her people.

- 3.82 Ngahihi o Te Ra Bidois puts it this way: mana lies “not so much in the deeds of the hero” but in collective community wellbeing.¹⁸⁰ Responsibilities tied to mana include “mauri ora (survival)”.¹⁸¹ Mana is said to be “as much about responsibility, the responsibility to maintain mauri ora or the healthy state of natural resources, as ... about rights of use”.¹⁸²

- 3.83 Kruger, too, expresses what is now often called “mana whenua” in the terms of different responsibilities that arise:¹⁸³

While the connection between Māori and the land at a spiritual level is enduring, the reality is there are different ways in which the relationship with particular areas come about. These are referred to as take, which means ‘the basis of’. There are five different take which allow for a closer analysis of the justification of a particular group’s responsibilities vis-à-vis the land: ...

Take kitea: responsibilities on the basis of discovering of the land;

Take tupuna: responsibilities on the basis of heritage or whakapapa;

Take raupatu: responsibilities on the basis of conquest or war;

Take tuku iho: responsibilities on the basis of gift, including through marriage; and

Take hoko: responsibilities arising from an exchange, though not a purchase in a Pākehā sense.

- 3.84 The maintenance of mana is a matter of great importance in te ao Māori. Showing manaakitanga to visitors and exercising kaitiakitanga in relation to natural resources are common examples of mana-associated responsibilities.

- 3.85 A person’s failure to discharge their responsibilities could significantly diminish mana and lead to whakamā. While this is often translated as shame, this is only partly accurate. Marsden described whakamā as “the outward expression of inward disintegration”.¹⁸⁴ This

¹⁷⁹ Margaret Mutu, Joan Metge and Maurice Alemann Brief of evidence, #F12 at [8], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.172].

¹⁸⁰ Ngahihi o Te Ra Bidois Statement of evidence, 19 November 2007 at [5.2], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.173].

¹⁸¹ Mita Michael Rinui Evidence, 6 July 2020 at [20], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.175].

¹⁸² Awhina Evelyn Waaka Affidavit, 21 November 2013 at [5], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.188].

¹⁸³ Vivian Tāmami Kruger Statement of evidence, 2 June 2020 at [97]–[98], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.200]. Compare the way in which Mead approaches issues of mana whenua and operative facts that must be shown to establish a claim to mana whenua: Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 305–308.

¹⁸⁴ Joan Metge *In and Out of Touch: Whakamaa in Cross-Cultural Context* (Victoria University Press, Wellington, 1986) at 77.

is not simply a matter of emotional harm. As Metge explains, loss of mana and consequent whakamā has multiple dimensions:¹⁸⁵

- (a) As mana is a spiritual force or has spiritual implications, whakamā cannot be viewed as simply a psychological problem. It is an illness with a spiritual dimension, affecting the whole person.
- (b) Because individuals derive so much of their mana from shared ancestors and from membership in descent groups and because mana empowers people for social action, whakamā cannot be seen as an individual matter.
- (c) Consequently, the effective treatment of whakamā must deal with the spiritual as well as the psychological aspect of a person and with the person in the context of social relations, not in isolation.
- (d) Even people whose mana is high will feel whakamā deeply when they suffer loss of mana. Others have a responsibility to bring a person out of whakamā.
- (e) Care must be taken not to unwittingly diminish mana, although there are times when that will be necessary to protect others' wellbeing.

3.86 In summary, while mana is often assumed to refer in broad terms to power and authority in respect of a place or people, it can be expressed in many forms. At its core, the power or authority to which mana may refer are conditional upon the discharge of accompanying responsibilities associated with the source of that power and the specific take or reason for it. For example, to the extent that mana may refer to chiefly mana in respect of the whenua or of people, it reflects both responsibilities and abilities to sustain the mauri or wellbeing of the whenua and of the people. Mana may increase or diminish depending on the success or failure to discharge associated responsibilities. Any impact on mana, either positive or negative, will impact not only the individual but also the collective to which the individual belongs. Loss of mana can cause great whakamā. Violation of mana without proper reason, including failure to respect it, must be remedied in order to restore that mana and therefore achieve ea.

Tapu

3.87 Tapu is closely allied with concepts of mana and mauri. It works to regulate, protect and preserve mana and mauri by imposing behavioural restrictions or requiring that certain actions or processes be followed.¹⁸⁶ Mikaere identifies tapu as having two major aspects: first, recognition of the inherent value of each individual and the sacredness of each life (sometimes called intrinsic tapu), and second, spiritual prohibition or protection to safeguard people, property and sacred sites and maintain social discipline.¹⁸⁷

¹⁸⁵ Joan Metge *In and Out of Touch: Whakamaa in Cross-Cultural Context* (Victoria University Press, Wellington, 1986) at 78–79.

¹⁸⁶ Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [37], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.72].

¹⁸⁷ Ani Mikaere “Cultural invasion continued: the ongoing colonisation of tikanga Māori” (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 134 at 137–138.

- 3.88 All things in te ao Māori have tapu,¹⁸⁸ termed by Jackson “the major cohesive force in Maori life”.¹⁸⁹ As Mead says:¹⁹⁰

Tapu is pervasive and touches all attributes. It is like a personal force field that can be felt and sensed by others. It is the sacred life force which supports the mauri (spark of life), another important attribute of a person. It reflects the state of the whole person. In fact, life can be viewed as protecting one’s personal tapu and in so doing one is looking after one’s physical, social, psychological and spiritual wellbeing.

- 3.89 While, in its second sense, tapu represents sacrosanct or untouchable matters, there are processes that enable engagement with things or people that are tapu and that remove tapu safely or suspend it for a particular purpose.¹⁹¹

EXPRESSIONS OF TAPU

Though ‘tapu’ is commonly translated as sacred, it is more accurate to think of tapu as being a restriction for spiritual purposes. ‘Tapu’ must be understood alongside the concept of ‘noa’. Noa is when tapu is removed or cleared through the proper karakia ritual, removing the spiritual restriction.¹⁹²

The purpose of tapu [is]:

to caution and warn of danger (kia wehi, kia tūpato i te tangata);

to instil faith, values and belief of traditions (kia ū te whakapono);

to guide, nurture and protect people (hei araki i te tangata);

to honour the relationship between humankind, the physical realm and Atua (whakahōnore whakapapa);

to instil mana (whakaū mana);

to protect the mauri (whakaū mauri); and

to restrict, impose a ban on an area for a short period of time (rāhui).¹⁹³

¹⁸⁸ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.48].

¹⁸⁹ Moana Jackson *The Maori and the Criminal Justice System: A New Perspective | He Whaipanga Hou* (Department of Justice, Study Series 18, 1987–1988, part 2) at 41; see too Ani Mikaere “Cultural invasion continued: the ongoing colonisation of tikanga Māori” (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 134 at 138.

¹⁹⁰ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 51.

¹⁹¹ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 128–129; Makereti Papakura *The Old-Time Maori* (Victor Gollancz, London, 1938) at 219–220 and 226.

¹⁹² Te Riaki Amoamo Affidavit, 25 January 2022 at [14], as cited in *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772.

¹⁹³ Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [37], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.73].

... the Māori world was a world of wairua, and Māori life was spiritually driven. Everything that was done was accompanied by karakia and rules of tapu.¹⁹⁴

When you enter the realm of Tapu the atua are always at the forefront of your mind ... When we enter the realm of Tapu, we enter where the atua reside, their rivers, their mountains, their waters, their forests, their domains, their territories, all of which fall under the spiritual protection of Tapu. ... Tapu comes directly from the atua.¹⁹⁵

... everything is intrinsically tapu because everything in the Māori world has whakapapa that goes back to ancestors and then eventually back to the Atua.¹⁹⁶

There are degrees of tapu. Some things are intrinsically more tapu than others because of their association with the hierarchy of gods.¹⁹⁷

... everyone also falls under the spiritual protection of tapu. Rangi is tapu and Papa is tapu. All their children and descendants are tapu, the mountains, the waters, the forests, they are all supreme beings superior to humankind. People are tapu as well from their head to their toes, the most tapu person all during a tangihanga [sic], are women. That is why only women can sit beside the tūpāpaku the entire duration of a tangi to mourn and lament, whilst men sit opposite or separate to the tūpāpaku.¹⁹⁸

The residual impact of mana is tapu. Where there is mana, which is god power, the influence creates an effect that is holy or tapu — the residue of gods. Important ancestors were not only tapu as a result of their descent but also their other works that required them to be a vessel or channel for godly activities such as controlling weather, volcanic activity and the seas. Where they ventured, places they named or built would become tapu thanks to the power of their mana.¹⁹⁹

I understand wāhi tapu to be a sacred or tapu place, a place where tapu exists whether it is in a traditional or spiritual sense. To Māori, the physical, spiritual and natural world are all linked and wāhi tapu are often sacred because they are sites which keep open our connection to our tīpuna, our atua Māori and our histories.²⁰⁰

Wāhi tapu areas were traditionally kept very separate from areas where fishing, kaimoana collection and other daily activities were performed because such activities are noa (common or ordinary), and never exercised in the same area as a wāhi tapu (sacred place). This is why you will rarely find wāhi

¹⁹⁴ Rima Eruera Statement of evidence, #F23 at [8], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.70].

¹⁹⁵ Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [37], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.72].

¹⁹⁶ Peter Addis Brief of evidence, #4.11 at 36, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.76].

¹⁹⁷ Peter Addis Brief of evidence, #4.11 at 36, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.76].

¹⁹⁸ Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [39], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.79].

¹⁹⁹ Tahu Potiki Cultural values assessment and analysis, August 2016 at [7.3], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.83].

²⁰⁰ Hetaraka Biddle Affidavit, undated at [6], [7] and [10]–[12], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.87].

tapu in coastal areas where there is lots of movement of people for fishing or transport, such as river mouths. If there are wāhi tapu present in such areas, they will have clearly defined boundaries so that people can avoid them and continue to use the kai gathering or travel routes that were essential to the everyday functioning of traditional Māori life.²⁰¹

... [the] consequence of breaking tapu results in misfortune, sickness or death. Therefore tapu was taken very seriously and even today, if there is sickness or death in a whanau or hapū we generally reflect on whether any tapu has been broken so we understand how to deal with it and remedy the situation.²⁰²

Tapu: a jural perspective

3.90 The meaning of tapu is complex. According to Tomas:

... tapu can best be described as a quality that emanates from the wairua source, investing objects with value. In its practical application, tapu was the principal means by which the mauri of an object could be protected from harmful interference by overlaying the object with tapu. The concept of “tapu” is closely related to that of “mana” in that the authority attributed to wairua and atua provided the impetus for investing objects with tapu. Additionally, mana tangata enabled those rangatira and tohunga with the requisite mana, to impose a state or condition of tapu over a person or object.

3.91 Marsden considered that tapu:²⁰³

... has both religious and legal connotations ... The person or object is ... removed from the sphere of the profane and put into the sphere of the sacred. It is untouchable, no longer to be put to common use. It is this untouchable quality that is the main element in the concept of tapu. In other words, the object is sacred and any profane use is sacrilege, breaking the law of tapu.

3.92 The authors of *He Hīnātore ki te ao Māori* observe that tapu acted as a protective mechanism,²⁰⁴ and as a corrective power within Māori society.²⁰⁵ They consider that tapu “acted in the same way as a legal system operated with prohibitory controls”.²⁰⁶ Making something or someone tapu could “either protect the environment against interference from people or protect people from possible dangers they may encounter”.²⁰⁷

3.93 As these authorities illustrate, tapu is often described as a form of restriction. As such, tapu is said to regulate. According to Matiu and Mutu: “[i]t is the laws of tapu which play

²⁰¹ Louis Agassiz Schenker Rapihana Affidavit, 31 March 2022 at [4.3], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.91].

²⁰² Te Riaki Amoamo Affidavit, 25 January 2022 at [13], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.137].

²⁰³ Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 174. Adopting Marsden see too McCully Matiu and Margaret Mutu *Te Whānau Moana: ngā Kaupapa me ngā Tikanga Customs and Protocols* (Reed Books, Auckland, 2003) at 158.

²⁰⁴ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 65.

²⁰⁵ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 1.

²⁰⁶ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 1.

²⁰⁷ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 65.

the most influential role in regulating Māori society”.²⁰⁸ According to the Awanuiārangi pūkenga: “tapu is the regulator of the actions in maintaining the connections”.²⁰⁹ However, perceiving tapu as merely a “restriction” is insufficiently nuanced. It is more accurate to see tapu as involving varying degrees of restriction. As the Commission observed in its 2001 Study Paper: “[t]here was ... a dynamic flow associated with tapu, so that its influence could spread by contact, or decline when needs changed”.²¹⁰

- 3.94 The tapu of a person, object or place can denote either their special significance that is worth protecting or a condition from which people must be protected, arising from the potential of the person, object or place to cause harm. One way in which tapu has jural significance is that it points to the corresponding significance of any violation. Improper interference with tapu demands utu.²¹¹ An intentional violation of tapu is a hara or wrongdoing for which there must be consequences.
- 3.95 In jural terms, therefore, tapu denotes a complex combination of immunity for tapu entities from interference, duties to maintain that which is tapu and liability proscribing engagement with tapu entities. For example, urupā (burial grounds) are considered particularly tapu. They are a place connected to the spiritual realm and therefore both sacred and a place where visitors may be at risk of potential harm. The tapu proscribes people from undertaking certain activities within urupā, recognising the need to respect them and maintain their sacredness.
- 3.96 Examples of kawa or protocols enforced to maintain tapu or to properly manage engagement with that which is tapu include for instance cleansing with water when leaving an urupā to return to a state of noa or ordinary life. Rāhui are another example. These restricted areas are often associated with the tapu of a place, for example, where a death has occurred, acknowledging both the sacrality of that place and the potential for harm. They are also associated with more mundane or practical objectives, for example, to avoid spread of disease or for sustainable management purposes. In this way, tapu can assist with the protection of mauri. Emphasising how tapu serves such practical purposes, Durie explains:²¹²
- ... a more utilitarian view of the purpose of tapu was discussed by Te Rangi Hiroa. He drew a connection between the use of tapu and the prevention of accidents or calamities, implying that a dangerous activity or location would be declared tapu in order to prevent misfortune. More than a divine message from the gods, or the recognition of status, the conferment of tapu was linked to healthy practices.
- 3.97 Durie describes tapu as a type of public health regulation basically concerned with avoiding risk and promoting good health. In contrast, noa (discussed in the next section)

²⁰⁸ McCully Matiu and Margaret Mutu *Te Whānau Moana: ngā Kaupapa me ngā Tikanga Customs and Protocols* (Reed Books, Auckland, 2003) at 159.

²⁰⁹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.48].

²¹⁰ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 37.

²¹¹ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 61.

²¹² Mason Durie “The application of tapu and noa to risk, safety, and health” (presentation to Challenges, Choices and Strategies, Mental Health Conference 2000, Wellington, 16 November 2000) at 3–4, as cited in Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 37–38.

was a term used to denote safety. Harm was less likely to come to those entering a noa location, eating food rendered noa by cooking or touching a noa object.²¹³

3.98 As we explained above, mana and tapu are closely related. Mana is associated with tapu – the higher the mana of a person, the greater the tapu. A tohunga (Māori knowledge expert), for instance, is likely to be considered particularly tapu and to have significant mana.²¹⁴ Accordingly, a violation of their mana is likely to transgress tapu and vice versa, with potentially significant consequences for the transgressor.²¹⁵

3.99 The tapu of a person, object or place can be reduced or removed if certain processes called whakanoa (meaning to remove tapu) are followed. As Mikaere says:²¹⁶

Just as vital as the ability to impose restrictions through the use of tapu was the ability to remove such restrictions. For the majority of people, the roles and tasks of daily life led them backwards and forwards across the boundaries of tapu and noa. ... The whare mate [a whare where a body lies during mourning] could not remain so indefinitely: they had to be repatriated back into the fold of the living. A new whare tupuna [marae meeting house] could not stand completed and empty: the tapu had to be lifted so that it could be used. This was the power of noa: the undoing of the restrictions imposed by tapu.

3.100 Mikaere thus rightly emphasises the fluidity of tapu. However, to make something noa without performing the appropriate process is a wrongdoing for which tikanga requires a consequence. We discuss noa next.

Noa

3.101 Noa refers to a state where strict processes are not required. Noa, which indicates some degree of freedom, is important because it is too difficult to always live in a tapu state.²¹⁷ However, the relationship between tapu and noa is complex, and the concepts are not opposites. Rather, tapu and noa work in tandem, each needing to be maintained at appropriate levels for Māori society to function in different situations.

3.102 Within hapū and iwi, certain actions can only be undertaken if there is a state of noa. Pōwhiri processes show the significance of noa. When visiting marae, manuhiri are only free to engage with their hosts after having achieved noa, which is facilitated by the pōwhiri.²¹⁸ At the beginning of the pōwhiri process, its participants are tapu.²¹⁹ Subsequently, visitors are allowed to consume food, enter the wharehau and freely

²¹³ Mason Durie *The Application of Tapu and Noa to Risk, Safety, and Health* (presentation to Challenges, Choices and Strategies, Mental Health Conference 2000, Wellington, 16 November 2000) at 3–4, cited in Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 37–38.

²¹⁴ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 1 and 53. Metge describes tapu as a state of being that results from mana: Joan Metge *In and Out of Touch: Whakamaa in Cross-Cultural Context* (Victoria University Press, Wellington, 1986) at 66.

²¹⁵ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 54.

²¹⁶ Ani Mikaere “Cultural invasion continued: the ongoing colonisation of tikanga Māori” (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 134 at 138.

²¹⁷ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 217; Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013) at 266.

²¹⁸ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 127.

²¹⁹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.59].

interact with the host group. As visitors transition from the ātea (the domain of Tūmataunga, the atua known for his unpredictability) to the whare (the domain of Rongomatāne, the atua responsible for peace), they must first be in a state of noa.

- 3.103 While noa and peace are not the same, they go hand in hand. There are also processes for returning the collective to a state of noa after a transgression has occurred. In this context, noa is linked to the concept of ea or balance.

EXPRESSIONS OF NOA

[Noa is] the spiritual state and physical ability to allow a person to be free from the restrictions of tapu. The people or place is no longer tapu for a permanent or short period of time so that people can access it without fear of spiritual harm to them or their whānau. Noa allows people to survive and live.²²⁰

... noa is not the opposite to tapu. The opposite to tapu are other forms of tapu.²²¹

Women are especially powerful in making things and activities noa. Women have a particularly important task in ensuring that the extension of tapu on buildings does not apply to the users. They therefore make buildings safe for use or habitation. This is the mana and tapu of women, in that they have the ability to free areas, things and people from restrictions imposed by tapu. Women are not noa, as is often thought, but they are agents to whakanoa — to make noa.²²²

Noa: a jural perspective

- 3.104 Noa is a relatively undernourished concept in tikanga discussions and academic writing. However, the freedoms that it connotes play a vital role in Māori social order. As Pihama explains:²²³

The influence and power of noa is very significant to the physical well-being of people by freeing them from any quality or condition that make them subject to spiritual and/or ceremonial restriction and influences. The concept of noa is usually associated with warm, benevolent, life-giving, constructive influences including ceremonial purification.

²²⁰ Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [57], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.143].

²²¹ Peter Adds Brief of evidence, #4.11 at 39, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.145].

²²² Leonie Pihama Statement of evidence, #A19 at [79], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.147].

²²³ Leonie Pihama quoting Rangimarie Rose Pere Statement of evidence, #A19 at [80], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.144].

- 3.105 Jurally, noa can be associated with freedom and powers, including the power to affect tapu through the process of whakanoa. An example of how noa provides comparative freedom is that karakia may be used to make a person’s body (or a part of their body) noa for the purpose of a medical procedure. By doing so, their body or body part is rendered immune from their tapu being interfered with. Correspondingly, the person conducting the procedure is freed from liability from interfering with the tapu of the person. There are nuances, as Mikaere shows, discussing removal of tapu from wharenui:²²⁴

For example, the lifting of the particular tapu imposed on a whare whilst it was being built did not then make the whare completely unrestricted. It simply meant that the particular restriction against anyone but those who were working on it entering the building was lifted. The iwi were now free to enter and to use the whare. However, the whare itself remained a tapu place in the sense that it represented a revered tupuna, and there remained many restrictions on conduct within it.

- 3.106 By analogy, this example might be extended to bodily integrity in the context of a medical procedure.
- 3.107 Because a perpetrator would be liable for improperly making something noa or reducing levels of tapu too much, the power to whakanoa must be carefully managed through appropriate processes, or kawa.²²⁵

Mana, tapu and noa in action

- 3.108 The overland journey of Kohinemataroa, as told by Tomas, provides an historical illustration of establishing mana and whakapapa:²²⁶

The first person to set foot on the land around the mid northern side of the Hokianga was Kohinemataroa. She was the daughter of Punateariari, who was a sister of Rahiri. As she journeyed across the land she named various places, including Waireia, Waihou, Oruaanui and Patiki (later renamed Whakarapa). The mana rangatira on the land was hers because she was the first person who travelled across the land, establishing her links to it through naming. Her son Rongomai accompanied her on her second visit, during which she named various other places. After she died her authority on the land passed to her son, Rongomai, and then down to her uri or descendants. Waihou, Whakarapa, Motuti and Whangapatiki all belonged to her, according to Re Te Tai. She consolidated her claim by working on the land and establishing kumara plantations. While she was working there she lived at Waihou and Whakarapa.

- 3.109 As Tomas also wrote, subsequent lack of contest for the lands claimed by Kohinemataroa was due to two factors. The mana of her senior lineage was respected by local

²²⁴ Ani Mikaere “Cultural invasion continued: the ongoing colonisation of tikanga Māori” (2005) 8(2) Yearbook of New Zealand Jurisprudence 134 at 138–139.

²²⁵ For discussion particularly of the role of wāhine Māori in whakanoa, and correspondingly whakatapu (that is, the transitions from tapu to noa and vice versa) see Ani Mikaere “Cultural invasion continued: the ongoing colonisation of tikanga Māori” (2005) 8(2) Yearbook of New Zealand Jurisprudence 134 at 139–141.

²²⁶ Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 127–128.

communities. Pragmatically, she also had mana in action, in the form of the power to exercise her authority through the backing of a powerful military force.²²⁷

- 3.110 This narrative further shows how whakapapa or connection to whenua, exemplified through place naming, may substantiate a tikanga based claim to a place. As the Awanuiārangi pūkenga explain, the connection the collective has to the land is reinforced by naming sites, rivers, ridgelines, hills and mountains. The names will narrate who was involved, what occurred and why.²²⁸
- 3.111 The rāhui placed in response to the eruption of Whakaari | White Island on 9 December 2019 is an example of a contemporary exercise of mana and the operation of tapu. Following the eruption, which caused 21 deaths, a number of iwi initially placed a total ban on all maritime activities in the ocean, including swimming. This was later changed to a ban only on fishing and gathering of seafood. The rāhui was widely respected despite the negative commercial and fiscal impact that the rāhui had on businesses in a beach and ocean-based community and the effect of it on Christmas and holiday ocean activities.²²⁹
- 3.112 The Awanuiārangi pūkenga provide a further historical example of tapu and mana in action, in the rāhui of Mihi-ki-te-kapua. In the early 1800s, a Tūhoe rangatira named Mihi-ki-te-kapua placed a rāhui over a coastline where her son had passed away. In response to the rāhui, people moved away from the area. As time passed, some longed to return and did so. However, for Mihi-ki-te-kapua, who was still grieving for her son, the site remained tapu. She said — do not return yet, you may unwittingly eat the remains of my son: “Taihoa e hoki koi kai koutou i ngā para o taku tamaiti”. Because of her mana and the hara consequent on the breach of tapu, she was able to assemble a taua or war party to enforce the rāhui at the cost of the lives of many of the returning hapū. The famous Tūhoe waiata Taku Rākau E records this event.²³⁰
- 3.113 To offer a final simple illustration of how tapu and noa interact:²³¹
- ... the whenua (placenta) of a newborn baby is returned to be buried in the tribal lands as a way of physically connecting them to their significant space and place. Where the whenua is buried, a hāngī stone [used for cooking food, and therefore noa] is placed directly on top of it and is also buried. As the whenua is part of the human body, it is considered tapu, and therefore where it is buried becomes tapu. The hāngī stone is placed on top of the whenua to nullify the tapu, thereby making the place noa.

Summary: mana, tapu and noa

- 3.114 In summary, mana, tapu and noa are significant in establishing correct relationships and regulating relationships. By establishing the standing of a person or entity, they clarify

²²⁷ Nin Tomas “Key concepts of tikanga Māori (Māori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 114–115.

²²⁸ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.35]; and see Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 309–311.

²²⁹ Hirini Moko Mead and Pou Temara Agreed statement of facts filed pursuant to s 9 of the Evidence Act 2006, 31 January 2020 at [46]–[47], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.109].

²³⁰ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [2.57].

²³¹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.60].

how others should relate to that person or entity and thereby regulate behaviour. Relational norms established by mana, tapu and noa are among the most fundamental norms governing Māori society. They stand alongside the structural norms of whakapapa and whanaungatanga and prescriptive norms of mauri, utu and ea. In a sense mana, tapu and noa might be termed the tikanga “engine room” because of the essential regulative role that they play. Below, the significance of kawa is noted in administering these concepts.

CONCEPTS OF RESPONSIBILITY

3.115 We have already explained that tikanga concepts of whanaungatanga and mana are closely associated with norms of responsibility. To illustrate this further, we next discuss four key responsibilities — kaitiakitanga, manaakitanga, aroha and atawhai. Each of these are inherent in mana and linked with whanaungatanga. Given these concepts’ jural similarities, we introduce each concept first and then discuss their jural aspects together. This differs slightly from the sequence followed in the chapter up to this point. These four responsibilities are only examples. In different factual situations further responsibilities such as kotahitanga (unity) may arise, as seen in Chapter 4 which follows.

Kaitiaki and kaitiakitanga

3.116 The word kaitiaki is sometimes defined as a guardian. A kaitiaki can be a person, creature, object or metaphysical being (such as taniwha), whose role involves protective duties towards place, people and, broadly, the kinship group.²³² Many duties of a kaitiaki concern whenua and the management of other natural resources. In modern times, kaitiakitanga is most often applied to the obligation of whānau, hapū and iwi to protect the spiritual and physical wellbeing of environmental resources in their care.²³³ However, kaitiakitanga also involves social responsibilities. In the *Report on the Crown’s Foreshore and Seabed Policy*, the Waitangi Tribunal identified that kaitiakitanga is different to a notion of environmental conservation.²³⁴ The Tribunal said that kaitiakitanga “best explains the mutual nurturing and protection of people and their natural world”.²³⁵

²³² Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.96]. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuarua* (Wai 262, 2011, vol 1) at 17; Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauriki Research Institute, Victoria University Press, Wellington, 2013) at 105.

²³³ Te Aka Matua o te Ture | Law Commission *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 40, citing Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) at 265–283.

²³⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Foreshore and Seabed Policy* (Wai 1071, 2004) at 8.

²³⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Foreshore and Seabed Policy* (Wai 1071, 2004) at 8; and see generally Merata Kawharu “Kaitiakitanga: a Maori anthropological perspective of the Maori socio-environmental ethic of resource management” (2000) 109 *The Journal of the Polynesian Society* 349.

- 3.117 Others emphasise that, in an older understanding, creatures were the kaitiaki and the role of humankind was to observe them.²³⁶ As Marsden pointed out, the atua Māori were kaitiaki of their domains.²³⁷ Matiu and Mutu explain that:²³⁸

Traditionally, kaitiaki are the many spiritual assistants of the gods, including the spirits of deceased ancestors, who were the spiritual minders of the elements of the natural world ... These spiritual assistants often manifest themselves in physical forms such as fish, animals, trees or reptiles ... Each kaitiaki is imbued with mana. ... There are many forms and aspects of mana, of which one is the power to sustain life.

- 3.118 As they continue:²³⁹

Māoridom is very careful to preserve the many forms of mana it holds, and in particular is very careful to ensure that the mana of kaitiaki is preserved. In this respect Māori become one and the same as kaitiaki (who are, after all, their relations).

- 3.119 Professor Merata Kawharu identifies that, for the kinship group, rangatira serve as kaitiaki. In this way, like Matiu and Mutu, Kawharu implicitly associates this function with mana.²⁴⁰

EXPRESSIONS OF KAITIAKI AND KAITIAKITANGA

[Kaitiakitanga incorporates] one universe, where all living things are connected. This includes animals, fish, plants, forests, sea and humans. Kaitiaki are manifested in tangible and intangible forms and are not always human.²⁴¹

²³⁶ Mere Roberts and others “Kaitiakitanga: Maori perspectives on conservation” (1995) 2 *Pacific Conservation Biology* 7 at 14; Edward Taihakurei Durie and others “Ngā wai o te Māori: ngā tikanga me ngā ture roia | The waters of the Māori: Māori law and State law” (paper prepared for the New Zealand Māori Council, 2017) at 30.

²³⁷ Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 67; see also Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauriki Research Institute, Victoria University Press, Wellington, 2013) at 105.

²³⁸ McCully Matiu and Margaret Mutu *Te Whānau Moana: ngā Kaupapa me ngā Tikanga Customs and Protocols* (Reed Books, Auckland, 2003) at 167.

²³⁹ McCully Matiu and Margaret Mutu *Te Whānau Moana: ngā Kaupapa me ngā Tikanga Customs and Protocols* (Reed Books, Auckland, 2003) at 167.

²⁴⁰ Merata Kawharu “Kaitiakitanga: a Maori anthropological perspective of the Maori socio-environmental ethic of resource management” (2000) 109 *The Journal of the Polynesian Society* 349 at 359.

²⁴¹ Kura Paul-Burke Statement of evidence, 22 December 2016 at [3.3], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.329].

Our hapū are obliged to actively protect our area for future generations through the practice of kaitiakitanga no matter what the cost. It is our responsibility to keep and guard hapū interests and taonga. It is us (Tainui o Tainui ki Whaingaroa) who are responsible for the preservation and guardianship of Whaingaroa Harbour. It is we who are obligated to nourish and control the relationship between our peoples and our natural world.²⁴²

Kaitiaki “have an intrinsic duty to safeguard the mauri of the environment, including to ensure the physical and spiritual health of the environment is maintained, protected and enhanced”.²⁴³

The fundamental component of kaitiakitanga is whakapapa. It is whakapapa that links individual kin to each other, to a specific location, resources, ngā Atua, as well as the dearly departed.²⁴⁴

[Kaitiakitanga is] essentially the responsibility aspect of mana. It recognises the responsibility of iwi and hapū to protect and look after the whenua, moana and taonga within their rohe. It also reflects the fact that iwi and hapū do not see themselves as owning the whenua, or moana, in the sense that we understand ownership today.²⁴⁵

When you are a kaitiaki you are the guardian of the resource for everybody. That doesn’t necessary [sic] mean you have the sole mana over the resource; kaitiaki need to exercise their guardianship for the benefit of the eco-system as a whole. The guardianship is over all living things and is not just restricted to human sustenance. If all living things are sustained then the people are sustained.²⁴⁶

Most importantly I have visited most of the sites I talk about in this evidence, and continue to visit them on a regular basis. I frequently wānanga (meet and discuss) at these sites with whānau, iwi members, students as part of a walking lecture and for anyone who is interested in learning more about these sites. I consider this as an active expression of my obligations as a kaitiaki for these kōrero and these sites our tūpuna lived and loved.²⁴⁷

... [a] person or iwi may be kaitiaki over land or water, but that is not ownership as once we leave this world someone else will take over as kaitiaki or guardian.²⁴⁸

²⁴² Angeline Greensill Statement of evidence, undated at [24], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.331].

²⁴³ David Topia Rameka Statement of evidence, 4 June 2017 at [21], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.331].

²⁴⁴ Gregory Lloyd White Statement of evidence (cultural), 14 June 2019 at [69]–[77], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.332].

²⁴⁵ Tamati Waaka Statement of evidence, 4 January 2017 at [55], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.338].

²⁴⁶ Hohepa Joseph Mason and Te Kei (O Te Waka) Wirihana Merito Brief of evidence, 29 April 2019 at [56], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.340].

²⁴⁷ Ngarimu Alan Huiroa Blair Statement of evidence, 2 June 2020 at [11], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.344].

²⁴⁸ Hemana Eruera Manuera Statement of evidence, 29 March 2019 at [54], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.347].

Tangitū manifested herself as a whale and is an important kaitiaki for the Hapū. According to tradition, if tikanga or kawa were not properly observed when gathering kaimoana or other resources, Tangitū the kaitiaki would appear. The Hapū believe that, as a kaitiaki, Tangitū has the power to protect her people, particularly in the event of natural disasters. She has been known to use her tail to unblock the mouth of Te Ngarue and Pākuratahi Streams, or lie across the mouth as protection in the event of high seas. There are other kaitiaki who live in Tangitū, including Uwha, at Arapawanui, who takes the form of an eel or octopus, and Moremore, the son of Pania (of the reef), who swims the coastline in the form of a mako.²⁴⁹

The seer or tohunga had a kaitiaki role. His role was to interpret any unnatural phenomena or occurrence like an unusual sighting, such as a log floating upstream against the current. That sighting would be deemed a taniwha. In summary a taniwha was regarded as the manifestation of an unnatural occurrence. Taniwha were used to support the decision making of a tohunga.²⁵⁰

Manaakitanga

3.120 Manaakitanga speaks to the duty of care people have to each other, the environment, mātauranga Māori, the past, the atua and to all things.²⁵¹ Manaakitanga, literally translated, means to care for mana.²⁵² As Coates and Irwin-Easthope find: “[a] number of people refer to the importance of manaakitanga to uphold both the mana of others and one’s own mana”.²⁵³ Durie describes manaakitanga as “an aspect of mana on which Māori placed special store. It amounted to generosity, caring for others and compassion.”²⁵⁴ According to the authors of *He Hīnātore ki te ao Māori*:²⁵⁵

Manaakitanga means to care for a person’s well being in a holistic sense — that is physically, mentally and psychologically. It is a concept that extends beyond the bounds of the family and involves all people. It is one of the main factors in judging a person’s status as a leader or one possessing mana, and that is by their generosity in taking care of others.

²⁴⁹ Tania Marama Petrus Hopmans Affidavit, 3 April 2017 at [84], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.368].

²⁵⁰ Waiohau (Ben) Te Haara Evidence in reply, undated at [15]–[16], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.366].

²⁵¹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.87].

²⁵² Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 166.

²⁵³ Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.256].

²⁵⁴ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 6.

²⁵⁵ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 166.

EXPRESSIONS OF MANAAKITANGA

... manaakitanga is the process of giving to others, but it is about “te mana āki” or enhancing the mana of others, and in doing so upholding your own mana.²⁵⁶

... [manaakitanga] can be described as generosity, care-giving, or compassion and is an expression of one’s mana, one’s status and authority, through acts of kindness and caring. To manaaki or give generously and provide hospitality is a mana-enhancing activity. It also creates an obligation on the visitor to reciprocate in the future. Thus mana, manaaki and tuku are closely related concepts in Te Ao Māori.²⁵⁷

There might be someone at a tangi (funeral) that wants to mihi (greet) the whānau on the paepae (orator’s bench) but they can’t kōrero Māori. Even though it is not tika (right) it might be decided to allow them to kōrero. This is consistent with the idea of manaakitanga and allowing for the exercise of whanaungatanga and connections to be made between people.²⁵⁸

There are different levels of manaakitanga accorded a person. It depends on the level of whanaungatanga, whether a close blood whānau member or a whanaunga. Sometimes the whanaunga relationship is stronger than the whanaungatanga to a blood relative this may be due to close association through work, sports and friendship. These types of relationships and as well as their strengths will determine what level of manaakitanga is given.²⁵⁹

Our customary areas are not as rigid as Western boundaries ... Other Whakatōhea hapū can come into our sector, for instance, we wouldn’t stop Ngāti Patu coming to fish in our area. The tikanga is that we share the kai because our hapū of Whakatōhea are related to each other by whakapapa, and it is part of our collective responsibility to care for our whanaunga, as they do for us (this is known as manaakitanga). However, [there is a] distinction between permitting access to our sea territory as a matter of manaakitanga and having the customary authority to act as the kaitiaki.²⁶⁰

²⁵⁶ Moe Milne Statement of evidence, #A62 at [122], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.256].

²⁵⁷ Margaret Anne Kawharu Statement of evidence, 2 June 2020 at [35], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.257].

²⁵⁸ David Wilson Brief of evidence, 13 October 2020 at [52], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [3.4].

²⁵⁹ Te Kahautu Maxwell Affidavit, 7 August 2020 at [99], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.258].

²⁶⁰ Te Riaki Amoamo Affidavit, 3 August 2020 at [6.5] and [6.6], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.259].

Aroha and atawhai

3.121 Aroha is often understood as a literal translation of love. However, the meaning is broader, having a “wide range of meaning from compassion and love to concern and sorrow”.²⁶¹ Barlow observes that “[a] person who has aroha for another expresses genuine concern towards them and acts with their welfare in mind”.²⁶² According to the authors of *He Hīnātore ki te ao Māori*:²⁶³

Aroha is an expression of love, care, respect and affection in its widest sense. It is the essential element in interpersonal relationships. It begins from birth and continues till death. Aroha encompasses respect, friendship, concern, hospitality, and the process of giving. Thus every person is concerned for and respects the rights of others. In short, it is valuing another person.

3.122 As we observed in relation to kaitiakitanga and manaakitanga, aroha and its similar concept, atawhai, are linked with mana. Similar to aroha, atawhai relates to nurturing, caring and kindness and “extends to embracing and supporting others in its broadest sense”.²⁶⁴ Tamati Waaka has discussed atawhai in connection with the responsibilities of rangatira. Waaka emphasises the important role that a rangatira has as someone who “possesses the skills necessary to maintain mana and was regarded as the repository for the mana of the collective”. He notes that their responsibilities include knowledge of how to look after people: “He atawhai tangata”.²⁶⁵

EXPRESSIONS OF AROHA

In te ao Māori, there are tikanga values that guide our relationship to the takutai moana [coastal area]. They are built on mana motuhake, mana whakahaere, mana takekake and notions of kaitiakitanga, aroha, and manaakitanga.²⁶⁶

The healthy harakeke [flax] is stabilised by a root system representing values and practices of aroha (love/compassion), manaakitanga (care/responsibility for others), wairuatanga (nurture of the spirit) and whanaungatanga (kinship obligations).²⁶⁷

²⁶¹ Te Aka Matua o te Ture | Law Commission *The Taking into Account of Te Ao Maori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 19.

²⁶² Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 8.

²⁶³ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 151.

²⁶⁴ Te Tāhū o te Ture | Ministry of Justice *He Hīnātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 152; H W Williams *Dictionary of the Māori Language* (GP Publications Ltd, Wellington, 1992) at 19.

²⁶⁵ Tamati Waaka Statement of evidence, 4 January 2017 at [38]–[41], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [6.101].

²⁶⁶ Te Rua Rakuraku and Donald Kurei Joint affidavit, 21 January 2022 at [20], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.336].

²⁶⁷ Khylee Quince s 27 report, 18 September 2018 at [9], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [2.58], drawing on the metaphor of “te pā harakeke” to explain the relationship between a child and their whānau.

I believe that [aroha] is the pivotal value around which Māori society was organised and it reflects a set of privileges and obligations that each folk has with the rest of his community.²⁶⁸

Aroha was the most important thing. If that aroha was abused, the abuser put the tuku at risk.²⁶⁹

A jural perspective: kaitiakitanga, manaakitanga, aroha and atawhai

- 3.123 Kaitiakitanga, manaakitanga, aroha and atawhai each describe norms of care and responsibility. They are each closely associated with whanaungatanga connections and with maintaining mana. Meeting responsibilities arising from whanaungatanga and consistent with mana will often require the exercise of kaitiakitanga or expressions of manaakitanga or aroha. Te Rua Rakuraku and Donald Kurei, for example, identify practices of kaitiakitanga, aroha and manaakitanga “embedded into the notions of authority”.²⁷⁰
- 3.124 Exercising kaitiakitanga for the kinship group or in relation to natural resources is strongly linked to whanaungatanga. Kaitiakitanga has been described by the Waitangi Tribunal as: “the obligation, arising from the kin relationship to nurture or care for a person or thing”.²⁷¹ While manaakitanga and aroha express broader responsibilities that are not unique to the kinship group, each similarly underpin the strengthening of relationships and interrelationships. For instance, as one Waitangi Tribunal report explains, “[m]anaaki was given especially to those who would live or align with the tribal group”.²⁷²
- 3.125 Kaitiakitanga has procedural implications. For instance, Marsden noted that although humans could harvest resources, they were “duty bound” to thank and appease the kaitiaki of those resources.²⁷³ In the flagship report *Ko Aotearoa Tēnei*, the Waitangi Tribunal considered that mana and kaitiakitanga go together and those who have mana “must exercise it in accordance with the values of kaitiakitanga — to act unselfishly, with right mind and heart, and with proper procedure”.²⁷⁴
- 3.126 Each of these responsibilities may also aid the satisfaction of utu. In some circumstances, kaitiakitanga, manaakitanga or aroha might be required for utu to be discharged.

²⁶⁸ Pita Sharples Notes of evidence at 129, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.264].

²⁶⁹ Ross Gregory Brief of evidence, #F28 at 5, as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.220], discussing tuku: an offer to share, or being presented with the opportunity to share, or bestowing a gift on someone.

²⁷⁰ Te Rua Rakuraku and Donald Kurei Joint affidavit, 21 January 2022 at [20], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [2.8].

²⁷¹ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011) at 23.

²⁷² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 26.

²⁷³ Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 67; see also Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauriki Research Institute, Victoria University Press, Wellington, 2013) at 105.

²⁷⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuarua* (Wai 262, 2011, vol 1) at 17.

Summary: responsibilities as associated norms

3.127 We have termed kaitiakitanga, manaakitanga, aroha and atawhai “associated norms”. They each reflect obligations that are associated with and intrinsic to concepts earlier described in the chapter, including whanaungatanga and mana. Fulfilling these responsibilities works towards or maintains a desired situation such as mana, whanaungatanga, utu or ea. Such responsibilities are fundamental to upholding tikanga as a structured system. They are facilitated by the processes and procedures called kawa that likewise work to maintain and express the primary structural, prescriptive and relational concepts we have discussed.

PROCESSES AND PROCEDURES (KAWA)

3.128 The meaning of kawa appears to vary between hapū and iwi and is not a universal term. However, the simplest and most widely accepted meaning is that kawa means process or procedure.²⁷⁵ As Te Riaki Amoamo considers, “[k]awa are etiquette and protocols. They are the protocols that keep things operating smoothly.”²⁷⁶ Royal writes:²⁷⁷

A key feature of kawa is that it orders behaviours in a certain pattern. That is, a kawa tells us that certain tikanga should take place at a certain time and in a certain order ... a kawa arranges tikanga into a particular order or pattern.

3.129 To distinguish between tikanga and kawa, Durie for instance describes tikanga as “Māori law” and kawa as “ritual and procedure”.²⁷⁸ Kruger explains:²⁷⁹

The practice or practical expression of tikanga is sometimes distinguished from the guiding principles of tikanga itself. These protocols are referred to as kawa, and are always grounded in the principles of tikanga.

3.130 Kruger explains that “[k]awa ... are first and foremost coercive and normative in nature”.²⁸⁰ Temara considers kawa to be “tikanga wrapped in tapu”.²⁸¹ The tapu nature of kawa can lead to some rigidity that may make kawa less susceptible to change than tikanga — it has been said that “tikanga can be interchangeable where kawa is rigid like the rising and setting of the sun”.²⁸² However, kawa can also vary according to context. For example, different karakia may be required to lift or reduce tapu depending on its nature.²⁸³ Kawa

²⁷⁵ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 3. While not every iwi or hapū adopts the term kawa, all will have processes and procedures with consistent purposes.

²⁷⁶ Te Riaki Amoamo Second affidavit, 21 February 2022 at [8], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [3.3].

²⁷⁷ Te Ahukaramū Charles Royal “An organic arising: an interpretation of tikanga based upon the Māori creation traditions” in Ngā Pae o te Māramatanga *Tikanga Rangahau Mātauranga Tuku Iho | Traditional Knowledge and Research Ethics Conference Proceedings 2004* (Ngā Pae o te Māramatanga, Auckland, 2005) 206 at 227.

²⁷⁸ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994) at 4.

²⁷⁹ Vivian Tāmami Kruger Statement of evidence, 2 June 2020 at [39], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [3.2].

²⁸⁰ Vivian Tāmami Kruger Statement of evidence, 2 June 2020 at [39], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [3.2].

²⁸¹ Pou Temara (wānanga held at Rotorua, 25 May 2022).

²⁸² Korohere Crossley Bishop Lloyd Ngāpō Statement of evidence (English translation), 13 October 2020 at [9], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [3.6].

²⁸³ See for example Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 77.

may change over time to reflect changing circumstances or what the occasion requires.²⁸⁴ Because of the tapu nature of kawa, transgressing kawa may mean punishment.²⁸⁵

- 3.131 We discuss four examples of kawa below: pōwhiri, rāhui, muru and karakia. Each of these processes and procedures illustrates how kawa support Māori society to function. The discussion also shows how kawa work to sustain the basic norms of tikanga in ways that give them a jural dimension. Kawa are techniques and methods connected with the other concepts explained above and used to maintain relationships and mediate disputes. One function of kawa is to mediate between mana, tapu and noa so that they are maintained at appropriate levels. Another is to express whanaungatanga.

Pōwhiri

- 3.132 Pōwhiri processes, through which visitors are welcomed and hosted on a marae, are steeped in kawa. Pōwhiri reflect responsibilities related to mana and whanaungatanga. They manage mana, tapu and noa.
- 3.133 Pōwhiri centre whanaungatanga. In pōwhiri, the exchange of karanga (a ceremonial call), whaikōrero (formal speeches) and the giving and receiving of koha (contributions) acknowledge the responsibilities of both hosts and guests that are associated with whanaungatanga. For example, koha are a tangible way of expressing norms of aroha and atawhai. When groups meet, processes such as mihimihi (introductions) and pōwhiri ensure whakawhanaungatanga (making connections) is a focus. Pōwhiri acknowledge relationships that must be referenced, drawing connections between manuhiri and the host group and links with those who have passed.²⁸⁶ A primary function of pōwhiri is to ensure that relevant connections are made. When manuhiri arrive and are welcomed onto the marae, the first connections made through the karanga are ancestral connections. The host group are calling their own ancestors forward to meet and welcome deceased loved ones that accompany the visiting manuhiri.²⁸⁷
- 3.134 The pōwhiri process expresses manaakitanga and ultimately reflects on the mana of both groups.²⁸⁸ Russell Bishop explains how acknowledgements of both groups' mana are reflected in pōwhiri protocols.²⁸⁹
- 3.135 Pōwhiri regulate tapu and noa. Pōwhiri processes are an example of detailed and carefully orchestrated steps that are taken to achieve noa. Manuhiri enter the marae ātea (the ground in front of the whareniui) in a state of tapu with their mate (dead). They are not free to engage with their hosts or consume food until noa has been achieved.

²⁸⁴ Edward Taihakurei Durie "Custom law" (unpublished draft paper, 1994) at 8–9.

²⁸⁵ Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.104].

²⁸⁶ Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [4.14].

²⁸⁷ Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [4.14].

²⁸⁸ Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [3.87]–[3.89].

²⁸⁹ Russell Bishop "Collaborative research stories: whakawhanaungatanga" (PhD Thesis, University of Otago, 1995) at 130–139 and 159.

Rāhui

- 3.136 Rāhui restore balance. In this way, rāhui have links with the concepts earlier identified as prescriptive: mauri, utu and ea. A rāhui involves restricting the use of a natural resource or an area by implementing a state of tapu to protect it.²⁹⁰ Publicly notifying this status, a rāhui pou (a post) imbued with mauri may be set in the ground to mark a restricted area. This is a purpose that must be honoured by all.²⁹¹
- 3.137 A place or natural resource subject to a rāhui will have a right to protection and an immunity from interference. People have a duty to respect the rāhui and cannot access the place or natural resource. Therefore, a rāhui is a good example of a process for managing the powers and responsibilities associated with tapu, and of how tapu (by setting in place a prohibition) facilitates utu and ea.
- 3.138 Rāhui relate to responsibilities. They have connections to whanaungatanga, mana and the norms of responsibility arising from each of these concepts. Placing a restriction on an area will almost always be done to fulfil the responsibilities of whanaungatanga and related to mana. Like pōwhiri, rāhui have the role of regulating tapu and noa. When a rāhui is lifted, noa will be engaged using the protocols of whakanoa.

Muru

- 3.139 Muru is another procedure concerned with balance. Muru is one way to achieve utu and, ultimately, ea. It has been described as a form of restorative justice.²⁹² It has a set protocol. The process of muru includes kōrero, which allows an accusation to be discussed and investigated. The outcome of a muru process will involve a judgement and compensation for both intentional and unintentional harm.²⁹³ The muru process enables denunciation of wrongdoing and is most effective when acknowledged by the associated communities. However, it is mana-enhancing for both transgressor and victim — it restores the mana of both.²⁹⁴
- 3.140 Muru may be mediated by associated responsibilities. Waaka explains that the customary “plundering” or restorative justice exacted from an individual, whānau, hapū or iwi by muru is also an act that is done with aroha.²⁹⁵ Manaakitanga obligations are also noted in connection with muru. Mead considers that even during the ritual practice of muru, manaakitanga was shown to the manuhiri who had come to take away the livelihood of those responsible for a transgression.²⁹⁶

²⁹⁰ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 105.

²⁹¹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.29].

²⁹² Hirini Moko Mead and Pou Temara Statement of tikanga, 31 January 2020 at [60]–[61], as cited in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

²⁹³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 166–176.

²⁹⁴ Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001) at 77–79; see also Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 167–168.

²⁹⁵ Tamati Waaka Statement of evidence, 4 January 2017 at [101]–[104], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.292].

²⁹⁶ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Revised ed, Huia Publishers, Wellington, 2016) at 33.

Karakia

3.141 Many tikanga practices require karakia to ensure positive outcomes, safeguarding protection and wellness for all.²⁹⁷ According to Barlow, karakia are:²⁹⁸

... pleas, prayers, and incantations addressed to the gods who reside in the spirit world. Karakia are offered so that the gods may intercede in the affairs of mortal men by providing comfort, guidance, direction, and blessings for them in their various activities and pursuits.

3.142 Karakia is a procedure that permeates Māori society, reflecting the belief that it is not a closed system but rather “interpenetrated” by the spiritual world.²⁹⁹ Barlow explains the “repertoire” and different functions of karakia:³⁰⁰

There are many types of karakia, and in ancient times all people used some form of prayer in daily life and on special occasions. Some prayers have special ritual functions, while others are used for protection, purification, ordination, and cleansing. In traditional Māori society, people of all classes, from children to adults and priestly experts, possessed a repertoire of karakia for use in all kinds of situations.

3.143 A key function of karakia is to connect to the surrounding wairua (other realities). For this reason, karakia can be a tapu practice and care is required to ensure that they are conducted correctly.³⁰¹ Karakia draw connections to atua Māori and tūpuna and may request their guidance, protection or help.³⁰² Karakia facilitate whanaungatanga by sustaining connections to atua Māori and those who have passed away.³⁰³ Karakia are used to implement a state of tapu, to reduce tapu, or to render something noa. Overall, karakia play a vital role in administering tikanga.

Summary: significance of kawa in normative and jural terms

3.144 Pōwhiri, rāhui, muru and karakia are examples of kawa concerned with giving effect to the normative tikanga framework we have discussed in this chapter. These kawa are concerned with recognising relationships, ensuring balance, administering tapu and acknowledging mana. Kawa can be seen as having a jural dimension in that they are procedural mechanisms. Kawa play a significant role in managing tikanga in daily life. Their significance in normative and jural terms should not be underestimated.

3.145 While we have noted the tendency of kawa to be relatively inflexible, the following accounts (each anonymised to maintain the privacy of affected hapū) also show how a search for what is tika or correct in the circumstances will prevail over strict adherence to these protocols.

²⁹⁷ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.107].

²⁹⁸ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 37.

²⁹⁹ Te Ahukaramū Charles Royal (ed) *The Woven Universe: Selected Writings of Rev Māori Marsden* (Estate of Rev Māori Marsden, Ōtaki, 2003) at 20.

³⁰⁰ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 37.

³⁰¹ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.106].

³⁰² Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.107].

³⁰³ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [3.12].

- 3.146 A travelling group of senior kaumātua (male elders) made a stop within the lands of a hapū with only very distant whakapapa connections. While there, one of the kaumātua passed away. The group sought permission to allow the tūpāpaku (deceased) to remain at a local marae while they completed their journey, promising to return to collect him. According to the kawa of that marae, any tūpāpaku lying on the marae for more than three days had to be buried locally. The travelling group did not return within this time. When they did return and realised that kawa would require the tūpāpaku to remain, they spoke of the sorrow and whakamā that would be caused if they returned home without the tūpāpaku and asked permission to cut his nails so that they might at least return with this part of him. The locals were so affected by this kōrero that, although it would involve a breach of their kawa, the tika or correct response was to allow them to return to their home with the tūpāpaku.³⁰⁴
- 3.147 In another example, a young man left his home to live within the whenua of a related hapū. When he died many years later, even though he did not belong to the local hapū, he was taken to the local marae for his tangihanga. When they heard of his passing, a whānau group from his homeland travelled to the marae to claim him. The local koroua who held the speaking rights noticed that the visiting group only had female speakers. This was problematic because the strict kawa of that marae was that only men could speak on the paepae (an expression meaning in this context that only men would be allowed to speak). However, they set aside their kawa after resolving that they could not deprive the visiting whānau of the right to claim their tūpāpaku. The generosity impressed the visiting whānau. They in turn resolved that the tūpāpaku should not be removed to his former home. To the whānau, the local hapū had shown that they would properly discharge their responsibility to care for him.³⁰⁵

NORMS BOUNDED BY WHAKAPAPA

- 3.148 In this concluding section, we return to the concept of whakapapa, reflecting on its place as a regulator and a decision-making guide. Whakapapa underlies all of the tikanga norms we have discussed. Tikanga concepts are bounded by reference to it. We consider that whakapapa is integral to understanding tikanga concepts such as whanaungatanga and mana, to keeping tikanga concepts within their proper bounds and to engaging with the concepts of responsibility.
- 3.149 Both whakapapa and whanaungatanga are expansive concepts and have the capacity to embrace new collectives. Neither one is fixed or static or confined to traditional tribal collectives. On the contrary, whakapapa and whanaungatanga are mechanisms for identifying connection and can evolve to embrace new relationships and new contexts.³⁰⁶ However, their primary normative and jural significance lies in ensuring that the order of things is properly layered, the connection to kāwai tupuna (line of descent, lineage) is acknowledged, relationships to the natural world, place and people are nurtured, associated responsibilities are discharged, and the processes for engagement that have

³⁰⁴ This account was provided to us by Pou Temara (May 2023).

³⁰⁵ This account was provided to us by Joan Metge (July 2023).

³⁰⁶ Edward Taihakurei Durie "Custom law" (unpublished draft paper, 1994) at 5.

been carefully laid down over generations are followed. Importantly, other concepts are never divorced from this foundation.³⁰⁷ For example, as we earlier reflected:

- (a) Mana arises from the atua Māori and other whakapapa-based connections.³⁰⁸
- (b) Kaitiakitanga (associated with mana) connects back to whakapapa. It is applied “within kin group social organisation”.³⁰⁹ It “is a direct result of that genealogical relationship”.³¹⁰
- (c) Whanaungatanga is a broad understanding of kinship that makes lateral connections, in ways which can overlap with whakapapa.

3.150 Tikanga concepts may have the capacity to expand into untried contexts, but from time to time this will risk unduly straining their meaning. Whakapapa provides one way to set a boundary around such expansion. It is for this reason that we began our discussion of tikanga concepts from within the wharenui — which is an embodiment of whakapapa. It represents a space safeguarding the integrity of tikanga, and within which tikanga concepts can be more genuinely understood.

CONCLUSION

3.151 In this chapter, we have outlined how tikanga concepts can be understood as a complete, coherent and connected system of norms and as having jural qualities. We have shown how tikanga concepts give rise to powers, rights, duties, liabilities and other interests or restrictions that govern relationships. The functions that tikanga concepts perform in Māori society are readily expressed in jural ways. They are widely and consistently understood by Māori in these ways. To appropriately engage with tikanga, it is important to conceive of tikanga as an entire system with concepts connected to one another and working together as we have described.

³⁰⁷ Moana Jackson Statement of evidence, 3 May 2012 at [93]–[94], as cited in Coates and Irwin-Easthope “Beneath the herbs and plants”, Appendix 2 at [4.6]; Nin Tomas “Key concepts of tikanga Maori (Maori custom law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present” (PhD Thesis, Waipapa Taumata Rau | University of Auckland, 2006) at 69: a “process within which other ideas and concepts can be structured into a coherent format”.

³⁰⁸ Cleve Barlow *Tikanga Whakaaro: Key Concepts in Maori Culture* (Oxford University Press, Auckland, 1994) at 60–61; Joseph Williams “He aha te tikanga Maori” (unpublished paper for Te Aka Matua o te Ture | Law Commission, 1998) at 11–12.

³⁰⁹ See particularly: Merata Kawharu “Kaitiakitanga: a Maori anthropological perspective of the Maori socio-environmental ethic of resource management” (2000) 109 *The Journal of the Polynesian Society* 349 at 349–350 (“applied within kin group social organisation”); see too Joseph Williams “He aha te tikanga Maori” (unpublished paper for Te Aka Matua o te Ture | Law Commission, 1998) at 14.

³¹⁰ Joseph Williams “He aha te tikanga Maori” (unpublished paper for Te Aka Matua o te Ture | Law Commission, 1998) at 10.

CHAPTER 4

A guide for engaging with tikanga

INTRODUCTION

- 4.1 In this chapter, we set out a guide for engaging with tikanga and apply it to six hypothetical case studies. Our approach continues to build upon Chapter 3, which analysed tikanga as a system of norms with legal implications. The step-by-step approach that we now set out in the form of a guide broadly reflects the way we have grouped and described tikanga concepts in Chapter 3. The guide and case studies are intended to assist people working in a legal or policy context to build their understanding of how these tikanga concepts may interact and be applied in different factual situations.
- 4.2 Tikanga concepts and their application and interaction are often implicit, making it difficult for those who are not familiar with tikanga to understand them. Those less familiar with tikanga may find value in working through the sequence of questions set out in the guide to clarify their thinking and lay groundwork for their own analysis of different factual situations. However, when developing the guide we have also been cautious because there are limits to how much assistance a guide can give when it comes to engaging with tikanga. Of the several considerations we ask future users of the guide to bear in mind, above all it will be important for them to read the guide alongside Part Three where (in both Chapters 8 and 9) we emphasise the need to develop processes that involve those with tikanga expertise. The guide is suggested as just one aid to clearer understanding. By itself, it will not equip users to competently undertake tikanga analysis. When applying the guide, it will be proper and necessary in many situations to seek guidance from pūkenga tikanga (tikanga experts). The guide may help to inform these conversations.
- 4.3 The six case studies supporting the guide have been developed mainly to illustrate the guide's application. However, they also help to show some of the ways in which tikanga works, including nuances that can arise in relation to different tikanga concepts. In this way, the case study analysis should bring readers from our theory of tikanga as a normative system to a more applied understanding of tikanga. That is why this chapter completes Part One of this Study Paper.

USING THIS GUIDE

- 4.4 For future users, there are several things to be aware of when using this guide.

- 4.5 First, consistent with the mātauranga (Māori knowledge) grounded approach that Part One of the Study Paper has taken, the guide intentionally focuses solely on tikanga rather than on the interaction between tikanga and state law. This is because we think it is preferable to first understand how tikanga concepts might be engaged in a factual situation before moving to the state law processes that we address in Part Three. For those who use the guide in a legal or policy context, the guide is therefore best viewed as an initial analytical or information-gathering step, and as one way of clarifying operative tikanga-focused facts.
- 4.6 Second, the guide focuses on tikanga concepts we identify as important and common. However, it is also open-ended to enable consideration of other relevant tikanga as well as iwi, hapū and whānau expressions of tikanga. This should help future users of the guide to accommodate all factual situations and facilitate analysis that accurately and appropriately engages with tikanga. In particular, this may arise when considering tikanga responsibilities and when identifying any relevant kōrero tuku iho (oral traditions), because the guide names only some common examples of responsibilities and kōrero tuku iho. For instance, whereas Chapter 3 focused on responsibilities of kaitiakitanga (guardianship), manaakitanga (giving to others) and aroha (love, concern), some of our case studies also identify kotahitanga (unity) as a further responsibility arising from the factual situations described.¹ Examples of kōrero tuku iho suggested below include whakataukī and whakatauākī (proverbs), waiata (song) and mōteatea (a chant or lament).
- 4.7 Third, the guide proposes a systematic analysis of tikanga rather than an approach that goes directly to obviously applicable individual tikanga concepts. A systematic approach is consistent with viewing tikanga as an integrated system of norms. It also helps to avoid the risk of placing undue focus on a particular concept (especially intuitively powerful and important concepts such as mana) and overlooking the application and interaction of other relevant tikanga. That said, the guide will still help to determine what tikanga concepts are primarily engaged, and whether particular concepts warrant consideration.
- 4.8 Fourth, as we said above, users of the guide may find it beneficial to consult with pūkenga to obtain guidance on appropriate sources of information or to test preliminary analysis. However, we would not suggest asking pūkenga to work through the guide and supply the analysis themselves. Pūkenga do not need a guide, nor will they necessarily be able to work within the parameters of a guide. For pūkenga, implicit tikanga concepts will be obvious. Instead, we would suggest asking pūkenga which tikanga concepts they consider are relevant in a factual situation and reflecting their responses in the analysis. It may be helpful to begin by asking them, for example, whether and how whakapapa is engaged — in other words, inviting them to describe any relevant genealogical and historical connections that explain how the parties to the case and any lands and waters are connected. In this way, the guide can act as a bridge between those steeped in tikanga and those who need to understand its application and interaction for the purposes of legal and policy work.
- 4.9 Fifth, it is important to understand that precedent in tikanga is not applied in the same way as the common law principle of *stare decisis*.² Tikanga outcomes (even in very similar

¹ Kotahitanga, meaning unity, was discussed in Chapter 2 as a central principle of the whareniui.

² *Stare decisis* means “to stand by things decided” in Latin. It is a common law principle that directs courts to adhere to previous judgments of the same or higher courts when resolving a case with allegedly comparable facts.

situations) can be broad ranging. What is important is that the outcomes are responsive to the context and are consistent with the underlying tikanga concepts. Similarly, when kōrero tuku iho such as pūrākau (legendary narratives) are shared, as we do in the case studies which follow, their primary purpose is to build understanding of the meaning of the relevant tikanga rather than as a source of precedent. They are not intended to be analysed in the same ways as we might be accustomed to do with case law. However, they may influence thinking about a problem and can help to build understanding of the significance of the tikanga and its context.

- 4.10 Lastly, in some ways such a structured guide runs counter to the flexible nature of tikanga. However, on balance we think this is outweighed by potential benefits in the legal and policy context. We acknowledge that tikanga operates within Māori communities every day without the need for any written guide. The purpose of this guide is to support proper engagement with tikanga in the context of state law. It may also support iwi, hapū and whānau when from time to time they seek assistance from state law. What we offer is merely one method that encourages future users to recognise tikanga as an integrated system and engage with it in a way that we think promotes and protects the integrity of tikanga. Future users will need to exercise their own judgement carefully when deciding when and how rigorously to apply the guide.

HOW WE DEVELOPED THIS GUIDE AND THE CASE STUDIES

- 4.11 The guide and case studies were developed in consultation with pūkenga from Te Whare Wānanga o Awanuiāraangi. We consider that the guide can apply in any factual context where tikanga concepts are or may be in application or interaction. It has three overall steps, each expanded on below. The steps are to:
- (a) Identify tikanga as it relates to the factual situation.
 - (b) Identify relevant kōrero tuku iho and related mātauranga.
 - (c) Identify other similar situations.
- 4.12 The case studies which then follow are informed by both kōrero shared with us by the Awanuiāraangi pūkenga and our own understanding of tikanga and state law. Each case study has been developed to outline a realistic, contemporary scenario that also generates (or may generate) an interface between tikanga and state law. Together, the case studies work to capture a range of tikanga concepts in application and interaction.
- 4.13 The case studies are hypothetical, with fictional names for people and generic names for hapū assigned using a reo Māori numbering format. Two of the case studies draw on work by Te Aka Matua o te Ture | Law Commission relating to surrogacy and succession law. Where we articulate the tikanga of iwi, hapū and whānau and identify similar situations in the case studies, this is at a high level in a way where the tikanga described might be generally accepted by iwi, hapū and whānau as one realistic way of doing things.
- 4.14 For each case study, we first set out the factual situation and then work through the steps in the guide.

A GUIDE FOR ENGAGING WITH TIKANGA

STEP 1: IDENTIFY THE TIKANGA

Identify the concepts of tikanga Māori that are engaged by the factual situation, including associated responsibilities and relevant tikanga processes and procedures. Where tikanga is engaged at an iwi, hapū or whānau level, identify how the concepts, including the associated responsibilities and processes or procedures, are expressed by those iwi, hapū or whānau. Consider the following:

- (a) The structural concepts of whakapapa and whanaungatanga.
- (b) The relational concepts of mana, tapu and noa arising from the status of an entity and:
 - (i) to the extent mana is engaged, its source; and
 - (ii) to the extent mana and tapu are engaged, the relevance of that to the protection of mauri.
- (c) Responsibilities associated with the structural and relational concepts, including, for example, kaitiakitanga, manaakitanga and aroha.
- (d) The take in the context, and the prescriptive concepts of utu and ea for maintaining balance.
- (e) Any other concepts of tikanga Māori that are engaged.
- (f) Any tikanga processes or procedures that have been, are, or could be engaged.

STEP 2: IDENTIFY RELEVANT KŌRERO TUKU IHO AND RELATED MĀTAURANGA, INCLUDING, FOR EXAMPLE, WHAKATAUKĪ, WHAKATAUĀKĪ, WAIATA AND MŌTEATEA

Identify any relevant kōrero tuku iho and related mātauranga such as whakataukī, whakatauākī and mōteatea to build understanding of the tikanga engaged and their application in context. Where tikanga is engaged at an iwi or hapū level, identify how kōrero tuku iho and related mātauranga are expressed by those iwi and hapū.

STEP 3: IDENTIFY OTHER SIMILAR SITUATIONS

- (a) Where tikanga is being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred within the iwi, hapū and whānau.
- (b) Where it is difficult to identify similar situations within the whānau, hapū and iwi, consider similar situations in other iwi of the same waka before identifying similar situations in any iwi, hapū or whānau.
- (c) Alternatively, where tikanga is not being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred in any iwi, hapū or whānau.

CASE STUDY 1: A TONO FOR A TŪPĀPAKU

The facts

When Ngārimu passes away, he is taken by one of his hapū, Ngāti Tuarua, to their marae. Ngārimu has whakapapa (connections) to Ngāti Tuarua through his maternal grandmother Aroha. He has lived near the marae for most of his life and was very close to Aroha when he was a child. Ngārimu served on the committee of the marae for 20 years before he died and was considered by Ngāti Tuarua to be a hapū leader with authority to speak on the marae. A large tangihanga is organised by Ngāti Tuarua and plans are made for the burial to take place at the urupā (cemetery) next to the marae.

At the first pōwhiri (welcome) for the tangihanga, a large group from another hapū, Ngāti Tuatahi, comes onto the marae. During whaikōrero (formal speeches), Ngāti Tuatahi makes a tonu (request) for the tūpāpaku (deceased), claiming that Ngārimu should be buried at the urupā next to the marae in their rohe (region). In the tangihanga context, a tonu is a tikanga process through which a group makes a request to another group to take possession of the tūpāpaku. For example, this may be to spend a night at a different marae or for a burial elsewhere. In this case, the tonu is based on the tikanga of Ngāti Tuatahi around whakapapa. Ngārimu has whakapapa to Ngāti Tuatahi through his paternal grandfather Rangī, and according to Ngāti Tuatahi tikanga, he needs to be buried with his paternal whakapapa just as Ngārimu's father was. Ngāti Tuatahi also says Ngāti Tuarua needs to defer to Ngāti Tuatahi tikanga because their tupuna (ancestor) Tuatahi was the tuakana (elder sibling) of Tuarua.

The whānau pani (bereaved family), the immediate whānau of Ngārimu, are visibly upset. His children want him to be buried at the urupā next to the marae of Ngāti Tuarua, the hapū to which they feel the strongest connection. A kuia (older woman) of Ngāti Tuarua suddenly stands behind the paepae (meaning, in this context, the assembled speakers) and says, “Kei ngā tamariki ngā kupu tuatahi e pā ana ki tēnei tonu” (the children will be the first to speak regarding this tonu).

The pōwhiri stops, and the whānau pani and leaders of both Ngāti Tuarua and Ngāti Tuatahi go into the wharekai (dining hall). In the wharekai, the whānau pani express their preference for the burial of Ngārimu to take place at the urupā next to the marae of Ngāti Tuarua.

After the whānau pani have expressed their views, discussions recommence on the marae ātea (space in front of the wharenuī), with Ngāti Tuarua and Ngāti Tuatahi going back and forth. The discussion is long and tense. Eventually, the hapū agree that Ngāti Tuatahi does have a greater claim in tikanga to the tūpāpaku than Ngāti Tuarua. The hapū therefore agree that Ngārimu will stay at the marae of Ngāti Tuarua for two nights before being moved to the marae of Ngāti Tuatahi for the third night, with the burial to take place at the urupā of the marae of Ngāti Tuatahi the following day.

As agreed between the hapū, the tūpāpaku is moved to the marae of Ngāti Tuatahi for the third night. While everyone is in the wharekai having dinner, the whānau pani, who are sitting with the tūpāpaku, take the tūpāpaku and go back to the rohe of Ngāti Tuarua. Before they can be stopped, the whānau pani bury the tūpāpaku at the urupā next to the marae of Ngāti Tuarua.

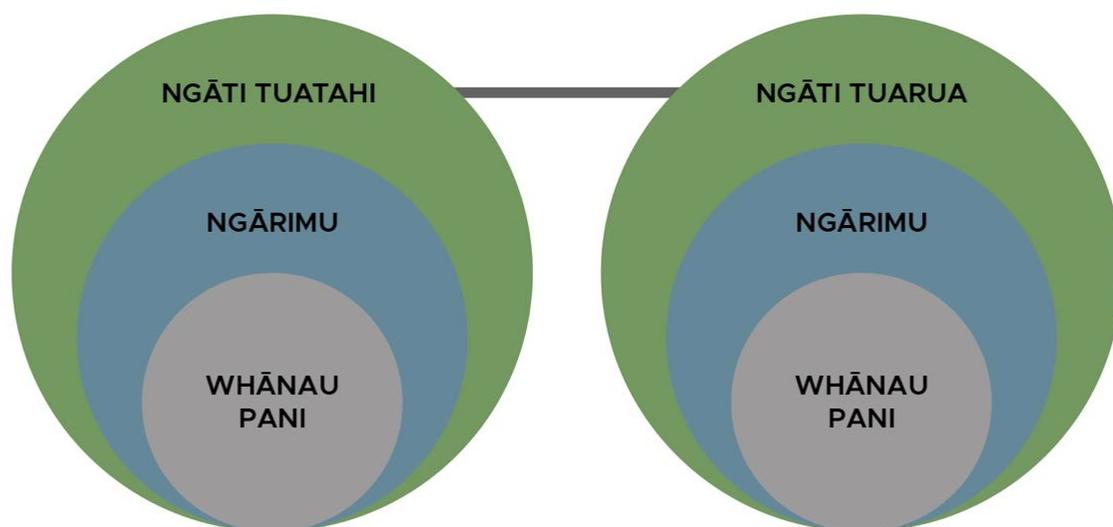


Figure 8: The relationships and positions of the hapū, Ngārimu and the whānau pani

Applying the guide to case study 1

STEP 1: IDENTIFY THE TIKANGA

Identify the concepts of tikanga Māori that are engaged by the factual situation, including associated responsibilities and relevant tikanga processes and procedures. Where tikanga is engaged at an iwi, hapū or whānau level, identify how the concepts, including the associated responsibilities and processes or procedures, are expressed by those iwi, hapū or whānau. Consider the following:

- (a) The structural concepts of whakapapa and whanaungatanga.

- 4.15 Ngārimu and the whānau pani whakapapa to both Ngāti Tuarua and Ngāti Tuatahi. The whakapapa of Ngārimu to Ngāti Tuatahi through his paternal grandfather Rangi is the primary reason for the request being made by Ngāti Tuatahi. Ngāti Tuarua and Ngāti Tuatahi also whakapapa to each other. This is because the ancestor named Tuatahi of Ngāti Tuatahi was the tuakana of the ancestor named Tuarua of Ngāti Tuarua.
- 4.16 Whanaungatanga is engaged between Ngāti Tuarua and Ngāti Tuatahi through their whakapapa to each other. Whanaungatanga is also engaged between the whānau pani and the two hapū as a result of the whakapapa of the whānau pani to the hapū. This whanaungatanga generates responsibilities, which are introduced below.

- (b) The relational concepts of mana, tapu and noa arising from the status of an entity and:
- (i) to the extent mana is engaged, its source; and
 - (ii) to the extent mana and tapu are engaged, the relevance of that to the protection of mauri.

- 4.17 Mana is strongly engaged. The hapū, the whānau pani and Ngārimu each have mana. The source of the mana of the hapū is mana tupuna (ancestral mana). The sources of the mana of the whānau pani and Ngārimu are mana tangata (a person's mana) and mana tupuna. The mana of the hapū, the whānau pani and Ngārimu will be diminished,

maintained or enhanced depending on how they fulfil responsibilities consistent with their mana. In this factual situation, these responsibilities are the same as those arising from whanaungatanga.

4.18 Tapu is engaged in this context because tūpāpaku are very tapu. The whānau pani are also in a state of tapu due to their close whakapapa to Ngārimu. Noa is not strongly engaged, but it is notable that whānau pani are generally not considered noa until after the burial, when a hākari (feast) takes place. The hākari would normally operate to whakanoa (reduce or remove tapu) the tapu of the whānau pani. In this instance, to enable the whānau pani to express their views in the wharekai, which is a noa space, the tapu of the whānau pani was briefly lifted. The whānau pani returned to their tapu state when discussions recommenced on the marae ātea.

4.19 Mauri is not strongly engaged. When Ngārimu died his mauri was extinguished.

(c) Responsibilities associated with the structural and relational concepts, including, for example, kaitiakitanga, manaakitanga and aroha.

4.20 Responsibilities arising from whanaungatanga and connected with mana include manaakitanga and aroha. In this factual situation, the whanaungatanga that exists between Ngāti Tuarua and Ngāti Tuatahi as a result of their whakapapa to each other includes the responsibility of showing manaakitanga and aroha towards each other and in relation to Ngārimu.

4.21 In this factual situation, a further responsibility of kotahitanga (unity) is applicable. The whanaungatanga between the whānau pani and the two hapū that exists as a result of the whakapapa of the whānau pani generates a responsibility by the whānau pani to act in accordance with the principle of kotahitanga. In turn, Ngāti Tuarua and Ngāti Tuatahi have responsibilities to show aroha and manaakitanga to the whānau pani.

4.22 Consistent with these responsibilities:

(a) Ngāti Tuarua and Ngāti Tuatahi fulfilled their responsibilities to show aroha and manaakitanga to each other and in relation to Ngārimu during the pōwhiri, where they agreed to what would happen with the tūpāpaku. Their actions enhanced the mana of both the hapū and Ngārimu. The hapū will need to continue showing aroha and manaakitanga to each other as the take (issue) is addressed.

(b) The hapū also had responsibilities to show aroha and manaakitanga to the whānau pani. The hapū fulfilled these responsibilities to the whānau pani by allowing the tapu to be lifted so that the whānau pani could express their views in the wharekai. It is worth noting that these are ongoing responsibilities, which means aroha and manaakitanga need to continue to be shown by the hapū to the whānau pani.

(c) The whānau pani had responsibilities to act in accordance with kotahitanga. The whānau pani needed to do what was agreed between the hapū. This responsibility was not fulfilled.

(d) The take in the context, and the prescriptive concepts of utu and ea for maintaining balance.

- 4.23 The take in this factual situation is that the whānau pani have not fulfilled their responsibilities to act in accordance with kotahitanga. The whānau pani acted in a way that was contrary to a process where an outcome considered proper had been agreed to by the hapū. As a result, the actions of the whānau pani have diminished the mana of themselves, Ngāti Tuarua, Ngāti Tuatahi and Ngārimu. The take is particularly serious, because the whānau pani also breached their own tapu and the tapu of the tūpāpaku when they took the tūpāpaku back to the rohe of Ngāti Tuarua. The normal hākari that would take place after the burial to whakanoa the whānau pani has also not occurred, meaning the whānau pani remains in a state of tapu.
- 4.24 In this situation, an utu is required for a state of ea to be achieved. Ngāti Tuarua and Ngāti Tuatahi will need to agree on the utu, and this is likely to require a hui (gathering). At the hui, options which might be discussed include:
- (a) Kōrero (addresses) to one another and koha (offerings) in the form of taonga (valuable objects) being exchanged that, if accepted, may be sufficient utu for a status of ea to be achieved.
 - (b) Alternatively, or in addition, the hapū may agree that the only way to achieve a state of ea and restore the mana of all involved as well as remedy the breach of tapu may be to hahu (exhume) the tūpāpaku and return it to the urupā next to the marae of Ngāti Tuatahi.
- 4.25 In determining and carrying out the appropriate utu, the hapū will need to be mindful of their responsibilities to show aroha and manaakitanga to the whānau pani. The whānau pani will also need to be mindful of their responsibilities to act in accordance with kotahitanga so that a state of ea can be achieved.
- (e) Any other concepts of tikanga Māori that are engaged.
- 4.26 Tika (what is right) is engaged in this factual situation because the hapū engaged in a customary process of making their request during the pōwhiri. Through that process, an outcome was reached that was considered tika by the hapū. The whānau pani acting contrary to the tika outcome is one reason for the take.
- (f) Any tikanga processes or procedures that have been, are, or could be engaged.
- 4.27 A tono is the tikanga process engaged in this case. As earlier explained, a tono allows a group to make a request to another group to take possession of the tūpāpaku.
- 4.28 The whānau of Ngārimu are what is sometimes known as the whānau pani or kirimate, which refers to the bereaved whānau. In tikanga, the whānau pani or kirimate are not able to speak during a tangihanga or participate directly in its organisation due to being in a heightened state of tapu. The state of tapu is brought about by the close whakapapa of the whānau pani or kirimate to the tūpāpaku.
- 4.29 The pōwhiri was a customary process Ngāti Tuatahi engaged in during the tangihanga in order for the tono to be made.
- 4.30 Utu may involve hui, kōrero, the exchange of koha in the form of taonga and/or an exhumation in order for a state of ea to be achieved.

STEP 2: IDENTIFY RELEVANT KŌRERO TUKU IHO AND RELATED MĀTAURANGA, INCLUDING, FOR EXAMPLE, WHAKATAUKĪ, WHAKATAUĀKĪ, WAIATA AND MŌTEATEA

Identify any relevant kōrero tuku iho and related mātauranga such as whakataukī, whakatauākī and mōteatea to build understanding of the tikanga engaged and their application in context. Where tikanga is engaged at an iwi or hapū level, identify how kōrero tuku iho and related mātauranga are expressed by those iwi and hapū.

- 4.31 In the Māori world view, death is strongly associated with the transition of Hinetītama to Hinenuitepō and the pūrākau concerning the fatal attempt of Māui to secure immortality for humankind. According to some iwi and hapū, the final resting place of those who have died is Rarohenga, where Hinenuitepō resides. This pūrākau indicates the tapu or sacred nature of the burial process and therefore the care with which it must be handled.

STEP 3: IDENTIFY OTHER SIMILAR SITUATIONS

- (a) Where tikanga is being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred within the iwi, hapū and whānau.
- (b) Where it is difficult to identify similar situations within the whānau, hapū and iwi, consider similar situations in other iwi of the same waka before identifying similar situations in any iwi, hapū or whānau.
- (c) Alternatively, where tikanga is not being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred in any iwi, hapū or whānau.

- 4.32 Ngāti Tuarua have recently exhumed one of their tupuna who they wished to be returned to the urupā next to their marae. The hahu took years to negotiate by the hapū involved, but it has restored the mana of those hapū.
- 4.33 Twenty years ago, another whānau pani of the iwi of Ngāti Tuatahi took a tūpāpaku in the night and buried it contrary to what had been agreed to by the iwi. In that context, there was no hahu, but taonga were exchanged as utu in order for a state of ea to be achieved.

CASE STUDY 2: CUSTODIANSHIP OF TAONGA AND ŌHĀKĪ

The facts

Nīkau is the custodian of three whānau taonga (family heirlooms): a mere pounamu (greenstone club), a heitiki (greenstone pendant) and a korowai (cloak). He has four children, including Pita, the mātāmua (oldest child) and Rāwiri, the pōtiki (youngest child). In their whānau, custodianship of the three whānau taonga has been passed down through the mātāmua. This tikanga was established over a century ago when a tupuna of the whānau and rangatira of their hapū said in an ōhākī (oral statement made prior to death), “Mā ngā mātāmua ngā taonga hei tiaki” (the oldest children shall have custody of the taonga).

Rāwiri, the pōtiki of the whānau, is married to Sarah who is from Germany. Sarah moved to Aotearoa New Zealand when she was nine. Rāwiri and Sarah have several children. They have also lived with and cared for Nīkau for the last five years. Nīkau has relied heavily on Rāwiri and Sarah in his old age, and he is grateful for their support. Living with Rāwiri and Sarah has also meant Nīkau has been able to spend a lot of time with his mokopuna (grandchildren).

The health of Nīkau deteriorated rapidly two weeks ago, and he passed away suddenly. Before Nīkau passed away, he told Rāwiri and Sarah in an ōhākī that he would leave the three whānau taonga to them. His will states that the whānau taonga are to be passed down in accordance with tikanga.

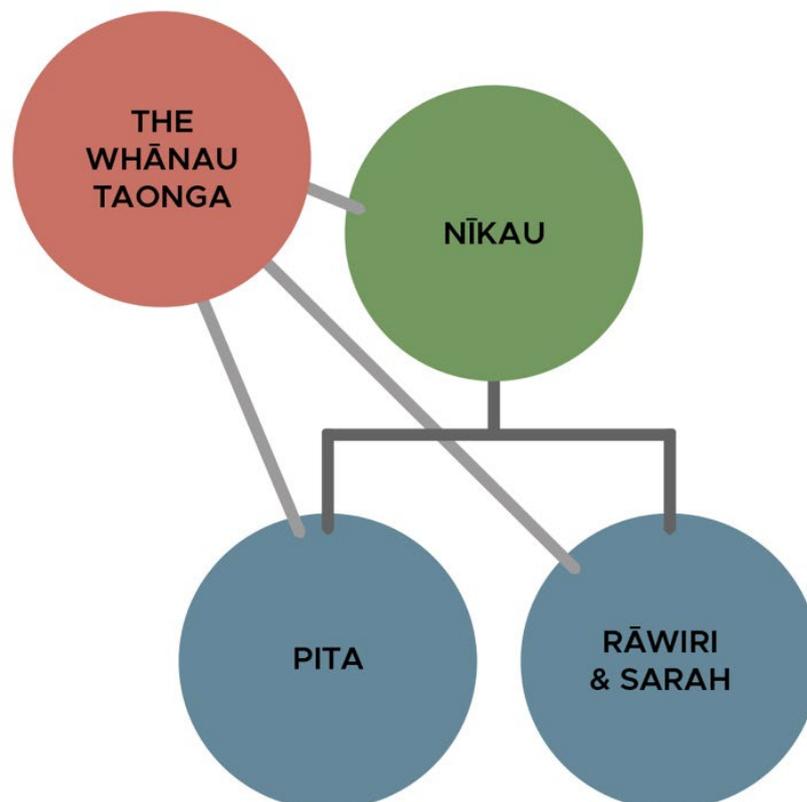


Figure 9: The relationships and positions of the whānau taonga, Nīkau, Pita, Rāwiri and Sarah

Applying the guide to case study 2

STEP 1: IDENTIFY THE TIKANGA

Identify the concepts of tikanga Māori that are engaged by the factual situation, including associated responsibilities and relevant tikanga processes and procedures. Where tikanga is engaged at an iwi, hapū or whānau level, identify how the concepts, including the associated responsibilities and processes or procedures, are expressed by those iwi, hapū or whānau. Consider the following:

(a) The structural concepts of whakapapa and whanaungatanga.

- 4.34 Nīkau and his children whakapapa to each other. They also whakapapa to the ancestor who established the tikanga regarding the whānau taonga in the initial ōhākī.
- 4.35 The whānau taonga whakapapa to the natural resources from which they have been made, tracing back to the atua (ancestor-god) credited with creating those natural resources. The whānau taonga also whakapapa to their custodians, tracing back to the person or people who created them.
- 4.36 Whanaungatanga is engaged between Nīkau and his children because of their whakapapa to each other. Whanaungatanga is also engaged between Nīkau and Sarah because of their relationship. This whanaungatanga generates responsibilities that include Nīkau, his children and Sarah showing manaakitanga and aroha towards each other.
- 4.37 Whanaungatanga is also engaged between the custodians of the whānau taonga and the whānau taonga themselves. This is because of the whakapapa of the whānau taonga to their custodians, tracing back to the person or people who created them. This whanaungatanga generates kaitiakitanga responsibilities for the custodians to fulfil as well as responsibilities to show manaakitanga and aroha to the whānau taonga.

(b) The relational concepts of mana, tapu and noa arising from the status of an entity and:

- (i) to the extent mana is engaged, its source; and
- (ii) to the extent mana and tapu are engaged, the relevance of that to the protection of mauri.

- 4.38 Nīkau, his children and Sarah each have mana. The sources of mana of Nīkau and his children are mana tangata and, reflecting Nīkau's Māori ancestry, mana tupuna. The source of Sarah's mana is mana tangata. Nīkau, his children and Sarah will diminish, maintain or enhance their mana depending on how they fulfil responsibilities that are consistent with mana. In this context, the responsibilities related to the mana of Nīkau, his children and Sarah are the same as those of whanaungatanga described above. The individuals need to show manaakitanga and aroha towards each other, and the custodians of the whānau taonga need to fulfil their kaitiakitanga responsibilities as well as show manaakitanga and aroha to the whānau taonga.
- 4.39 The whānau taonga also have mana. The source of the mana of the whānau taonga is mana atua (mana of the atua Māori). This is because the whānau taonga whakapapa to the natural resources from which they have been made, tracing back to the atua credited with creating those natural resources.

4.40 While tapu and noa are not strongly engaged, the whānau taonga are inherently tapu to a degree that demands respect. This tapu arises in two ways. It arises through the whakapapa of the taonga to the atua. It also arises through the whakapapa of the whānau taonga tracing back to the person or people that created them.

4.41 The ōhākī of both the tupuna and Nīkau are also tapu and demand respect.

4.42 Each of the whānau taonga has a mauri. Custodians of the whānau taonga will help to protect the mauri of the whānau taonga by fulfilling their kaitiakitanga responsibilities and respecting the tapu of the whānau taonga.

(c) Responsibilities associated with the structural and relational concepts, including, for example, kaitiakitanga, manaakitanga and aroha.

4.43 In this factual situation, the relevant responsibilities arising from whanaungatanga and associated with mana are manaakitanga, aroha and kaitiakitanga:

(a) The children of Nīkau and Sarah will need to show manaakitanga and aroha to each other.

(b) The next custodian of the whānau taonga will need to fulfil their kaitiakitanga responsibilities as well as show manaakitanga and aroha to the whānau taonga.

(d) The take in the context, and the prescriptive concepts of utu and ea for maintaining balance.

4.44 The take in this context is that there have been two ōhākī that stipulate different testamentary wishes for the same whānau taonga. The appropriate utu for a state of ea to be achieved is not so much about who the “right” custodian is but about how the whānau reach a decision and whether that process enables all involved to fulfil their responsibilities that are associated with whanaungatanga and with mana.

4.45 It is important to understand that one ōhākī does not necessarily take precedence over the other. Tikanga is pragmatic and can adapt to different circumstances. The tikanga in this whānau may allow custodianship of one, two or all of the whānau taonga to go to Rāwiri and Sarah for the remainder of the life of Rāwiri, to acknowledge the ōhākī of Nīkau and Rāwiri and Sarah’s care of him, then revert to the oldest child Pita on the death of Rāwiri. This seems an appropriate result that respects the tapu of both ōhākī and maintains the mana of all involved. Alternatively, the whānau may agree that the ōhākī of Nīkau has adapted the tikanga of the whānau permanently and now the whānau taonga will be passed down through the pōtikī, the youngest child. However, this seems unlikely given that the ōhākī of Nīkau was more narrowly worded than the ōhākī of the tupuna.

4.46 Ideally, a decision will be reached by consensus at a whānau hui (a process enabling all to fulfil their whanaungatanga and mana-related responsibilities). If consensus cannot be reached, the whānau may utilise a pūkenga from their broader whānau or hapū to guide them. If there is a dispute, an interface between tikanga and state law may arise.

(e) Any other concepts of tikanga Māori that are engaged.

4.47 No other concepts appear to be engaged in this context.

(f) Any tikanga processes or procedures that have been, are, or could be engaged.

4.48 An ōhākī is the main tikanga process engaged in this case. An ōhākī can cover a range of matters, including guidance, information not previously disclosed or testamentary wishes. Ōhākī are tapu because the spoken word has an inherent value in tikanga and because a person giving an ōhākī is usually in a state of heightened tapu due to being close to death.

4.49 Utu may involve a whānau hui to determine how the take should be addressed for a state of ea to be achieved.

STEP 2: IDENTIFY RELEVANT KŌRERO TUKU IHO AND RELATED MĀTAURANGA, INCLUDING, FOR EXAMPLE, WHAKATAUKĪ, WHAKATAUĀKĪ, WAIATA AND MŌTEATEA

Identify any relevant kōrero tuku iho and related mātauranga such as whakataukī, whakatauāki and mōteatea to build understanding of the tikanga engaged and their application in context. Where tikanga is engaged at an iwi or hapū level, identify how kōrero tuku iho and related mātauranga are expressed by those iwi and hapū.

4.50 Some consider the words of Hinētītama, spoken when she realised her father was her lover and before she fled to Rarohenga, to be the first ōhākī. She said:³

I will leave this realm of Te Aotūroa and relocate to Rarohenga and there await our offspring to ensure they safely make passage when they pass from this world into the next. There I will take the name Hine-nui-te-pō.

4.51 Her statement was significant because it outlined the fate of humanity on death. It helps to explain why, according to tikanga, ōhākī are considered so tapu.

STEP 3: IDENTIFY OTHER SIMILAR SITUATIONS

- (a) Where tikanga is being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred within the iwi, hapū and whānau.
- (b) Where it is difficult to identify similar situations within the whānau, hapū and iwi, consider similar situations in other iwi of the same waka before identifying similar situations in any iwi, hapū or whānau.
- (c) Alternatively, where tikanga is not being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred in any iwi, hapū or whānau.

4.52 Within the hapū to which Nīkau and his whānau belong, another whānau have had issues with whānau taonga not being passed on in accordance with the tikanga of the whānau. Their whānau taonga have gone missing, generating tension and distrust within the whānau.

³ Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangī, 2023) at [2.25].

- 4.53 Another whānau, also from the same hapū, recently complied with a request made in an ōhākī by the custodian of a kahu kiwi (a korowai adorned with the feathers of kiwi). The ōhākī stipulated that the kahu kiwi should be given to a particular master weaver rather than the mātāmua of the whānau. The whānau agreed that this was the right approach because the kahu kiwi needed to be cared for by someone with expertise in kahu conservation. The whānau asked the master weaver to accept requests by the whānau to use the kahu kiwi on special occasions. The whānau and the master weaver also agreed that a consensus will need to be reached by the whānau as to what will happen to the kahu kiwi when the master weaver is no longer able to care for it.

CASE STUDY 3: WHANAUNGATANGA AND BREACH OF CONTRACT FOR SUPPLY

The facts

The trustees of six ahu whenua trusts own land in the central North Island.⁴ The trustees and the beneficiaries of the trusts are all connected to each other by whakapapa. Whanaungatanga between the beneficiaries is particularly strong because six tūpuna (ancestors) to whom all the beneficiaries whakapapa were killed in battle with a neighbouring hapū in the late eighteenth century.

Most of the whenua (land) in the six trusts is used for dairy farming. However, land that is too steep was planted with mānuka 10 years ago, and the trusts entered into a joint venture arrangement for the purposes of collecting and processing honey.

The joint venture operates through a limited partnership (a type of business structure subject to the Limited Partnerships Act 2008). The six ahu whenua trusts are limited partners in the limited partnership. The general partner company, responsible for managing the limited partnership, has eight directors (one from each of the ahu whenua trusts and two who are independent).

The six ahu whenua trusts employ their whānau to collect honey from their respective whenua, and the employees supply the honey to the limited partnership under contracts of supply. The limited partnership purchased honey processing equipment and leases the premises where the honey is processed using funds contributed to it by each of the ahu whenua trusts.

In the last two years, there has been tension in the joint venture. Poor weather has impacted honey production, which has impacted the supply of honey to the limited partnership and reduced profits.

Earlier this year, a category one cyclone devastated the central North Island. The whenua of ahu whenua trusts 1 and 2 where mānuka had been planted slid away in a mass of debris, and the whānau that collected honey from that whenua had severe flooding in their homes. The whenua of ahu whenua trusts 3, 4, 5 and 6 and the whānau that collect honey from that whenua were not directly affected by the cyclone.

The whānau from ahu whenua trusts 3 and 4 stopped work to help the whānau of ahu whenua trusts 1 and 2 who were affected. They spent four weeks helping the whānau clear the silt from their homes and debris from the whenua. Because of the time spent helping those other whānau, the whānau from ahu whenua trusts 3 and 4 did not collect and supply honey to the limited partnership during those four weeks. The whānau from ahu whenua trusts 5 and 6 that were not directly affected did not stop work to help the whānau of ahu whenua trusts 1 and 2. They kept working and continued to collect and supply honey to the limited partnership.

⁴ An ahu whenua trust is a type of trust constituted under Te Ture Whenua Maori Act 1993, s 215.

Four of the directors of the general partner company (the two from ahu whenua trusts 5 and 6 and the independent directors) are sympathetic to the whānau of ahu whenua trusts 1 and 2, but they are dissatisfied that the whānau from ahu whenua trusts 3 and 4 did not communicate with them that they would stop working to help the whānau from ahu whenua trusts 1 and 2 to clear the silt from their homes and debris from the whenua. The actions of the whānau from ahu whenua trusts 3 and 4 will further impact this year’s profits, which will already be severely affected by the impact of the cyclone on the whenua of ahu whenua trusts 1 and 2 where the mānuka slipped away.

Those four directors consider whether the limited partnership should make a claim against the whānau from ahu whenua trusts 3 and 4 for breach of their contracts of supply. The limited partnership may have a claim because the whānau from ahu whenua trusts 3 and 4 who stopped working to help are unlikely to be able to rely on the force majeure clauses in their contracts (which waive contract performance for a period in the event of an “act of God”) because their whenua and homes were not affected by the cyclone.

When the trustees of ahu whenua trusts 3 and 4 are notified of a potential claim, they respond that the whānau who stopped work to help with the clean-up were acting in accordance with tikanga. They also say that the whānau of ahu whenua trusts 5 and 6 breached tikanga by not stopping work to help.

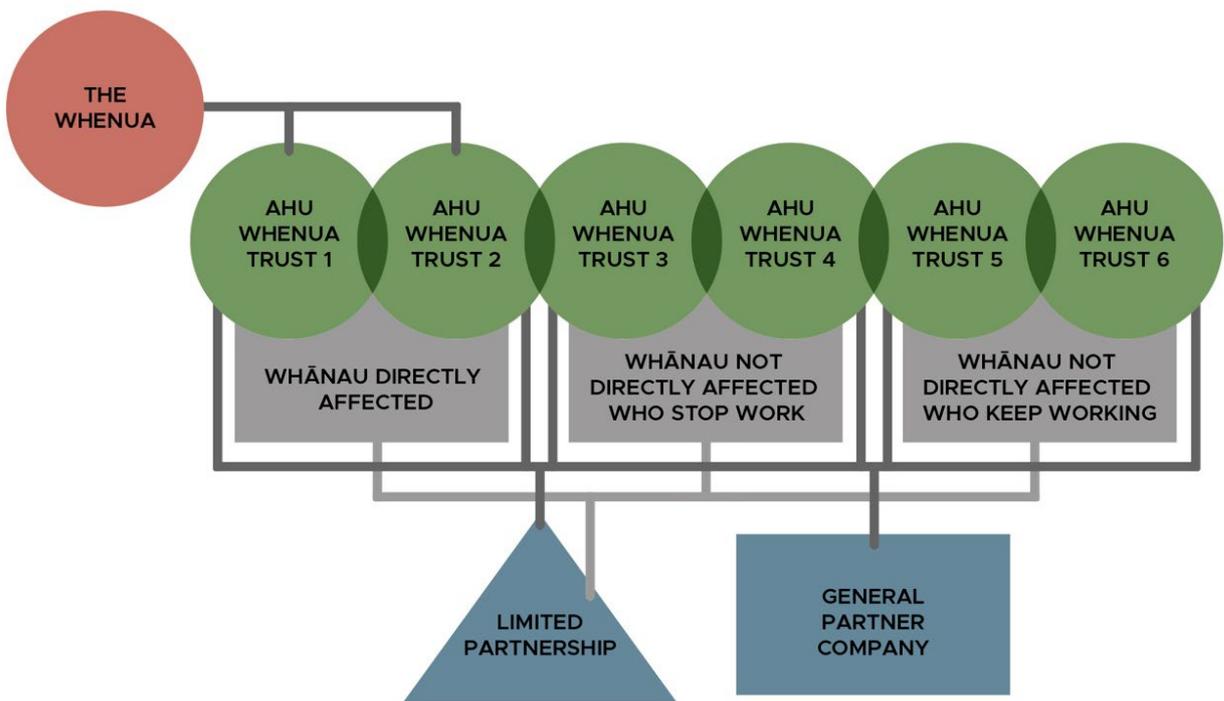


Figure 10: The joint venture structure and the relationships between the entities, whānau and whenua

Applying the guide to case study 3

STEP 1: IDENTIFY THE TIKANGA

Identify the concepts of tikanga Māori that are engaged by the factual situation, including associated responsibilities and relevant tikanga processes and procedures. Where tikanga is engaged at an iwi, hapū or whānau level, identify how the concepts, including the associated responsibilities and processes or procedures, are expressed by those iwi, hapū or whānau. Consider the following:

(a) The structural concepts of whakapapa and whanaungatanga.

- 4.54 The whānau all whakapapa to each other. The whānau of ahu whenua trusts 1 and 2 also whakapapa to the land damaged by the cyclone, because it was discovered and named by one of their ancestors.
- 4.55 Whanaungatanga is strongly engaged because of the whakapapa between the whānau and because of the tūpuna to whom they all whakapapa who were killed in battle. In this situation, whanaungatanga generates responsibilities for the whānau of ahu whenua trusts 3, 4, 5 and 6 to show aroha and manaakitanga to the whānau of ahu whenua trusts 1 and 2 in relation to the damage caused by the cyclone. At the same time, the whānau of ahu whenua trusts 3, 4, 5 and 6 have responsibilities to show aroha and manaakitanga to the whānau of ahu whenua trusts 1 and 2 and to each other in relation to the limited partnership. The whānau of ahu whenua trusts 1 and 2 are absolved of their whanaungatanga responsibilities in relation to the limited partnership because they have been severely impacted by the cyclone.
- 4.56 Whanaungatanga is also engaged between the whānau of ahu whenua trusts 1 and 2 and the whenua because of their whakapapa to the whenua. The whānau of ahu whenua trusts 1 and 2 have kaitiakitanga responsibilities to the whenua.

(b) The relational concepts of mana, tapu and noa arising from the status of an entity and:

- (i) to the extent mana is engaged, its source; and
- (ii) to the extent mana and tapu are engaged, the relevance of that to the protection of mauri.

- 4.57 The whānau of all the ahu whenua trusts have mana. The source of the mana of each whānau in relation to each other is mana tangata and mana tupuna. The whānau of ahu whenua trusts 1 and 2 also have mana in relation to the whenua. The source of this mana is mana whenua (power of the land, authority over land) arising from their connection to the whenua. The basis of their mana whenua is take tupuna (an ancestral claim).
- 4.58 The mana of the whānau will be diminished, maintained or enhanced depending on how they fulfil their responsibilities. In this context, the responsibilities consistent with mana are the same as those of whanaungatanga described above. The whānau of ahu whenua trusts 3, 4, 5 and 6 need to show aroha and manaakitanga to the whānau of ahu whenua trusts 1 and 2 in relation to the damage caused by the cyclone. They also need to show aroha and manaakitanga to the whānau of ahu whenua trusts 1 and 2 and to each other

in relation to the limited partnership. The whānau of ahu whenua trusts 1 and 2 need to fulfil their kaitiakitanga responsibilities to the whenua.

- 4.59 Tapu and noa are not strongly engaged by the factual situation. The whenua that has been affected by the cyclone will be tapu to a degree that demands respect although not to a degree where access must be restricted. This tapu arises in two ways. It arises through the connection of the whenua to Papatūānuku and Tāne (as atua of whenua). It also arises through the whakapapa of the whānau of ahu whenua trusts 1 and 2 to the whenua.
- 4.60 Mauri is not strongly engaged, although the mauri of the whenua is likely to have been affected by the cyclone. The whānau of ahu whenua trusts 1 and 2 will be responsible for restoring the mauri of the whenua by fulfilling their kaitiakitanga responsibilities and respecting the tapu of the whenua.

(c) Responsibilities associated with the structural and relational concepts, including, for example, kaitiakitanga, manaakitanga and aroha.

- 4.61 In this factual situation, the relevant responsibilities arising from whanaungatanga and associated with mana are aroha, manaakitanga and kaitiakitanga:
- (a) The whānau of ahu whenua trusts 3, 4, 5 and 6 need to show aroha and manaakitanga to the whānau of ahu whenua trusts 1 and 2 in relation to the damage caused by the cyclone.
 - (b) The whānau of ahu whenua trusts 3, 4, 5 and 6 need to show aroha and manaakitanga to the whānau of ahu whenua trusts 1 and 2 and each other in relation to the limited partnership.
 - (c) The whānau of ahu whenua trusts 1 and 2 need to fulfil their kaitiakitanga responsibilities in relation to the whenua.

(d) The take in the context, and the prescriptive concepts of utu and ea for maintaining balance.

- 4.62 There are two take in this factual situation:
- (a) While the whānau of ahu whenua trusts 3 and 4 have fulfilled their responsibilities to show aroha and manaakitanga to the whānau of ahu whenua trusts 1 and 2 in relation to the damage caused by the cyclone, they have not fulfilled their responsibilities to the whānau of ahu whenua trusts 1, 2, 5 and 6 in relation to the limited partnership. This is because they neglected the collection and supply of honey.
 - (b) While the whānau of ahu whenua trusts 5 and 6 have fulfilled their responsibilities to show aroha and manaakitanga to the whānau of ahu whenua trusts 1, 2, 3 and 4 in relation to the limited partnership by collecting and supplying honey, they have not fulfilled their responsibilities to the whānau of ahu whenua trusts 1 and 2 in relation to the damage caused by the cyclone.
- 4.63 To achieve a state of ea, utu is required from the whānau of ahu whenua trusts 3, 4, 5 and 6 to remedy their failure to fulfil responsibilities. The trustees may call a hui at which the whānau of ahu whenua trusts 3, 4, 5 and 6 may give koha to the groups in relation to

whom they neglected their responsibilities (the whānau of ahu whenua trusts 1 and 2 and the limited partnership). The koha would be an acknowledgement of the failure to fulfil these responsibilities.

- 4.64 If the koha are accepted, utu will have been achieved, the mana that has been diminished will be restored and there will be a state of ea. It may also be appropriate for the trustees of the ahu whenua trusts to discuss how these situations might be appropriately managed in the future.
- 4.65 The whānau of ahu whenua trusts 1 and 2 may have to provide an utu in response at some point in the future so that utu and therefore ea are maintained among the whānau of the ahu whenua trusts.

(e) Any other concepts of tikanga Māori that are engaged.

- 4.66 No other concepts appear to be engaged in this context.

(f) Any tikanga processes or procedures that have been, are, or could be engaged.

- 4.67 Utu may involve hui and giving koha to achieve a state of ea.

STEP 2: IDENTIFY RELEVANT KŌRERO TUKU IHO AND RELATED MĀTAURANGA, INCLUDING, FOR EXAMPLE, WHAKATAUKĪ, WHAKATAUĀKĪ, WAIATA AND MŌTEATEA

Identify any relevant kōrero tuku iho and related mātauranga such as whakataukī, whakatauāki and mōteatea to build understanding of the tikanga engaged and their application in context. Where tikanga is engaged at an iwi or hapū level, identify how kōrero tuku iho and related mātauranga are expressed by those iwi and hapū.

- 4.68 There are many examples of whakataukī that indicate the significance of helping those in need, particularly those between whom there is whakapapa and/or whanaungatanga. “Ki a koe tētehi kīwai, ki a au tētehi kīwai”, for instance, can be translated to mean that the work or the burden is to be shared equally.⁵

STEP 3: IDENTIFY OTHER SIMILAR SITUATIONS

- (a) Where tikanga is being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred within the iwi, hapū and whānau.
- (b) Where it is difficult to identify similar situations within the whānau, hapū and iwi, consider similar situations in other iwi of the same waka before identifying similar situations in any iwi, hapū or whānau.
- (c) Alternatively, where tikanga is not being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred in any iwi, hapū or whānau.

⁵ Hirini Moko Mead and Neil Grove *Ngā Pēpeha a ngā Tīpuna* (Victoria University Press, 2001) at 212.

- 4.69 Other whānau of the hapū to which all the whānau whakapapa ceased work to help people impacted by the cyclone. Many businesses in the area who were not directly affected did not cease work but gave koha to those directly affected.
- 4.70 Three years ago, a hapū from the same iwi to which all the whānau are connected by whakapapa refused to catch and supply kōura (crayfish) to a fisheries joint venture due to evidence of the resource being depleted. The hapū notified other members of the joint venture of their decision and offered to forgo their share of the profits derived from the kōura catch for the season. The joint venture partners acknowledged the offer but still allocated a share of the profits from the kōura to the hapū, to acknowledge that the decision made by the hapū was based in tikanga and reflected kaitiakitanga responsibilities to the resource. The contracts of supply were also amended to waive the requirement to catch and supply a species where to do so would deplete that species in the future.

CASE STUDY 4: MANA MOANA AND CONSULTATION REGARDING THE REGULATION OF A PIPI BED

The facts

Ngāti Tuatoru and Ngāti Tuawhā are neighbouring hapū. Both hapū have collected pipi (a type of shellfish) from the local pipi bed for as long as anyone can remember, but only Ngāti Tuatoru occupies the whenua adjacent to the pipi bed.

The collection by Ngāti Tuawhā of pipi from the pipi bed is based on an agreement with Ngāti Tuatoru in the early nineteenth century for the mutual collection of kaimoana (seafood) from their respective fishing grounds. Under the agreement, in exchange for collection by Ngāti Tuawhā of pipi from the pipi bed, Ngāti Tuatoru may spear or cast nets for pātiki (flounder) from the harbour bed adjacent to whenua occupied by Ngāti Tuawhā.

It is well known that, when the agreement was reached, a rangatira of Ngāti Tuatoru and a rangatira of Ngāti Tuawhā exchanged words. The rangatira of Ngāti Tuatoru said, “Kei a mātou te mana, kei a koutou ngā pipi” (we retain the mana, and you may have the pipi), and the rangatira of Ngāti Tuawhā responded, “Kei a mātou te mana, kei a koutou ngā pātiki” (we retain the mana, and you may have the pātiki).

The agreement was settled through a tomo (arranged marriage) between a child of each of the rangatira. Further tomo between members of both hapū have since reinforced that agreement.

Now, the local council is required to consult with local hapū regarding the regulation of the pipi bed. Ngāti Tuatoru claims it should be the sole hapū consulted by the local council. Ngāti Tuawhā claims it should also be consulted.

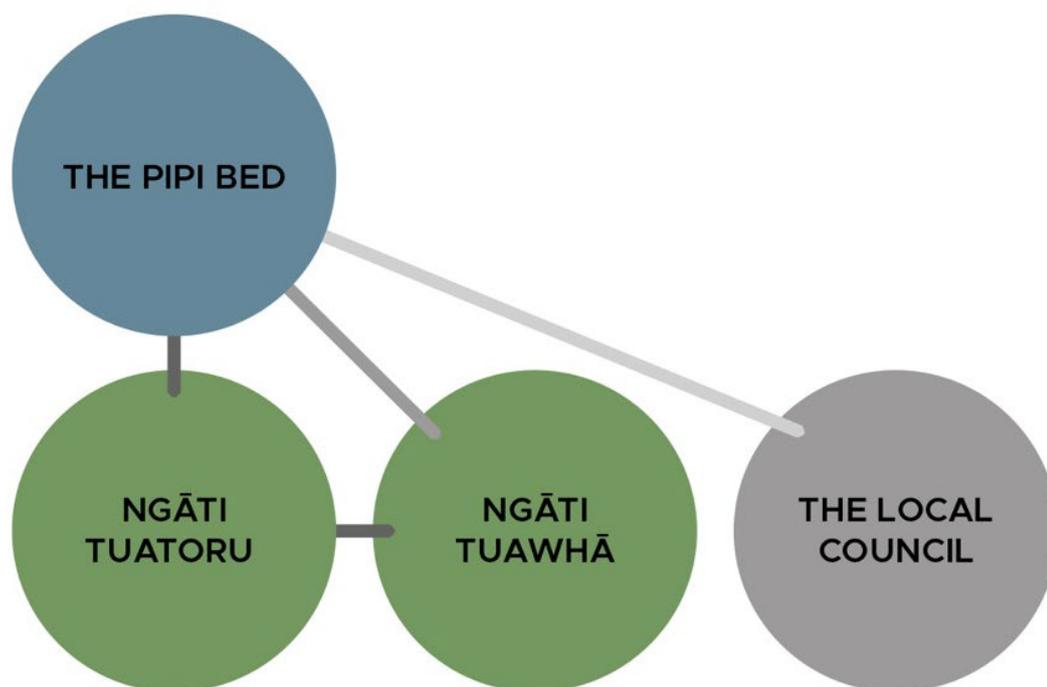


Figure 11: The relationships between the piipi bed, the hapū and the local council

Applying the guide to case study 4

STEP 1: IDENTIFY THE TIKANGA

Identify the concepts of tikanga Māori that are engaged by the factual situation, including associated responsibilities and relevant tikanga processes and procedures. Where tikanga is engaged at an iwi, hapū or whānau level, identify how the concepts, including the associated responsibilities and processes or procedures, are expressed by those iwi, hapū or whānau. Consider the following:

- (a) The structural concepts of whakapapa and whanaungatanga.

- 4.71 Ngāti Tuatoru has direct whakapapa to the piipi bed because it was discovered and named by one of their tupuna. While some members of Ngāti Tuawhā also whakapapa to the piipi bed, this is through their Ngāti Tuatoru whakapapa, which was established through the arranged marriages that were entered into to reinforce the agreement between the hapū. Ngāti Tuatoru and Ngāti Tuawhā also whakapapa to each other via those marriages.
- 4.72 Since Ngāti Tuatoru has whakapapa to the piipi bed, Ngāti Tuatoru automatically has a whanaungatanga connection to it. Kaitiakitanga responsibilities derive from that whanaungatanga.
- 4.73 Both Ngāti Tuatoru and Ngāti Tuawhā also have whanaungatanga responsibilities to each other as a result of their whakapapa to each other and the agreement reached by their tūpuna. These responsibilities include showing manaakitanga and aroha towards each other in relation to the piipi bed and honouring the agreement.

- (b) The relational concepts of mana, tapu and noa arising from the status of an entity and:
 - (i) to the extent mana is engaged, its source; and
 - (ii) to the extent mana and tapu are engaged, the relevance of that to the protection of mauri.

- 4.74 Both Ngāti Tuatoru and Ngāti Tuawhā have mana in relation to the pipi bed, the source of which is mana moana (power or authority relating to part of the sea). However, the basis of the mana moana differs between the two hapū, as reflected in the kōrero between the rangatira of the hapū when the agreement was reached. The mana moana of Ngāti Tuatoru is based in take tupuna (through its direct whakapapa to the pipi bed), while the mana moana of Ngāti Tuawhā is based in take hoko via the agreement (take hoko refers to an exchange). This difference means that, while both hapū have kaitiakitanga responsibilities associated with mana moana, the responsibilities of Ngāti Tuatoru in relation to the pipi bed are greater.
- 4.75 It is also notable that the way the local council approaches consultation could affect the mana moana of one or both hapū. This could have implications for the relationship between Ngāti Tuatoru and Ngāti Tuawhā as well as their relationships and respective mana in relation to other hapū in the area. Both Ngāti Tuatoru and Ngāti Tuawhā will want to ensure that their respective mana is not impacted by the council's actions.
- 4.76 The pipi bed is tapu to a degree that demands respect, although not to a degree where access must be restricted. This tapu arises in two ways. It arises through the whakapapa of the pipi bed to Hinemoana (an atua associated with the moana and shellfish in particular). It also arises through the whakapapa of Ngāti Tuatoru to the pipi bed. The way the local council regulates collection of pipi will need to give due respect to its tapu. This will be a matter of concern to both Ngāti Tuatoru and Ngāti Tuawhā. Each hapū will want to ensure that the way collection of pipi is regulated respects tapu as part of fulfilling their respective kaitiakitanga responsibilities.
- 4.77 Noa is engaged because Ngāti Tuatoru and Ngāti Tuawhā have been able to collect kaimoana from the pipi bed without state-imposed restriction in accordance with their original agreement. Each hapū will want to ensure that the way the pipi bed is regulated does not impact on their access to the pipi bed in the future.
- 4.78 The way the pipi bed is regulated may have an impact on its mauri. Both hapū will be responsible for maintaining and protecting the mauri of the pipi bed by fulfilling their kaitiakitanga responsibilities and respecting the tapu of the pipi bed.

- (c) Responsibilities associated with the structural and relational concepts, including, for example, kaitiakitanga, manaakitanga and aroha.

- 4.79 In this factual situation, the relevant responsibilities arising from whanaungatanga and associated with mana are aroha, manaakitanga and kaitiakitanga:
- (a) The hapū have whanaungatanga responsibilities to each other as a result of their whakapapa to each other and the agreement reached by their tūpuna. These responsibilities include showing manaakitanga and aroha towards each other in relation to the pipi bed. For Ngāti Tuatoru, this may mean ensuring Ngāti Tuawhā has

continued access to the pipi bed, and for Ngāti Tuawhā, this may mean care needs to be taken to ensure that the pipi bed is not depleted.

- (b) Both hapū also have kaitiakitanga responsibilities in relation to the pipi bed. The kaitiakitanga responsibilities of Ngāti Tuatoru derive from whanaungatanga (due to the direct whakapapa of the hapū to the pipi bed) and are also inherent in its mana moana status based in take tupuna. The kaitiakitanga responsibilities of Ngāti Tuawhā are inherent in its mana moana status based in take hoko. Because the kaitiakitanga responsibilities are generated differently for each hapū, the responsibilities and the way in which they are fulfilled are different — the responsibilities of Ngāti Tuatoru in relation to the pipi bed are greater. Accordingly, Ngāti Tuatoru fulfilling its responsibilities might extend to involvement in management of the pipi bed going forward, while Ngāti Tuawhā fulfilling its responsibilities might be limited to access management.

- (d) The take in the context, and the prescriptive concepts of utu and ea for maintaining balance.

4.80 The take in the context is the local council being required to consult with local hapū and Ngāti Tuatoru and Ngāti Tuawhā having different views about who should be consulted.

4.81 Utu and ea have been maintained until now through the agreement between Ngāti Tuatoru and Ngāti Tuawhā and through each hapū fulfilling their responsibilities to the pipi bed and each other. This has enabled a state of balance in relation to the mana moana of each hapū. It has also protected the mauri of the pipi bed and respected its tapu.

4.82 One way the hapū might address the take is to agree on how they might fulfil their respective responsibilities to the pipi bed and each other moving forward. This could involve a tikanga process to determine the appropriate utu in order for a state of ea to be achieved. It may be appropriate for a hui to be called by the hapū at which they discuss how they could fulfil their respective responsibilities to the pipi bed and each other. The hapū might agree that:

- (a) The responsibilities of Ngāti Tuatoru mean they should be consulted on all matters relating to the regulation of the pipi bed. In being consulted, Ngāti Tuatoru will actively try to ensure Ngāti Tuawhā has continued access to the pipi bed.
- (b) The responsibilities of Ngāti Tuawhā mean they should be consulted on matters relating to access to the pipi bed. Ngāti Tuawhā will also continue to take care to ensure the pipi bed is not depleted.

4.83 The hapū may wish to invite the local council to the hui so that it has a better understanding of the tikanga in application and interaction in relation to the pipi bed and the hapū.

4.84 The hapū may not be able to reach an agreement between each other as to how their responsibilities in relation to the pipi bed and each other can be fulfilled moving forward. Even if an agreement is reached between the hapū, it may not be acted on by the local council. In either of these scenarios, an interface between tikanga and state law may arise.

(e) Any other concepts of tikanga Māori that are engaged.

4.85 No other concepts appear to be engaged in this context.

(f) Any tikanga processes or procedures that have been, are, or could be engaged.

4.86 The process that has regulated the pipi bed between the hapū until this point has been the agreement entered into by the hapū in the early nineteenth century. The marriage entered into as part of the agreement was a tomo, and subsequent tomo have reinforced the agreement. Arranged marriages of this kind place a heavier obligation on the descendants of those marriages to fulfil the whanaungatanga responsibilities that are also consistent with their mana moana.

4.87 Utu may involve hui in order for a state of ea to be achieved.

STEP 2: IDENTIFY RELEVANT KŌRERO TUKU IHO AND RELATED MĀTAURANGA, INCLUDING, FOR EXAMPLE, WHAKATAUKĪ, WHAKATAUĀKĪ, WAIATA AND MŌTEATEA

Identify any relevant kōrero tuku iho and related mātauranga such as whakataukī, whakatauākī and mōteatea to build understanding of the tikanga engaged and their application in context. Where tikanga is engaged at an iwi or hapū level, identify how kōrero tuku iho and related mātauranga are expressed by those iwi and hapū.

4.88 Some iwi and hapū trace the whakapapa of shellfish to Hinemoana, a daughter of Hineahuone. Hinemoana personifies water and constantly bites or gnaws Papatūānuku as tides rise and fall, articulated in the whakataukī “Te ngaunga a Hinemoana”.⁶

STEP 3: IDENTIFY OTHER SIMILAR SITUATIONS

- (a) Where tikanga is being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred within the iwi, hapū and whānau.
- (b) Where it is difficult to identify similar situations within the whānau, hapū and iwi, consider similar situations in other iwi of the same waka before identifying similar situations in any iwi, hapū or whānau.
- (c) Alternatively, where tikanga is not being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred in any iwi, hapū or whānau.

4.89 Recently, two hapū of the same iwi as Ngāti Tuatoru and Ngāti Tuawhā entered into a kawenata (covenant) that set out the different areas of their rohe over which they have mana whenua and the basis of that mana whenua. The kawenata also sets out how the hapū wish to engage with the local council should the council be required to consult local hapū in relation to the whenua.

⁶ Hirini Moko Mead and Neil Grove *Ngā Pēpeha a ngā Tīpuna* (Victoria University Press, 2001) at 383.

- 4.90 Two other iwi of the same waka to which Ngāti Tuatoru and Ngāti Tuawhā affiliate have found a tikanga-led resolution in a similar context. The two iwi have been placed in the same large natural grouping for the purposes of a settlement with the Crown relating to breaches by the Crown of te Tiriti o Waitangi | Treaty of Waitangi. Commercial redress in the settlement includes 40 deferred selection properties that the large natural grouping will have a right to purchase from the Crown for a period after settlement. The iwi have entered into an agreement, separate to the Crown, that sets out which deferred selection properties they should each have a right to purchase under the settlement in accordance with tikanga. If both iwi agree, the large natural grouping will purchase the deferred selection properties from the Crown after settlement and transfer them to the iwi with the greater interest.

CASE STUDY 5: CREATING A WHĀNAU THROUGH SURROGACY

The facts

Rāniera and Matthew are a married male couple who have been together for 15 years when they decide they are ready to start a whānau via surrogacy. Rāniera is of Ngāti Tuarima, and Matthew moved to Aotearoa New Zealand from Scotland when he was three.

Rāniera has a brother who is married to Erana. Erana is of Ngāti Tuaono, and she has agreed to be Rāniera and Matthew’s surrogate. Rāniera and Matthew hope Erana will be able to have two children by surrogacy for them to raise so they (Rāniera and Matthew) can each be a genetic parent of one of the children.

Rāniera and Matthew start looking for an ova donor whose ova will be used with their sperm to create embryos for implantation in Erana via in vitro fertilisation (IVF). Rāniera and Matthew would like the ova donor to be Māori so that the children will share the same whakapapa. Otherwise, only the child whose genetic parent is Rāniera will be Māori with whakapapa to a hapū and iwi.

Rāniera and Matthew meet Anahera through one of Matthew’s work colleagues, and they become close friends. Anahera is of Ngāti Tuawhitu. After Rāniera and Matthew have known Anahera for a year, they mention to her that they are looking for an ova donor, and she immediately offers to help.

Rāniera, Matthew, Erana, her husband and Anahera begin the surrogacy process. It involves getting approval for the surrogacy arrangement from the Ethics Committee on Assisted Reproductive Technology, a committee designated by the Minister of Health. To get approval, Rāniera, Matthew, Erana, her husband and Anahera must meet certain requirements under guidelines applying to surrogacy arrangements involving IVF. This includes a requirement for each individual and the group to have counselling regarding the surrogacy arrangement. The counselling must be “culturally appropriate” and provide for “whānau involvement”.⁷ A principle of the only legislation that directly addresses surrogacy (the Human Assisted Reproductive Technology Act 2004) also states that “the needs, values and beliefs of Māori should be considered and treated with respect” by all people exercising powers or functions under the legislation.⁸

The parents of Anahera come with her to both her individual counselling appointment and the group counselling appointment. They want to understand how tikanga will be acknowledged and complied

⁷ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [B(3)].

⁸ Human Assisted Reproductive Technology Act 2004, s 4(f).

with in the surrogacy arrangement. They are also concerned to ensure the future children are born and raised in a manner consistent with tikanga.

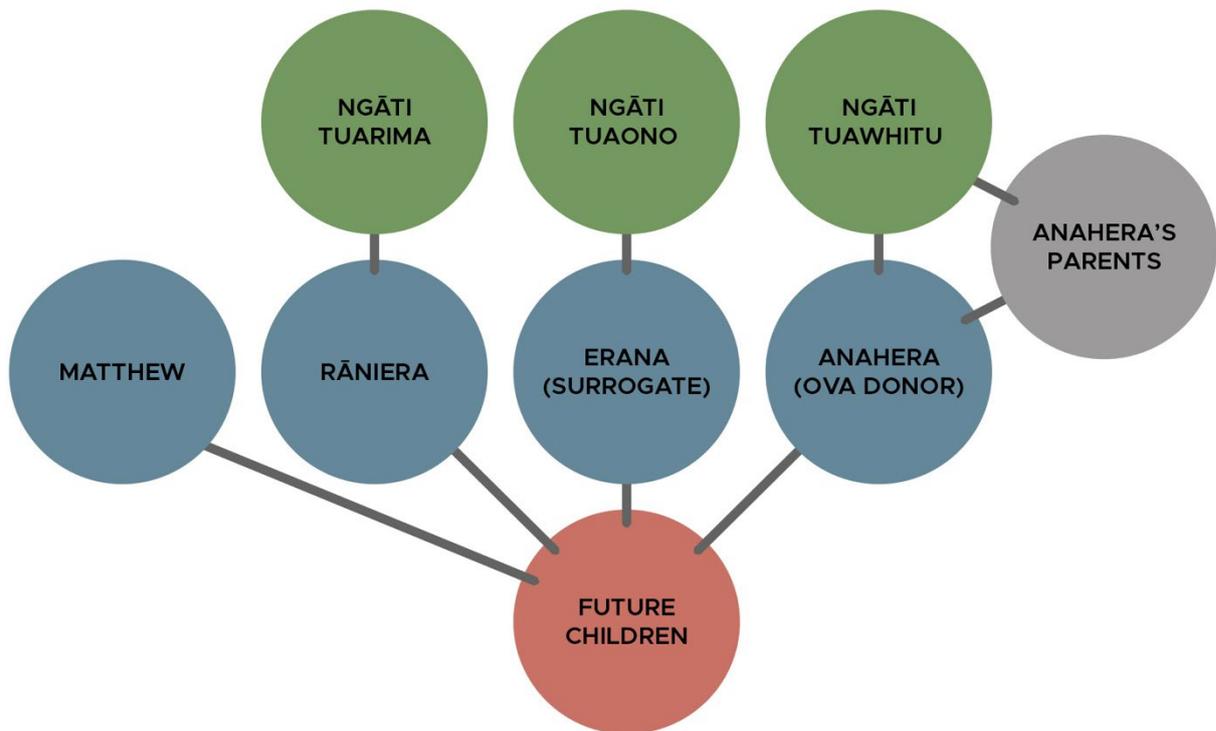


Figure 12: The relationships between the individuals involved in the surrogacy arrangement and their hapū

Applying the guide to case study 5

STEP 1: IDENTIFY THE TIKANGA

Identify the concepts of tikanga Māori that are engaged by the factual situation, including associated responsibilities and relevant tikanga processes and procedures. Where tikanga is engaged at an iwi, hapū or whānau level, identify how the concepts, including the associated responsibilities and processes or procedures, are expressed by those iwi, hapū or whānau. Consider the following:

- (a) The structural concepts of whakapapa and whanaungatanga.

- 4.91 One of the future children will whakapapa to Ngāti Tuarima and the whānau of Rāniera through Rāniera. Both children will whakapapa to Ngāti Tuawhitu and the whānau of Anahera through Anahera. Both children may also be considered to whakapapa to Ngāti Tuaono and the whānau of Erana through Erana. This is because Erana will become pregnant, carry and give birth to the children.
- 4.92 Whanaungatanga is already engaged between Matthew, Rāniera and Erana because Erana is Rāniera's brother's wife. In agreeing to be Matthew and Rāniera's surrogate, Erana may be fulfilling her responsibilities arising from whanaungatanga to show aroha

and manaakitanga. In fulfilling these responsibilities, Erana will be helping to ensure the whakapapa of Rāniera continues and that Rāniera and Matthew do not become whare ngaro (lost houses). Whare ngaro is a term alluding to the loss of whakapapa resulting from infertility.

- 4.93 The surrogacy arrangement may generate whanaungatanga between Erana and Anahera because they will both be involved in the creation of a whānau through the surrogacy arrangement.
- 4.94 Whanaungatanga already exists between Matthew, Rāniera and Anahera through their close friendship. Whanaungatanga does not always require direct whakapapa. The whanaungatanga between Matthew, Rāniera and Anahera may also be a reason for Anahera offering to donate her ova for the surrogacy arrangement. Similar to Erana, Anahera may be fulfilling her responsibilities to show aroha and manaakitanga arising from whanaungatanga. Anahera will also be helping to ensure the whakapapa of Rāniera continues and that Rāniera and Matthew do not become whare ngaro.
- 4.95 The surrogacy arrangement will further strengthen whanaungatanga between Matthew, Rāniera, Erana and Anahera. Matthew and Rāniera will have whanaungatanga responsibilities to show Erana and Anahera aroha and manaakitanga due to the surrogacy arrangement.
- 4.96 The surrogacy arrangement will also further strengthen whanaungatanga between the individuals and their respective whānau and hapū, particularly when the children are born. The whānau and perhaps the hapū of each individual will want to be involved in the children's upbringing in order to fulfil their own responsibilities (to show aroha and manaakitanga) arising from whanaungatanga. Part of fulfilling these responsibilities will include ensuring both children are aware of their whakapapa.
- 4.97 Whanaungatanga is also engaged between Rāniera, Erana, Anahera as individuals and their respective whānau and hapū. Their whānau and hapū could disagree with their involvement in the surrogacy arrangement (perhaps because they consider it is not tika). If this happens, whanaungatanga and a responsibility arising from it to act in accordance with kotahitanga may require the person's involvement in the surrogacy arrangement to cease.

- (b) The relational concepts of mana, tapu and noa arising from the status of an entity and:
- (i) to the extent mana is engaged, its source; and
 - (ii) to the extent mana and tapu are engaged, the relevance of that to the protection of mauri.

- 4.98 The individuals, the whānau and the hapū have mana in relation to the surrogacy arrangement. The mana is sourced differently, so we identify the sources of the mana of the individuals, the whānau and the hapū below:
- (a) The sources of the mana of both Anahera and Erana are mana tangata, mana tupuna and mana wāhine.
 - (b) The sources of the mana of Rāniera are mana tangata and mana tupuna.
 - (c) The source of the mana of Matthew is mana tangata.
 - (d) The source of the mana of the whānau and hapū is mana tupuna.

- 4.99 The mana of the individuals, whānau and hapū will be diminished, maintained or enhanced depending on how they fulfil their responsibilities in the surrogacy arrangement. In this context, the responsibilities associated with mana are the same as those arising from whanaungatanga described above. The individuals, whānau and hapū have responsibilities to show aroha and manaakitanga. The individuals also have a responsibility to act in accordance with kotahitanga.
- 4.100 Female reproductive organs and their functions are considered particularly tapu. Anahera will therefore be in a heightened state of tapu during ova donation. Erana will be in a heightened state of tapu during pregnancy and birth.
- 4.101 Noa is relevant to the extent that the tapu of Anahera and Erana might be actively reduced through a process to whakanoa to allow medical treatment in the surrogacy arrangement to occur. The purpose of a process to whakanoa would be to avoid a breach of tapu.
- 4.102 The mauri of Erana and Anahera may be affected due to the general health risks associated with pregnancy (in relation to Erana) and ova donation (in relation to Anahera). The mauri of Erana and Anahera will need to be protected throughout the surrogacy arrangement. Protection will be partially achieved by Matthew and Rāniera fulfilling their responsibilities to show aroha and manaakitanga and by ensuring that the tapu of Erana and Anahera is respected.

(c) Responsibilities associated with the structural and relational concepts, including, for example, kaitiakitanga, manaakitanga and aroha.

- 4.103 In this factual situation, the relevant responsibilities arising from whanaungatanga and associated with mana are aroha, manaakitanga and kotahitanga:
- (a) Erana and Anahera are showing aroha and manaakitanga by agreeing to be involved in the surrogacy arrangement.
 - (b) Matthew and Rāniera will need to show aroha and manaakitanga towards Erana and Anahera, their whānau and their hapū during the surrogacy arrangement.
 - (c) The whānau and hapū will want to show aroha and manaakitanga to all involved, particularly the future children.
 - (d) If the surrogacy arrangement is not considered tika by the respective whānau and hapū of the individuals, they may be required to cease their involvement in the surrogacy arrangement in accordance with kotahitanga.

(d) The take in the context, and the prescriptive concepts of utu and ea for maintaining balance.

- 4.104 The take in this context is Anahera agreeing to donate her ova and Erana agreeing to become pregnant, carry and give birth to children Matthew and Rāniera will raise.
- 4.105 The appropriate utu in this context will be, at a minimum, ensuring each person, whānau and hapū can fulfil their responsibilities arising from whanaungatanga and associated with mana. More may be required for a state of ea to be achieved. For example, the whānau

of Rāniera and his hapū may wish to give a koha to Erana and Anahera, their whānau and/or their hapū to recognise their involvement in the surrogacy arrangement.

(e) Any other concepts of tikanga Māori that are engaged.

4.106 Tika may be engaged in this context. This is about whether the surrogacy arrangement is considered to be ethically and culturally right. Views may differ among the whānau and hapū about whether the surrogacy arrangement is tika.

4.107 Whakamā (shame) could also be engaged in this context. If the responsibilities engaged in this factual situation are not fulfilled, utu will not have been appropriate and so a state of ea will not be achieved. This could place some or all of the individuals, their whānau and the hapū in a state of whakamā.

(f) Any tikanga processes or procedures that have been, are, or could be engaged.

4.108 If Matthew and Rāniera do not have children, they will become whare ngaro. As earlier explained, the term literally translates to lost houses and alludes to infertility resulting in the loss of whakapapa.

4.109 Some may consider the surrogacy arrangement is similar to a whāngai (customary adoption) or atawhai (caregiving) arrangement, where a child is given to others to raise for a variety of reasons, including infertility.

4.110 There could be karakia (ritual prayers) during medical treatment in the surrogacy arrangement, to whakanoa Anahera and Erana for limited periods to avoid breaches of tapu relating to their reproductive organs and functions.

4.111 An individual, whānau or hapū may wish to give koha to recognise the contribution of Anahera and Erana to the surrogacy arrangement if it is considered an appropriate utu for a status of ea to be achieved.

4.112 There are many tikanga associated with childbirth. For example, the whenua (placenta) and pito (umbilical cord) of Māori children are often returned to the land to which they are connected through whakapapa, and sometimes tohi (ritual ceremonies) are conducted after birth. The whānau may need to consider where the whenua and pito of the children born as a result of the surrogacy arrangement are returned to as well as whether there should be a tohi.

STEP 2: IDENTIFY RELEVANT KŌRERO TUKU IHO AND RELATED MĀTAURANGA, INCLUDING, FOR EXAMPLE, WHAKATAUKĪ, WHAKATAUĀKĪ, WAIATA AND MŌTEATEA

Identify any relevant kōrero tuku iho and related mātauranga such as whakataukī, whakatauāki and mōteatea to build understanding of the tikanga engaged and their application in context. Where tikanga is engaged at an iwi or hapū level, identify how kōrero tuku iho and related mātauranga are expressed by those iwi and hapū.

- 4.113 The creation narrative of Te Kore, Te Pō and Te Ao Mārama is a metaphor for the birth process and emphasises the importance of women and their ability to give birth.⁹
- 4.114 Maternal figures feature prominently in kōrero tuku iho in the whakapapa of humanity. It is widely accepted by Māori that the first human, a woman named Hinetītama, was created by the children of Papatūānuku and Ranginui with the assistance of Papatūānuku, who provided the uha (female element).
- 4.115 There are numerous examples of whakataukī that indicate the significance of women and their ability to give birth. “He wahine, he whenua, e ngaro ai te tangata”, for instance, can be translated to mean that, without women to guarantee progeny and land, the people will perish.¹⁰

STEP 3: IDENTIFY OTHER SIMILAR SITUATIONS

- (a) Where tikanga is being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred within the iwi, hapū and whānau.
- (b) Where it is difficult to identify similar situations within the whānau, hapū and iwi, consider similar situations in other iwi of the same waka before identifying similar situations in any iwi, hapū or whānau.
- (c) Alternatively, where tikanga is not being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred in any iwi, hapū or whānau.
- 4.116 The parents of Anahera are not aware of any situations in Ngāti Tuawhiti where a person has donated their ova for the purposes of a surrogacy arrangement. However, they do remember being told about a situation in the late 1800s where a tupuna of Ngāti Tuawhiti was unable to bear children of her own. Her husband, who was from a different hapū, had natural intercourse with other women and the tupuna raised the children. The children were considered to be descendants of Ngāti Tuawhiti by whakapapa, even though they did not have a genetic connection to the hapū.
- 4.117 Rāniera is the first person from his iwi to enter into a surrogacy arrangement as far as he is aware. He has spoken to his kuia about the proposed surrogacy arrangement, and she has told him that it sounds very similar to a whāngai arrangement. She herself is a whāngai and was raised by her grandmother. The kuia of Rāniera does not see any issue with the surrogacy arrangement in tikanga. In other words, she considers it to be tika. In her view, the most important thing is the children and ensuring that they know their whakapapa.
- 4.118 Another hapū from the same iwi as the hapū of Erana was recently involved in a surrogacy arrangement that occurred after a male couple posted online looking for a Māori ova donor. A donor from the hapū volunteered, and the hapū supported the surrogacy arrangement. There were 40 other potential Māori donors who responded to the post offering to help.

⁹ The creation narrative of Te Kore, Te Pō and Te Ao Mārama is described in Chapter 2.

¹⁰ Rangimarie Rose Pere *Ako Concepts and Learning in the Māori Tradition* (Te Kohanga Reo National Trust Board, Wellington, 1994) at 20.

CASE STUDY 6: A RĀHUI AND AN ASSAULT

The facts

A man and his two children drown while holidaying at a small beachside town. A rāhui (a process that formally restricts access to an area for a certain period) is placed on the beach by the local hapū, Ngāti Tuawaru. The rāhui extends to the local boat ramp and will be in place for at least three weeks as the search continues for the man's body.

The rāhui frustrates local commercial fishing companies whose businesses will be affected by not being able to launch their vessels. The nearest boat ramp where they can launch is over two hours' drive away. The crew of one commercial fishing vessel are drinking at a local pub when they make plans to launch their boat the next day despite the rāhui.

Matiu and Hōhepa are twins from Ngāti Tuawaru. They have grown up in the town and are closely connected to their hapū and marae. Their best friend Tim is not Māori but has grown up with Matiu and Hōhepa. Tim is considered a member of the whānau of Matiu and Hōhepa and attends hui at the marae, tangihanga and other hapū events.

Matiu, Hōhepa and Tim are at the local pub when they overhear the crew of the commercial fishing vessel planning to launch their boat the next day. The friends decide to go to the local boat ramp to try to stop them. At the boat ramp, a discussion escalates, and Matiu and Tim punch two of the crew. The crew are shaken but not otherwise physically injured. Matiu and Tim are charged and convicted of common assault.

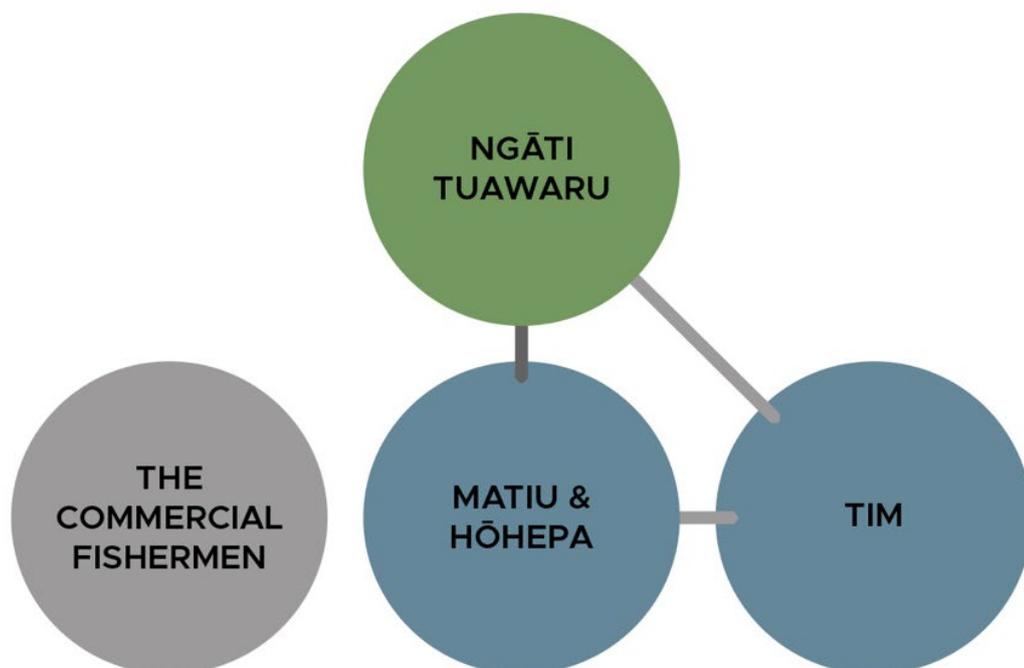


Figure 13: The relationships between the hapū responsible for the rāhui, the individuals involved in the assault and the commercial fishers

Applying the guide to case study 6

STEP 1: IDENTIFY THE TIKANGA

Identify the concepts of tikanga Māori that are engaged by the factual situation, including associated responsibilities and relevant tikanga processes and procedures. Where tikanga is engaged at an iwi, hapū or whānau level, identify how the concepts, including the associated responsibilities and processes or procedures, are expressed by those iwi, hapū or whānau. Consider the following:

(a) The structural concepts of whakapapa and whanaungatanga.

- 4.119 Matiu and Hōhepa whakapapa to Ngāti Tuawaru. Ngāti Tuawaru also whakapapa to the beach on which the rāhui has been placed. This is because the beach was discovered and named by a tupuna of the hapū.
- 4.120 Whanaungatanga is engaged between Matiu and Hōhepa and Ngāti Tuawaru because of their whakapapa to Ngāti Tuawaru. Whanaungatanga is engaged between Matiu, Hōhepa and Tim because of their close friendship. Whanaungatanga is engaged between Tim and Ngāti Tuawaru because of Tim's long association with the hapū. The whanaungatanga between Matiu, Hōhepa, Tim and Ngāti Tuawaru generates responsibilities between the three men and the hapū to show manaakitanga and act in accordance with kotahitanga.
- 4.121 Whanaungatanga is also engaged between Ngāti Tuawaru and the beach on which the rāhui has been placed because of the whakapapa of the hapū to the beach. The whanaungatanga between Ngāti Tuawaru and the beach generates kaitiakitanga responsibilities. Ngāti Tuawaru was fulfilling these responsibilities by placing the rāhui on the beach.

(b) The relational concepts of mana, tapu and noa arising from the status of an entity and:

- (i) to the extent mana is engaged, its source; and
- (ii) to the extent mana and tapu are engaged, the relevance of that to the protection of mauri.

- 4.122 Matiu, Hōhepa and Tim each have mana. The sources of mana of Matiu and Hōhepa are mana tangata and mana tupuna. The source of Tim's mana is mana tangata.
- 4.123 Ngāti Tuawaru also has mana. The source of the mana of the hapū is mana tupuna and mana moana based in take tupuna. That is because the hapū has whakapapa to the beach.
- 4.124 The mana of the three men and the hapū will be diminished, maintained or enhanced depending on how they fulfil their responsibilities. In this factual situation the responsibilities associated with the mana of the three men and the hapū are the same as the whanaungatanga responsibilities described above. The three men and Ngāti Tuawaru have responsibilities to show manaakitanga and act in accordance with kotahitanga. Ngāti Tuawaru has kaitiakitanga responsibilities in relation to the beach.

- 4.125 The commercial fishers also have mana. Similar to Tim, the source of each of their mana is mana tangata. The mana of the commercial fishers will be diminished, maintained or enhanced depending on how they fulfil responsibilities consistent with their mana. In this factual situation, the mana of the commercial fishers will be affected by their performance of associated responsibilities, such as showing manaakitanga by respecting the rāhui.
- 4.126 The beach over which the rāhui has been placed is extremely tapu because of the deaths that have occurred there.
- 4.127 By punching the commercial fishers, Matiu and Tim have breached the inherent tapu of the commercial fishers.
- 4.128 Noa is not strongly engaged. However, when the rāhui is lifted this will occur through a process of whakanoa. The whakanoa process will reduce the potency of the tapu and enable people to access the beach without restriction.
- 4.129 Mauri is not strongly engaged, although each individual and the beach has a mauri that may have been affected by these events. Had the commercial fishers managed to launch their vessel in breach of the rāhui, they may have further impacted the mauri of the beach by disrespecting its tapu.

(c) Responsibilities associated with the structural and relational concepts, including, for example, kaitiakitanga, manaakitanga and aroha.

- 4.130 In this factual situation, the relevant responsibilities arising from whanaungatanga and associated with mana are manaakitanga, kotahitanga and kaitiakitanga:
- (a) The three men and Ngāti Tuawaru have responsibilities to show manaakitanga and act in accordance with kotahitanga.
- (b) Ngāti Tuawaru has kaitiakitanga responsibilities in relation to the beach. This responsibility has been recognised by Ngāti Tuawaru by placing the rāhui on the beach.
- (c) The commercial fishers have a responsibility to show manaakitanga in relation to the rāhui.

(d) The take in the context, and the prescriptive concepts of utu and ea for maintaining balance.

- 4.131 There are multiple take in this factual situation:
- (a) While the three men were trying to show manaakitanga for Ngāti Tuawaru and the rāhui by seeking to get the commercial fishers to respect the restriction, they did not do so with hapū support. In fact, they acted unilaterally, which means they did not fulfil their responsibility to act in accordance with kotahitanga. They also violated the inherent tapu of the commercial fishers.
- (b) By attempting to launch their vessel, the commercial fishers failed to respect the rāhui. In doing so, they did not fulfil their responsibility to show manaakitanga in relation to the rāhui. The failure to fulfil this responsibility is significant because of the level of tapu relating to the rāhui.

- 4.132 The take have diminished the mana of the three men, Ngāti Tuawaru and the commercial fishers. For a state of ea to be achieved, utu is required to remedy the parties' respective failures to live up to their responsibilities. One way to achieve a state of ea is for Ngāti Tuawaru to call a hui so that all involved can agree to an appropriate utu. In taking this approach, Ngāti Tuawaru would be fulfilling its own responsibility to show manaakitanga to the three men. The responsibility arises from whanaungatanga and relates to the mana of the hapū.
- 4.133 If an appropriate utu can be agreed at a hui, the mana of the three men, the hapū and the commercial fishers could be restored. Utu may involve apologies being made in kōrero, the gifting of koha in the form of taonga or the offering of a service such as collecting rubbish from the beach over which the rāhui has been placed. If the commercial fishers chose not to attend the hui, that would not prevent the mana of the three men and the hapū being restored or a state of ea being achieved. It would simply result in the mana of the commercial fishers remaining diminished.

(e) Any other concepts of tikanga Māori that are engaged.

- 4.134 No other concepts appear to be engaged in this context.

(f) Any tikanga processes or procedures that have been, are, or could be engaged.

- 4.135 A rāhui is a process that formally restricts access to an area for a certain period. There are different causes for rāhui, one of which is the protection of natural resources. Where a rāhui is caused by death, as it is in this context, the rāhui recognises the tapu state of an area brought about by the death or deaths that have occurred.

- 4.136 Utu may involve hui, kōrero and the gifting of koha for a state of ea to be achieved.

STEP 2: IDENTIFY RELEVANT KŌRERO TUKU IHO AND RELATED MĀTAURANGA, INCLUDING, FOR EXAMPLE, WHAKATAUKĪ, WHAKATAUĀKĪ, WAIATA AND MŌTEATEA

Identify any relevant kōrero tuku iho and related mātauranga such as whakataukī, whakatauāki and mōteatea to build understanding of the tikanga engaged and their application in context. Where tikanga is engaged at an iwi or hapū level, identify how kōrero tuku iho and related mātauranga are expressed by those iwi and hapū.

- 4.137 Rāhui are a long-established practice, set in place to recognise or place an area in a state of tapu. Rāhui do not appear to be associated with a particular atua, nor have we been able to identify other mātauranga relating specifically to rāhui.

STEP 3: IDENTIFY OTHER SIMILAR SITUATIONS

- (a) Where tikanga is being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred within the iwi, hapū and whānau.
- (b) Where it is difficult to identify similar situations within the whānau, hapū and iwi, consider similar situations in other iwi of the same waka before identifying similar situations in any iwi, hapū or whānau.
- (c) Alternatively, where tikanga is not being engaged at an iwi, hapū or whānau level, identify any similar situations that have occurred in any iwi, hapū or whānau.

4.138 It is standard practice for Ngāti Tuawaru to place rāhui on areas where death has occurred to recognise tapu. One example is in relation to a river that connects to the beach where the most recent drownings have occurred. Forty years ago, a whānau from Ngāti Tuawaru drowned in the river while netting for tuna (eels). The hapū placed a rāhui on that part of the river. The rāhui is yet to be lifted so no one swims in that part of the river anymore. Ngāti Tuawaru also refrain from collecting kaimoana or water from any part of the river.

Part Two

Interaction between tikanga and state law

I think that there is a key distinction between law in the colonial period and that of the post-1970s modern period. It is this: where tikanga Māori was recognised during the colonial period, it was recognised only to the extent necessary to succeed in extinguishing it ... The recognition of custom in the modern era is different. It is intended to be permanent and, admittedly within the broad confines of the status quo, transformative.

Justice Joseph Williams¹

¹ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 Taumauri | Waikato Law Review 1 at 12. We acknowledge that not everyone regards the modern shift as “transformative”: see for example Moana Jackson “Changing realities: unchanging truths” (1994) 10 Australian Journal of Law and Society 115 at 116; Ani Mikaere *Colonising Myths — Māori Realities | He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011); Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, Vancouver, 2016) at 42–50.

CHAPTER 5

Tikanga and the common law

INTRODUCTION

- 5.1 In this part, we provide an overview of the historical foundations of engagement and continuing engagement between tikanga and state law. The part shows the impact that tikanga has already had on state law and lays a foundation for Part Three in which we discuss strategies for their future engagement. Chapter 5 and Chapter 6 take a high-level historical overview of legal interactions between tikanga and the two main sources of state law — common law and statute. Chapter 7 considers specific areas of state law in more depth, describing how lawmakers in areas such as environmental law, criminal law and family law are currently engaging with tikanga.
- 5.2 In the present chapter, we begin by examining how the common law has engaged with tikanga. Modern cases have brought the relationship between tikanga and the common law into focus.¹ While these decisions mark significant developments, the relationship between tikanga and the common law has developed over nearly two centuries. As judges begin to grapple with tikanga, understanding where we are and how we got here assumes importance.
- 5.3 We first discuss the engagement between tikanga and the common law through the customary law doctrine. We then examine modern authorities, beginning with *Takamore v Clarke*,² that move beyond the application of customary law doctrines to engage with tikanga in new ways.

EARLY DEVELOPMENTS: TIKANGA AS CUSTOMARY LAW

- 5.4 The English common law brought with it doctrines concerning the recognition of “local custom”, and it was through that lens that state law first interacted with indigenous law in Aotearoa New Zealand. We highlight two preliminary points. First, many of the older authorities use “local custom”, “customary law” or “indigenous customary law” to refer to tikanga itself. We do not consider that custom and tikanga are synonymous and we have not used them as such in this paper. When we use the terms “customary law” or

¹ See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801; *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239; *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142.

² *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

“tikanga as custom” we are intending to refer only to common law recognition of tikanga and not to tikanga itself. Second, the common law has always contained doctrines to facilitate the recognition of local customs as part of the common law.³ The common law extended this recognition of custom to the custom of indigenous peoples in British colonies unless and until altered by legislation.⁴ Thus, extending recognition to tikanga through these doctrines was not novel from the common law’s perspective.

5.5 Two important, interrelated legal doctrines were brought with English common law to the new colony of Aotearoa New Zealand that shaped early engagement with tikanga:

- (a) The doctrine of continuity recognised some pre-existing customs of indigenous inhabitants as having legal effect as customary law, despite the acquisition of British sovereignty.⁵ Indigenous custom was not recognised by the common law without meeting a threshold test that required the custom to have existed from time immemorial, to have continued as of right and without interruption since its origin, to be reasonable, and to not have been extinguished by statute.⁶ The doctrine of continuity was reflected in Aotearoa New Zealand by the English Laws Act 1858, which provided for the laws of England to apply in Aotearoa New Zealand “so far as applicable to the circumstances of the said Colony of New Zealand”.⁷
- (b) The doctrine of native title considered the radical title acquired by the colonising power — in this case, the British Crown — to be subject to existing native rights.⁸ Those native rights cannot be extinguished otherwise than by the free consent of the native occupiers — and then only to the Crown and in strict compliance with the provisions of any relevant statutes.⁹

5.6 The two doctrines are interrelated because the first defines the content of any native rights or title asserted under the second.¹⁰ As Elias CJ was later to explain in *Attorney-General v Ngati Apa*, any property interest of the Crown in land over which it has acquired

³ The foundational case for these requirements is *The Case of Tanistry* (1608) Dav Ir 28, 80 ER 516 (KB) at 32; see also Sir William Blackstone *Commentaries on the Laws of England* (1765–9) (University of Chicago Press, London, 1979) vol 1 at 63: “[t]he *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called, but also the particular customs of certain parts of the kingdom; and likewise, those particular laws that are by custom observed only in certain courts and jurisdictions”. Some parts of the common law in England evolved out of customary practices that were particular to various localities to become customary law common to the realm. See Brian Z Tamanaha *A General Jurisprudence of Law and Society* (Oxford University Press, Oxford, 2001) at 5; Alan Cromartie “The idea of common law as custom” in Amanda Perreau Saussine and James Bernard Murphy (eds) *The Nature of Customary Law* (Cambridge University Press, Cambridge, 2007) 203 at 222; AWB Simpson “The common law and legal theory” in AWB Simpson (ed) *Legal Theory and Legal History: Essays on the Common Law* (A&C Black, London, 1987) 359 at 373; and P J Fitzgerald *Salmond on Jurisprudence* (12th ed, Sweet & Maxwell Ltd, London, 1966) at 189.

⁴ *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at fn 43.

⁵ *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [112] citing P G McHugh *The Aboriginal Rights of the New Zealand Maori at Common Law* (PhD Thesis, University of Cambridge, 1987) at 149–150 and 184.

⁶ *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [109].

⁷ English Laws Act 1858, s 1. See also Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 11, citing Douglas Lambert “*Van Der Peet and Delgamuukw*: ten unresolved issues” (1998) 32 *University of British Columbia Law Review* 249 at 261.

⁸ *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 23–24 per Cooke P for the Court.

⁹ *R v Symonds* (1847) NZPCC 387 at 390 per Chapman J, in a passage later expressly adopted by the Privy Council in a judgment delivered by Lord Davey: *Nireaha Tamaki v Baker* (1901) NZPCC 371 at 384.

¹⁰ *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [120] per Glazebrooke and Wild JJ.

sovereignty depends upon any pre-existing customary interest and its nature, which is a question of fact:¹¹

The content of such customary interest is a question fact discoverable, if necessary, by evidence ... As a matter of custom the burden on the Crown's radical title might be limited to use or occupation rights held as a matter of custom ...

5.7 Initially, these two doctrines shaped two lines of case law through which the foundations of the doctrines in Aotearoa New Zealand were tested. We have therefore structured our discussion around:

- (a) property rights cases that addressed rights and title in land, as founded in indigenous customary law; and
- (b) “general custom” cases (that is, those not concerned with property) that addressed whether tikanga could be given effect to by the common law by meeting the criteria of a customary law recognition test.

PROPERTY RIGHTS

5.8 Before discussing how the courts have treated Māori customary property rights in state law, we observe that transforming tikanga-based relational rights and interests in whenua into alienable property rights and interests departs from the fundamental nature of that relationship in tikanga, which is based on whakapapa (connections) and whanaungatanga (kinship in an extended sense). Recognition in the form of alienable property rights or interests, while affirming rights to land in the common law, could thus not have been a direct application or recognition of tikanga.¹² Case law identifies this important difference, noting that tikanga-based interests should not be conflated with and do not require proof of proprietorship in an English law sense.¹³

5.9 The courts' modern treatment of Māori customary property rights is different to treatment in the colonial period, although there has not been a linear progression from rejection to acceptance. The cases demonstrate significant variations in approach. We have identified three broad themes in the authorities: outright rejection, acknowledgment without enforcement, and recognition. We discuss each of these themes below, then outline the modern approach as seen in *Ngati Apa* and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.

Rejection of proprietary rights

5.10 As is well known, the Court in *Wi Parata v Bishop of Wellington* in 1878 found that Māori were “without any kind of civil government, or any settled system of law”.¹⁴ The Court described te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) as a “simple nullity” and dismissed the reference in the Native Rights Act 1865 to “the Ancient Custom and Usage

¹¹ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [31].

¹² Anthropologists and prominent writers have argued that not all land was held communally and that Māori recognised concepts of private ownership. See Richard Boast “Māori land boards: experts at being defendants 1900–1950” (2021) 17 *Otago Law Review* 83 at 84; Te Maire Tau “Property rights in Kaiapoi” (2016) 47 *Victoria University of Wellington Law Review* 677.

¹³ *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [129]–[130]; *Re Reeder* [2021] NZHC 2726 at [24]–[27].

¹⁴ *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur (NS) SC 72 at 77.

of the Maori people”, saying that “a phrase in a statute cannot call what is non-existent into being”.¹⁵ The Court also said that the Crown was the “sole arbiter” of its own justice as it relates to customary rights.¹⁶

- 5.11 The Privy Council expressly rejected the idea there could be no such thing as customary rights to land in *Nireaha Tamaki v Baker* in 1901.¹⁷ However, the influence of *Wi Parata* can be found deep into the twentieth century. An example is the 1963 decision in the *Ninety Mile Beach* case, where *Wi Parata* was cited for the proposition that it was for the Crown to determine the nature and incidents of any title it would confer and that “it must be the sole arbiter of its own justice”.¹⁸

Acknowledgement but not enforcement

- 5.12 Although *Wi Parata* had a powerful influence on the overall direction of the law as it related to customary property rights and interests, it was not universally applied. Some decisions did acknowledge the existence of customary interests in land based on tikanga, but then refused or failed to give effect to them. In *Mangakahia v New Zealand Timber Co*, Gilles J did not accept that the Treaty was a simple nullity and acknowledged the existence of customary interests in land. However, he found that they were not enforceable rights in the ordinary courts, saying:¹⁹

One of the attributes or incidents of land in fee simple under English law is that the owner being out of possession may by entry obtain a constructive trust possession as to entitle him by virtue of his freehold title to sue as a trespasser. No attribute or incident can be held to attach to an ownership according to native custom.

- 5.13 In other cases, courts deferred to the Crown to recognise customary interests or found that they did not survive the operation of other common law norms or statutes.²⁰ For example, in *Re the Bed of the Wanganui River* Te Kōti Pira | Court of Appeal (the Court of Appeal) rejected the idea that there could be ownership of the riverbed separate from ownership of the lands adjacent to the same bed, relying on factual findings of Te Kooti Pira Māori | Māori Appellate Court (the Māori Appellate Court) about customary relationships to riverbeds. On that basis, the Court said that any interest to the riverbed was alienated when the title to the adjacent lands was alienated. This also meant that the *ad medium filum* rule (the common law presumption of riparian ownership to the middle of the flowing water) applied to exclude any adverse customary interests.²¹ Similarly, in *Ninety Mile Beach*, a claim to the foreshore failed because of the extinguishing effect of section 147 of the Harbours Act 1878.²²

¹⁵ *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur (NS) SC 72 at 79. See also the Native Rights Act 1865, s 3.

¹⁶ *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur (NS) SC 72 at 78.

¹⁷ *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 577. See the reasoning in *Re Wanganui River Packet License to Stuart* [1903] 23 NZLR 510 (SC) at 514 and *Re the Ninety Mile Beach* [1963] NZLR 461 (CA) at 476 for examples.

¹⁸ *Re the Ninety Mile Beach* [1963] NZLR 461 (CA) at 476.

¹⁹ *Mangakahia v New Zealand Timber Co* (1884) 2 NZLR 345 (SC) at 350.

²⁰ See for example *Re the Ninety Mile Beach* [1963] NZLR 461 (CA); *Waipapakura v Hempton* (1914) 33 NZLR 1065 (SC) at 1071–1072; *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA); *Inspector of Fisheries v Ihaia Weepu* [1956] NZLR 920 (HC).

²¹ *Re the Bed of the Wanganui River* [1962] NZLR 600 (CA) at 609 per Gresson J, 616–617 per Cleary J and 624 per Turner J.

²² *Re the Ninety Mile Beach* [1963] NZLR 461 (CA).

Recognition of customary proprietary rights

5.14 *R v Symonds*, which predated *Wi Parata*, is a case that indicated early acceptance of custom as giving rise to property rights and interests.²³ In that case, which involved a dispute between two British settlers over the validity of a Crown grant, Chapman J observed:²⁴

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.

5.15 In *Tamihana Korokai v Solicitor-General*, the full Court of Appeal recognised the existence of customary rights to a lake bed and their enforceability in the Native Land Court. The Court held that Native Land Court applicants were entitled to have their title investigated unless it was shown the title had been extinguished by statute, cession or Crown grant.²⁵

5.16 The prior existence of customary property rights in respect of riverbeds and the foreshore was also confirmed by the Court of Appeal in the first *Wanganui River* case and the *Ninety Mile Beach* case respectively.²⁶ While the Court of Appeal ultimately found the respective rights had not survived alienation of adjacent lands or statutory extinguishment, it did not doubt the prior existence of customary property rights to riverbeds and to the foreshore.

Modern approach: *Ngati Apa* and *Trans-Tasman Resources*

5.17 The now-settled approach in state law to customary property interests is that they are enforceable in the ordinary courts unless expressly extinguished by statute.²⁷

5.18 In the 2003 *Ngati Apa* case, which concerned Māori customary interests in the foreshore and seabed, the Court of Appeal found that Te Kooti Whenua Māori | Māori Land Court could inquire into whether certain land below the high-water mark is Māori customary land. Elias CJ stated that:²⁸

²³ *R v Symonds* [1840–1932] NZPCC 387 (SC); see also Shaunnagh Dorsett *Juridical Encounters: Māori and the Colonial Courts 1840–1852* (University of Auckland Press, Auckland, 2017) at 50–69, 85, 90 and 155. The *Symonds* line of authority has been interpreted differently by some prominent writers, with emphasis placed on the fact that non-Māori were the beneficiaries of the application of customary interests. See Sarah Down and David V Williams “Building the foundations of tikanga jurisprudence” (2022) 29 *Canterbury Law Review* 27.

²⁴ *R v Symonds* [1840–1932] NZPCC 387 (PC) at 390.

²⁵ *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 (CA) at 345 per Stout CJ, at 349–350 per Edwards J, 351 per Williams J and 356 per Chapman J.

²⁶ See *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 461 per North J who observed that, prior to the Treaty of Waitangi, the bed of the river would have been tribal property. In the same case at 427–433, Cooke J found the following factors influential in determining the claimants held the bed of the Wanganui river under their customs and usages as at 1840: the river was in the boundaries of the Wanganui iwi; the river was an integral part of the community life of the iwi; fishing weirs were attached to the bed of the river and the evidence illustrated that the river was a highway for the iwi. In *Re the Ninety Mile Beach* [1963] NZLR 461 (CA) at 467, Gresson J affirmed that the foreshore of the Ninety Mile Beach had immediately before the Treaty been part of the territory in respect of which the two appellate iwi exercised exclusive dominion and control and therefore deemed to own and occupy those lands.

²⁷ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [32]–[33]; *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277.

²⁸ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [49].

Maori custom and usage recognising property in foreshore and seabed lands displaces any English Crown prerogative and is effective as a matter of New Zealand law, unless such property interests have been lawfully extinguished.

- 5.19 Tipping J said that “Maori customary law is an ingredient of the common law of New Zealand”.²⁹ In respect of the customary title, he said:³⁰

... Maori customary title was, as I have already discussed, not a matter of grace and favour but of common law. Having become part of the common law of New Zealand, it could not be ignored by the Crown unless and until Parliament had clearly extinguished it, and then only subject to whatever might have been put in its place.

- 5.20 In *Paki v Attorney-General* in 2012, Te Kōti Mana Nui | Supreme Court (the Supreme Court) affirmed the *Ngati Apa* reasoning in the context of customary property interests in the Waikato River. Following *Ngati Apa*, Elias CJ held that “application of the common law presumption of riparian ownership to the middle of the flow could not arise until Maori customary interests were excluded”.³¹ Māori customary interests in the riverbed therefore displaced the common law presumption of riparian ownership to the middle of the riverbed.

- 5.21 In 2021 the Supreme Court in *Trans-Tasman Resources* unanimously held that a statutory reference in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) to “existing interests” in the coastal marine area included tikanga-based interests that had been claimed but not yet granted by the courts under the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act).³² The Court concluded that tikanga will be “applicable law” under the EEZ Act where its recognition and application is appropriate to the particular circumstances of the consent application at hand.³³ The Court also held that “tikanga-based customary rights and interests” were existing interests under relevant legislation.³⁴

- 5.22 The Court of Appeal had held that it was:³⁵

... axiomatic that 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.

- 5.23 Importantly, the Court explained that the continued existence of customary property rights necessarily implies the continued existence and operation of tikanga defining their nature and extent.³⁶ The Supreme Court agreed with the Court of Appeal that the Takutai

²⁹ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [185].

³⁰ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [208].

³¹ *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18].

³² *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [149] per William Young and France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

³³ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [169] per William Young and France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.

³⁴ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 59(2)(a). See *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [8] and [154]–[155] per William Young and France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.

³⁵ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [177].

³⁶ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [177], citing the same observation made by Tipping J in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) in relation to tikanga of customary land.

Moana Act was not the source of customary interests but rather the mechanism for their recognition.³⁷ The rights claimed under the Takutai Moana Act were “existing interests”.³⁸

5.24 In addressing the status of tikanga, France and Young JJ observed that tikanga has been “treated as norms influencing the development of the common law”.³⁹ Their Honours added that “tikanga Māori is a body of customs and practices, part of which is properly described as custom law” and that “tikanga as law” is a subset of the customary values and practices referred to in the EEZ Act. On that reasoning, it followed that tikanga was “applicable law”.⁴⁰ In a footnote, France and Young JJ left open the question of whether tikanga is a separate or third source of law and whether there should be any change to the threshold tests set out in *Public Trustee v Loasby* (discussed below).⁴¹ They also gave an illustration of how tikanga might be engaged under the EEZ Act. They said that the decision maker would look at the tikanga itself and consider what it might say about the rights or interests of customary “owners” or of the resource itself. For instance, if the tikanga emphasises mauri, consideration of environmental effects (as required by the EEZ Act) would extend beyond physical effects.⁴²

5.25 Williams J agreed with France and Young JJ’s reasoning as to the relevance of tikanga. However, he added that what is meant by “existing interests” and “other applicable law” “must not only be viewed through a Pākehā lens”, commenting:⁴³

As the Court of Appeal rightly pointed out, the interests of iwi with mana moana in the consent area are the longest-standing human related interests in that place. As with all interests, they reflect the relevant values of the interest-holder. Those values — mana, whanaungatanga and kaitiakitanga — are relational. They are also principles of law that predate the arrival of the common law in 1840.

5.26 The judgments of the Court of Appeal and the Supreme Court in *Trans-Tasman Resources* recognised tikanga both as a strand of the common law and as “law” in its own right. In order to do this, the courts built on existing and established common law principles grounded in the presumption of continuity. This exemplifies the common law method in action.

GENERAL CUSTOM

5.27 The category we describe as “general custom” captures all customs that are not concerned with interests or rights in property. In the 1908 case of *Public Trustee v*

³⁷ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [154] per France and William Young JJ.

³⁸ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [154] per France and William Young JJ referring to *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

³⁹ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [168] per France and William Young JJ.

⁴⁰ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [171] per France and William Young JJ.

⁴¹ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at fn 282.

⁴² *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [172].

⁴³ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [297].

Loasby,⁴⁴ the Court considered that a custom could give rise to enforceable rights in the courts if it satisfied the criteria that:⁴⁵

- (a) the custom existed as a general custom;
- (b) it is not contrary to statute; and
- (c) it is reasonable, taking the whole of the circumstances into account.

5.28 In *Loasby*, the Court considered whether the costs of the tangi of rangatira Mahupuku should be paid by the Public Trustee. The Court found that tangi were a well-established custom, saying:⁴⁶

... it is no objection to a custom founded, as this is, on immemorial usage that it is not comfortable to the common law of the land, for it is of the very essence of the custom that it should vary from it.

5.29 In this respect, the *Loasby* decision may be contrasted with the earlier 1888 case of *Rira Peti v Ngaraihi Te Paku*, in which Prendergast CJ had refused to recognise Māori customary marriage and therefore entertain the plaintiff’s interest in the deceased’s estate unless they were recognised by law. He said:⁴⁷

The natives are British subjects, their relations to each other are governed by the laws of the land, and not by their usages, unless, and only so far as these laws have provided for their recognition of their usages.

5.30 Subsequent to *Loasby*, general customs were also recognised by the Privy Council in the 1919 case of *Hineita Rirerire Arani v Public Trustee of New Zealand*.⁴⁸ The case concerned the customary adoption of a non-Māori child by Māori and whether the child could succeed to Māori land interests that were otherwise inalienable to non-Māori under the relevant native lands legislation.⁴⁹ The Privy Council recognised the right of Māori to adopt both according to their customs and according to the relevant legislation, saying:⁵⁰

It would, therefore, appear that a Maori has the same rights of availing himself of the Adoption of Children Act as a person of European descent ... The right of the Maori to adopt according to his own custom is not interfered with by giving him a further right to adopt in the form and under the conditions provided by the Act.

5.31 The Privy Council also recognised Māori authority to modify their own customs, saying that Māori “as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs”.⁵¹

5.32 The criteria set out in *Loasby* for recognition of general custom were endorsed nearly 80 years later by Te Kōti Matua | High Court (the High Court) in *Huakina Development Trust v Waikato Valley Authority*.⁵² In that case, the High Court held that “customs and practices that include spiritual elements are cognisable in a court of law provided they are properly

⁴⁴ *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC).

⁴⁵ *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) at 806.

⁴⁶ *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) at 806.

⁴⁷ *Rira Peti v Ngaraihi Te Paku* [1888] 7 NZLR 235 (HC) at 239.

⁴⁸ *Hineiti Hirerire Arani v Public Trustee of New Zealand* (1919) NZPCC 1 (PC).

⁴⁹ *Hineiti Hirerire Arani v Public Trustee of New Zealand* (1919) NZPCC 1 (PC) at 1–2.

⁵⁰ *Hineiti Hirerire Arani v Public Trustee of New Zealand* (1919) NZPCC 1 (PC) at 4.

⁵¹ *Hineiti Hirerire Arani v Public Trustee of New Zealand* (1919) NZPCC 1 (PC) at 5.

⁵² *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

established, usually by evidence”.⁵³ In the 2004 case of *Proprietors of Parininihi Ki Waitotara Block v Ngaruahine Iwi Authority*, the High Court held that *Loasby* stated the criteria that Māori custom must meet to be part of the common law of Aotearoa New Zealand.⁵⁴ The *Loasby* approach was also largely adopted by the Court of Appeal in *R v Iti* in 2008.⁵⁵ This case considered whether a defence based on tikanga was available to the defendant, Mr Iti, who had been charged with the unlawful discharge of a firearm. In finding that the defence was not available, the Court found that the tikanga claimed by the defendant could not be reconciled with the relevant statutory policy.⁵⁶

Modern approach to custom: *Loasby* overruled

- 5.33 In *Ellis v R*, the Supreme Court gave considerable attention to the relationship between tikanga and the common law.⁵⁷ The Court was addressing whether, and to what extent, tikanga should inform the law as it relates to rights of appeal in respect of a deceased person. The case was not expressly concerned with either property or general custom.⁵⁸ Nonetheless, a majority of the Court overruled *Loasby*.⁵⁹
- 5.34 Glazebrook J, with whom Winkelmann CJ and Williams J agreed,⁶⁰ considered that the *Loasby* incorporation rules are “colonial relics with no place in modern Aotearoa/New Zealand”.⁶¹ Several cases pre-dating *Ellis* had cast doubt on the need for “colonial incorporation tests”.⁶² There is now no good reason, Glazebrook J considered, to retain the incorporation rules in any context given their incompatibility with the nature of tikanga and the underlying premise of the superiority and dominance of Western law.⁶³ The majority on this point did not reformulate a test for the incorporation of custom into the common law or indeed indicate whether in their view a test or framework would be appropriate at all.⁶⁴ The minority on this point considered that the *Loasby* test should not have been overruled in *Ellis*, where no counsel argued it should be overruled and where the Court was not in a position to articulate what would replace it.⁶⁵

⁵³ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 215.

⁵⁴ *Proprietors of Parininihi ki Waitotara Block v Ngaruahine Iwi Authority* [2004] 2 NZLR 201 (HC) at [18].

⁵⁵ *R v Iti* [2007] NZCA 119, [2008] 1 NZLR 587.

⁵⁶ *R v Iti* [2007] NZCA 119, [2008] 1 NZLR 587 at [50].

⁵⁷ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

⁵⁸ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 is addressed below in more detail.

⁵⁹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [113]–[115] per Glazebrook J, and Winkelmann CJ and Williams J in agreement at [177] and [260] respectively.

⁶⁰ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [177] and [260].

⁶¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [113].

⁶² *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [114]: “[The Supreme Court] in *Trans-Tasman* said that the tests set out in *Loasby* were not necessary on the approach taken by this Court in *Takamore* (where tikanga was seen as a relevant factor but not controlling).” In addition, Glazebrook J cited at fn 133 her own suggestion in the earlier *Takamore* (CA) decision at [254] that a “more modern” approach could be taken that did not rely on strict colonial rules, and Williams J recorded his view at [260] of *Ellis v R* that the Supreme Court in *Takamore* had implicitly abandoned the *Loasby* test.

⁶³ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [113]–[115].

⁶⁴ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [116] per Glazebrook J, [183] per Winkelmann CJ and [261] per Williams J.

⁶⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at fn 279.

- 5.35 The implications of the cases discussed above and how the law might develop in the absence of the *Loasby* criteria are discussed in Chapter 8. As that discussion makes clear, some aspects of tikanga will continue to be incorporated into the common law and given effect to through the customary law doctrine.
- 5.36 However, the courts have also re-examined the place of tikanga in the common law. Further decisions reposition tikanga from being recognisable to the common law through the customary law doctrine to:
- (a) providing a source of values that can inform the common law;⁶⁶ and
 - (b) recognising tikanga as being a separate source of law.⁶⁷
- 5.37 In advance of our Chapter 8 discussion, we next review case law relating to each of these categories.

FURTHER DEVELOPMENTS: TIKANGA VALUES AND TIKANGA AS LAW

Tikanga values

Takamore v Clarke

- 5.38 The Supreme Court's 2012 decision in *Takamore v Clarke* marked a significant step in the relationship between tikanga and the common law.⁶⁸ This case addressed the place of tikanga in the law relating to burial. None of the three Supreme Court judgments applied the *Loasby* test, preferring instead to recognise tikanga alongside other important values as a “relevant factor in deciding on the burial place of a person with Māori whakapapa”.⁶⁹ Weighing these values, the Court nevertheless found that the decision for burial lay with the deceased's wife and not his whānau.⁷⁰
- 5.39 The significance of this decision should not be underestimated. It is one of the first cases that recognises tikanga values as having legal significance within the common law.⁷¹ In Part One of this paper, we demonstrate that tikanga is a complex system of values, norms and rules that exists naturally within mātauranga Māori. Until *Takamore*, outside of statutory incorporation, the common law did not directly engage with tikanga values. Engagement continued to be framed by reference to the *Loasby* test or the rules applying to recognition of property interests. By contrast, *Takamore* allowed the common law to look beyond customary practices and their “reasonableness” to the broader normative and legal significance of tikanga values.

⁶⁶ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

⁶⁷ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [111] per Glazebrook J.

⁶⁸ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733. See the analysis in Carwyn Jones “Lost from sight: developing recognition of Māori law in Aotearoa New Zealand” (2021) 1(2) *Legalities* 162.

⁶⁹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [95], citing *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [164] per Tipping, McGrath and Blanchard JJ.

⁷⁰ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [169] per Tipping, McGrath and Blanchard JJ.

⁷¹ Courts of specialist jurisdiction such as Te Kooti Whenua Māori | Māori Land Court and Te Kōti Taiao | Environment Court have operated within legislative frameworks that facilitate the incorporation of tikanga into their operation and decisions since the early 90s. Although significant, those jurisdictions exist within their relevant legislative frameworks, while *Takamore* was decided in the context of the common law outright.

- 5.40 The Supreme Court found that Mr Takamore’s widow should have the power to decide where he would be buried.⁷² However, the majority of Tipping, McGrath and Blanchard JJ considered that tikanga was a relevant consideration for the executor when making the burial decision.⁷³ The majority judgment did not attempt to apply the *Loasby* criteria for recognition of custom, holding instead that the values of tikanga and corresponding customary practice were a relevant consideration for the person who has the common law right and duty to dispose of a deceased’s body.⁷⁴
- 5.41 Elias CJ took a different approach to the majority, focusing on the resolution of competing values.⁷⁵ Her Honour made the following points in relation to tikanga values and the common law:
- (a) Values and cultural precepts important in Aotearoa New Zealand society must be weighed in the common law method according to their materiality in the particular case.⁷⁶
 - (b) Māori custom according to tikanga is part of the values of the Aotearoa New Zealand common law.⁷⁷
 - (c) What constitutes Māori custom is a question of fact for expert evidence or reference to the Māori Appellate Court in the appropriate case.⁷⁸
 - (d) A court engaged in a process of identifying custom is “not engaged in the same process of interpretation or law creation, as is its responsibility in stating the common law”.⁷⁹
 - (e) The law cannot give effect to customs or values that are contrary to statute or to fundamental principles and policies of the law.⁸⁰
 - (f) The reasonableness of the tikanga is not determined by an observed aspect (for example, forcible removal) but rather by reference to the underlying values that define the custom.⁸¹

Post-Takamore

- 5.42 Since *Takamore*, the courts have begun to consider tikanga values where appropriate to do so in the circumstances of the case. For example, in *Sweeney v The Prison Manager, Spring Hill Corrections Facility*, the High Court found that revoking the plaintiff’s prison

⁷² *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [12] per Elias CJ, [165] per Tipping, McGrath and Blanchard JJ and [175] per William Young J.

⁷³ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [156] per Tipping, McGrath and Blanchard JJ.

⁷⁴ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [112]–[119] and [152].

⁷⁵ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [92].

⁷⁶ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

⁷⁷ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94], citing *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) at 807.

⁷⁸ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95].

⁷⁹ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95].

⁸⁰ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95].

⁸¹ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [96].

visitor’s pass was unlawful.⁸² The plaintiff was Māori and worked as an addictions counsellor. The Court held that a declaration was necessary in order to uphold the plaintiff’s mana (authority, esteem) and vindicate his rights.⁸³ The Court referred to *Takamore v Clarke* and *Trans-Tasman Resources* to support the view that, where tikanga is “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”.⁸⁴

- 5.43 The Court of Appeal has commented on how tikanga may inform the principles of equity and the nature of fiduciary duties in the context of Māori land administration and ownership.⁸⁵ In *Kusabs v Staite*, a rangatira for two hapū was acting as a trustee on separate trusts that represented each hapū, creating a potential conflict of interest. The Court noted that Māori land is a communal asset, with associated rights and obligations that arise from whanaungatanga.⁸⁶ Because whanaungatanga is complex, most owners have multiple interests in blocks affiliated to multiple hapū. Trustees are appointed by owners and are generally leaders within their communities. These trustees are also likely to have complex whanaungatanga connections and consequently may be trustees for multiple blocks of Māori land.⁸⁷ The Court went on to say:⁸⁸

If fiduciary duties are applied to Māori land administration without due regard to whanaungatanga, the former may frustrate the positive expression of the latter. This would be contrary to the underlying values of equity which, after all, developed as a response to the rigid formalism of the common law courts.

- 5.44 The Court was satisfied that “[b]earing the principles of equity and tikanga” in mind, the interests of a rangatira in both of the trusts and his position as trustee for both trusts could not give rise to a real possibility of conflict on the facts.⁸⁹

Ellis v R

- 5.45 In *Ellis v R*, the Supreme Court considered whether tikanga could have any effect on the test for whether an appeal should continue in the event of the appellant’s death. By a majority comprising Glazebrook, O’Regan and Arnold JJ (the “test majority”), the Court did not consider that tikanga was material to the development of the common law rule in issue.⁹⁰

⁸² *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27.

⁸³ *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27 at [1].

⁸⁴ *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27 at [75].

⁸⁵ *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [119]–[122].

⁸⁶ *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [119].

⁸⁷ *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [123].

⁸⁸ *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [124].

⁸⁹ *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [134].

⁹⁰ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [11] and at [142]–[145] per Glazebrook J and [315] per O’Regan and Arnold JJ.

- 5.46 The Court, however, expressed the unanimous view that tikanga:
- (a) has been and will continue to be recognised in the development of the common law of Aotearoa New Zealand in cases where it is relevant;⁹¹ and
 - (b) forms part of state law as a result of being incorporated into statutes and regulations.⁹²
- 5.47 A different majority comprising Winkelmann CJ and Glazebrook and Williams JJ (the “tikanga majority”) recognised that tikanga was the first law of Aotearoa New Zealand and that it continues to shape and regulate the lives of Māori.⁹³ In their separate reasons, they each acknowledge the large and increasing presence of tikanga in state law. The “tikanga minority” (comprising O’Regan and Arnold JJ) also acknowledged that “fundamental concepts of the common law have been adapted so as to give effect to core values of tikanga in particular contexts”.⁹⁴
- 5.48 Each of the judges in the tikanga majority identified potential principles for future engagement between tikanga and the common law. The majority held in relation to tikanga that:
- (a) the *Loasby* criteria should no longer apply;⁹⁵
 - (b) tikanga is a complete system with fundamental concepts that are intertwined and exist as an interconnected matrix;⁹⁶
 - (c) the appropriate method for engagement must depend on the circumstances of the case;⁹⁷
 - (d) the relationship between tikanga and the common law will evolve contextually and as required on a case-by-case basis;⁹⁸
 - (e) tikanga values may clash with other values in society, existing principles or existing common law, and this conflict will need to be worked through;⁹⁹ and

⁹¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [108]–[110] per Glazebrook J, [171]–[174] per Winkelmann CJ, [257]–[259] per Williams J and [279] per O’Regan and Arnold JJ.

⁹² *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [98]–[102] per Glazebrook J, [175]–[176] per Winkelmann CJ, [257] per Williams J and [280] per O’Regan and Arnold JJ.

⁹³ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [107] and [110] per Glazebrook J, [168], [169] and [172] per Winkelmann CJ and [272] per Williams J.

⁹⁴ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [280] per O’Regan and Arnold JJ, referring to legislation identifying Te Urewera as a legal entity and the Whanganui River as a legal person.

⁹⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [21] and [113]–[116] per Glazebrook J, [177] per Winkelmann CJ and [260] per Williams J. The minority on this point (O’Regan and Arnold JJ) were critical of the majority noting in fn 297 that “the test set out in the incorporation cases should not be overruled without the Court being in a position to articulate what replaces it, especially as no counsel argued that it should be overruled”.

⁹⁶ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [180] per Winkelmann CJ.

⁹⁷ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [121]–[125] per Glazebrook J, [181] per Winkelmann CJ and [273] per Williams J.

⁹⁸ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [116], [119] and [127] per Glazebrook J, [183] per Winkelmann CJ and [261] per Williams J.

⁹⁹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [119] per Glazebrook J, [182] per Winkelmann CJ and [266] per Williams J: “unambiguous statutory language will be required to exclude tikanga”.

- (f) the courts must not exceed their function when engaging with tikanga and care must be taken not to impair the operation of tikanga as a system of law and custom in its own right.¹⁰⁰
- 5.49 As noted above, the test majority did not consider it necessary to consider tikanga when assessing whether to allow an appeal to continue after the death of the deceased. Given that two members of this majority did not consider the present case to be a suitable case to make pronouncements of a general nature about the incorporation or application of tikanga in Aotearoa New Zealand’s common law, that is not surprising.
- 5.50 Significantly, Mr Ellis was not Māori, nor were any of the alleged victims.¹⁰¹ As Winkelmann CJ put it, this meant that the case raised for consideration “the place of tikanga in the common law in a particularly stark way”.¹⁰² Until *Ellis*, most of the cases that engaged with tikanga had what might be described as a Māori element in that Māori rights or interests were engaged in some way.¹⁰³ These factors ultimately colour the court’s reasoning in each case and impose factual limitations on the broader impact of the court’s analysis. *Ellis* had none of these limitations and so the decision is particularly relevant for considering how tikanga might infuse the development of the common law for everyone.
- 5.51 The judges were consistent in their views that tikanga remains a coherent and distinct system grounded in its own cultural context.¹⁰⁴ To that end, the tikanga majority judges were wary of the common law declaring tikanga as opposed to applying it.¹⁰⁵ Williams J phrased his concern in this way:¹⁰⁶
- I simply wish to acknowledge that tikanga Māori continues to operate as law in the lives of Māori people and communities today; and that the risks to tikanga’s integrity of dialogue with the common law are real enough and need to [be] mitigated.
- 5.52 In terms of how a court ascertains tikanga, the tikanga majority judges seemed to move away from the current approach of treating proof of tikanga as a question of evidence. Williams J said he was “somewhat uncomfortable” with its application to indigenous law, noting that there are multiple techniques available to assist courts to understand and apply tikanga.¹⁰⁷

¹⁰⁰ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [22] per the majority (Winkelmann CJ, Glazebrook and Williams JJ).

¹⁰¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [160].

¹⁰² *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [160].

¹⁰³ Although, the beneficiaries of these were not always Māori. See Sarah Down and David V Williams “Building the foundations of tikanga jurisprudence” (2022) 29 *Canterbury Law Review* 27 at 35.

¹⁰⁴ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [171] and [180]–[181] per Winkelmann CJ and [256] per Williams J.

¹⁰⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [180]–[181] per Winkelmann CJ and [271] per Williams J.

¹⁰⁶ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [272] per Williams J.

¹⁰⁷ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [273] per Williams J. Glazebrook J also noted the various methods available to a court at [125].

Tikanga as law

- 5.53 The common law has further recognised tikanga as law within Māori society.¹⁰⁸ In this category of case, tikanga is being recognised as operating as law in its own right without regard to state law rules for incorporation. However, declarations made by the court about tikanga may have secondary legal consequences within state law. The High Court decision in *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* provides an example.
- 5.54 In *Ngāti Whātua (No 4)*, the High Court was tasked with making declarations on the scope and content of mana whenua (authority in respect of land) between different Māori groups. This meant that the legal issues concerned tikanga operating within te ao Māori, rather than tikanga as either a basis for or direct influence on the common law. In relation to tikanga, Palmer J accepted that:
- (a) the law that accompanied Māori to Aotearoa New Zealand was constituted by tikanga;¹⁰⁹
 - (b) tikanga governs and binds iwi and hapū and is developed over time by iwi and hapū;¹¹⁰
 - (c) tikanga is a “free-standing” legal framework recognised by state law;¹¹¹ and
 - (d) tikanga does not, however, bind the Crown or directly modify the common law or statutory law that bind the Crown.¹¹²
- 5.55 *Ngāti Whātua (No 4)* built on earlier High Court decisions. In *Ngāti Whātua Ōrākei v Attorney-General (No 1)*, Palmer J said that tikanga is “law proved as a matter of fact”.¹¹³ In *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)*, Palmer J urged caution when “finding” tikanga as fact because tikanga is created by the relevant hapū or iwi through practice, tradition and deliberation.¹¹⁴ A court’s recognition of tikanga is only a “snapshot at a certain point”, which cannot change the tikanga determined by hapū or iwi exercising their rangatiratanga.¹¹⁵
- 5.56 *Ellis v R*, which was delivered six months after *Ngāti Whātua (No 4)*, did not expressly reference Palmer J’s decision.¹¹⁶ Even so, the Court made various statements that indicated support for the recognition of tikanga as law within Māori society on its own terms.¹¹⁷ A majority in *Ellis* recognised that “tikanga was the first law of Aotearoa/New

¹⁰⁸ See *Ngāti Whātua Ōrākei (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [355] (a “free-standing legal framework”); and see *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [169], fn 282 per William Young and France JJ, agreed to by Glazebrook J at [237], Williams J at [296]–[297] and Winkelmann CJ at [332].

¹⁰⁹ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [355].

¹¹⁰ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [355].

¹¹¹ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [355].

¹¹² *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [570].

¹¹³ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 at [36]. Palmer J was echoing similar comments made by Elias CJ in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95].

¹¹⁴ *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [58].

¹¹⁵ *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [58].

¹¹⁶ Other than at fn 185 per Winkelmann CJ as an authority supporting a tikanga-consistent approach to statutory interpretation.

¹¹⁷ Sarah Down and David V Williams “Building the foundations of tikanga jurisprudence” (2022) 29 *Canterbury Law Review* 27 at 37.

Zealand and that it continues to shape and regulate the lives of Māori”.¹¹⁸ As Glazebrook J said:¹¹⁹

... tikanga will continue to be applied by Māori and will continue to develop, independent of its place as part of the common law or as contained in legislation and policy. In this sense, tikanga is a separate or third source of law.

5.57 The Supreme Court’s 2022 decision in *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* illustrates how a tikanga framework can expand to address novel issues.¹²⁰ In that case, Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal (the Waitangi Tribunal) left open the prospect of resumption of lands in favour of an iwi who were not traditional mana whenua (Ngāti Kahungunu ki Wairarapa).¹²¹ The High Court held this to be contrary to tikanga based on tikanga evidence given before the Waitangi Tribunal about who were the mana whenua, namely Raukawa.¹²² Raukawa’s claim to mana whenua was based on whakapapa to the whenua, usually the strongest basis for exercising mana (authority, responsibilities) in respect of whenua.¹²³ However, the Supreme Court (Williams J writing for the majority comprising also Winkelmann CJ and Glazebrook J) reversed the High Court’s decision, finding that the Tribunal did not err.¹²⁴ Instead, the Court emphasised that context is everything and it is “dangerous to apply tikanga principles, even important ones, as if they are rules that exclude context”.¹²⁵ Williams J for the majority commented that:¹²⁶

... tikanga is a principles based system of law that is highly sensitive to context and sceptical of unbending rules.

5.58 Applying a contextual approach, his Honour said that, while mana whenua is important and not lightly overridden,¹²⁷ “even within its own tikanga framework, mana whenua is neither immutable nor incapable of adaption to new circumstances”.¹²⁸ Williams J also referred to the concept of tuku whenua involving transfers of land for many purposes, including compensation for wrongdoing, recognition of service or building alliances.¹²⁹

5.59 Williams J observed that the Waitangi Tribunal did not refuse to apply tikanga. Rather, it concluded that mana whenua need not be the controlling tikanga because other tikanga principles were in play, namely hara (a wrong), utu (reciprocity), ea (a settled state) and mana. He referred to the need for the Crown to restore the mana of Ngāti Kahungunu ki

¹¹⁸ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [22] and at [107] and [110] per Glazebrook J, [168], [169] and [172] per Winkelmann CJ and [272] per Williams J.

¹¹⁹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [111].

¹²⁰ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142.

¹²¹ Resumption of land refers to a remedy that the Waitangi Tribunal may order. The Tribunal can make a binding recommendation to the Crown that it purchase the land and return it to Māori ownership as a way of settling a claim.

¹²² *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 per Cooke J at [147(d)].

¹²³ *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 per Cooke J at [105]–[107].

¹²⁴ The decision went on appeal directly from the High Court to the Supreme Court: *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2021] NZSC 134; *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2021] NZSC 183.

¹²⁵ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [74].

¹²⁶ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [76].

¹²⁷ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [75].

¹²⁸ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [76].

¹²⁹ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [81].

Wairarapa for the Crown's hara or wrongdoing to them in rendering them landless.¹³⁰ Relevant context also included the allocation of Crown land belonging to Ngāti Kahungunu ki Wairarapa (non-mana whenua), that Raukawa had already settled their claims and that Ngāti Kahungunu ki Wairarapa had a well-founded claim.¹³¹ For these reasons, the majority concluded that the High Court was wrong to give primacy to mana whenua, noting that, while an important principle, there were other relevant principles.

CONCLUSION

5.60 In this chapter, we have reviewed how the common law addresses tikanga. Doing so has shown how the courts have turned from their original reliance on rules of incorporation governing the recognition of tikanga as customary law towards a repositioning of tikanga. The way is open to recognition of tikanga by itself, both providing a source of values informative of the common law and, further, simply engaging with tikanga directly upon its own terms, unmediated by state law tests or contending values. This need not be confined to Māori (although tikanga continues to determine Māori relational interests, and courts may at times be asked to adjudicate). In the following chapter, we move to considering how a similar shift in the ways that tikanga has been acknowledged by state law can be seen in a legislative context.

¹³⁰ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [77].

¹³¹ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [82].

CHAPTER 6

Tikanga and statute law

INTRODUCTION

- 6.1 This chapter discusses the different approaches taken by the state to recognition of tikanga in legislation. While the interaction between common law and tikanga has attracted considerable attention, statutes and statutory interpretation have always been the primary mechanism by which state law engages with tikanga. In addition, the application of tikanga within the common law can be modified by statute.¹ New statutes must be drafted with consideration of whether the statute might affect tikanga practices and must be consistent with tikanga “as far as practicable”.²
- 6.2 This chapter identifies key themes in the engagement between tikanga and legislation. We have divided our discussion of themes into two time periods — the period before 1975 and the period after 1975. We have found it helpful to approach our analysis in this way because of the shift in societal and government attitudes towards Māori generally that was occurring from around 1975.³ This was reflected in both government policy and legislation.

ENGAGEMENT WITH TIKANGA IN STATUTES BEFORE 1975

- 6.3 Early statutes had to acknowledge and consider tikanga by necessity.⁴ Until around 1860, Māori outnumbered the non-Māori settler population,⁵ and tikanga was the only system

¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [98]. Glazebrook J notes that tikanga itself cannot be modified by statute, only its operation within the common law.

² Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at [3.4] and [5.3].

³ Caren Fox “Ko te mana te utu: narratives of sovereignty, law and tribal citizenship in the Pōtikirua ki Te Toka-a-Taiau district” (PhD Thesis, Te Whare Wānanga o Awanuiārangi, 2023) at 53.

⁴ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 9. See also Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand’s Bachelor of Laws Degree: Phase One — Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Ngā Pae o te Māramatanga, supported by the Michael and Suzanne Borrin Foundation, August 2020) at 27–28; Caren Fox “Ko te mana te utu: narratives of sovereignty, law and tribal citizenship in the Pōtikirua ki Te Toka-a-Taiau district” (PhD Thesis, Te Whare Wānanga o Awanuiārangi, 2023) at 49.

⁵ Te Ara: The Encyclopaedia of New Zealand “Māori and European population numbers, 1838–1901” (4 October 2021) Nga korero a ipurangi o Aotearoa | New Zealand History <nzhistory.govt.nz>.

of law that operated in most of Aotearoa New Zealand. In the *Muriwhenua* report, Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal said:⁶

It was natural ... [for Māori] to assume that their own laws and standards would continue without let or hindrance. Indeed, they knew no other law or standards ... Moreover, throughout the crucial period from first contact to 1865, Māori were by far the majority population in this district. It was their way that prevailed, and it must have seemed to them that their arrangements with Europeans would be determined according to no other laws and customs than their own.

- 6.4 Early legislators made attempts to engage with tikanga, although their approaches were varied.⁷ As Te Aka Matua o te Ture | Law Commission (the Commission) observed in *Māori Custom and Values in New Zealand Law*, this was in part a result of the colonial government struggling to decide whether “English law should apply equally to everyone in New Zealand or whether exceptions should be made in favour of Māori and taking into account Māori customs”.⁸ At least initially, the sentiment of the colonial government towards Māori custom seemed favourable. An account from Lord Russell to Governor Hobson was certainly to that effect:⁹

[The Māori people] have established by their own customs a division and appropriation of the soil ... with usages having the character and authority of law ... it will of course be the duty of the protectors to make themselves conversant with these native customs ...

- 6.5 Some officials appeared satisfied that, with the exception of “barbarous customs”, Māori should be exempted from the application of any British law in relation to matters between Māori:¹⁰

... there was no reason why the aborigines should not be exempted from any responsibility to English law or to English courts of justice as far as respects their relations and dealings with each other.

⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 2; see also Robert Joseph “Colonial biculturalism? The recognition & denial of Māori custom in the colonial & post-colonial legal system of Aotearoa/New Zealand” (paper prepared for Te Mātāhauariki Research Institute, Te Whare Wananga o Waikato | University of Waikato FRST Project, 1998) at 2; Ani Mikaere *Colonising Myths — Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 258.

⁷ Various commentators have written about the attitudes of early government in this period. See Alex Frame “Colonising attitudes towards Māori custom” [1981] *New Zealand Law Journal* 105 at 105–106; Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 18–26; Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand’s Bachelor of Laws Degree: Phase One — Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Ngā Pae o te Māramatanga, supported by the Michael and Suzanne Borrin Foundation, August 2020) at 27–29.

⁸ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 18.

⁹ Dispatch from Lord John Russell to Governor Hobson, 9 December 1840, in “Correspondence respecting the colonization of New Zealand” Great Britain Parliamentary Papers relating to New Zealand, No 17 at 27–28; see also Alex Frame “Colonising attitudes towards Māori custom” [1981] *New Zealand Law Journal* 105 at 105–106.

¹⁰ Instructions from James Stephen to Willoughby Shortland, as cited in Shaunnagh Dorsett “Sworn on the dirt of graves: sovereignty, jurisdiction and the judicial abrogation of ‘barbarous’ customs in New Zealand in the 1840s” (2009) 30 *The Journal of Legal History* 175 at 179.

- 6.6 However, as Professor Emeritus David V Williams captures in his research report on early Crown policy for the Waitangi Tribunal, government officials were also concerned with the assimilation of Māori into other ways of life.¹¹ After this early period of statutory engagement, general recognition of tikanga declined over time with the exception of land tenure and the work of the Native Land Court.¹²
- 6.7 The pre-1975 statutes therefore represented an amalgamation of different attitudes towards Māori custom.¹³ An analysis of statutes over this period reveals a variety of methods by which they engaged with tikanga or “customs”:
- (a) Providing for matters to be determined according to “native customs” to varying degrees.
 - (b) Recognising “native rights” to certain resources.
 - (c) Attempting to recognise specific customs through prescriptive drafting.
 - (d) Establishing processes that enabled tikanga to operate.
 - (e) Establishing geographic areas where Māori custom operated in some limited form with respect to matters between Māori.
 - (f) Providing that a particular custom is of no legal effect.
 - (g) Ignoring tikanga.
- 6.8 Below, we expand on each of these methods and discuss some examples.

Providing for matters to be determined according to “native customs”

- 6.9 The most common way in which pre-1975 statutes attempted to recognise tikanga was to provide that matters were to be determined, to varying degrees, according to “native customs”.¹⁴ Naturally, this led to different judicial interpretations of what native customs were. As the Commission has previously described the ensuing process, it was an “assimilation by recognition followed by extinguishment through re-interpretation”.¹⁵ For example, referring to the Native Land Court’s investigation of titles, the Commission said:¹⁶

The Court’s investigation of titles to land was expressed to be in accordance with Māori custom. However, it awarded titles only to individuals, and at one stage awarded title for land areas less than 5,000 acres to 10 owners or less.

¹¹ See the discussion in David V Williams *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (Waitangi Tribunal Publications, Wai 262 #K003, 2001) at ch 1. Williams cites Alan Ward *A Show of Justice: Racial ‘amalgamation’ in nineteenth century New Zealand* (Auckland University Press, Auckland, 1974), which also includes a critical analysis of early government policy.

¹² Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand’s Bachelor of Laws Degree: Phase One — Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Ngā Pae o te Māramatanga, supported by the Michael and Suzanne Borrin Foundation, August 2020) at 27–28.

¹³ See also the discussion in Te Aka Matua o te Ture | Law Commission *Mataitai: Nga tikanga Maori me te Tiriti o Waitangi / The Treaty of Waitangi and Maori Fisheries* (NZLC PP9, 1989) at 130–131.

¹⁴ “Custom” being the dominant way that legislation referred to tikanga. Several different usages occur including “Native customs”, “Native customs and usages” and “Māori custom”.

¹⁵ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 25.

¹⁶ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 25.

- 6.10 The Commission’s attention to the Native Land Court reflects the numerous references to custom in native lands statutes in the nineteenth and early twentieth centuries.¹⁷ To exemplify the process of recognition and subsequent interpretation, the Native Lands Act 1865 and the *Papakura* decision are typical.¹⁸ The Act gave the Native Land Court jurisdiction to inquire (upon application) into who should succeed to Māori land derived from a Crown grant on intestacy according to English law “as nearly as it can be reconciled with Native custom”.¹⁹ In the *Papakura* decision, the Native Land Court interpreted this provision to mean that English law should apply except where “strict adherence to English rules of law would be very repugnant to native ideas and customs”.²⁰ The Court held that the provision meant all issue of the deceased would inherit land in equal shares.²¹
- 6.11 Another example in the succession context is the Native Succession Act 1881. This Act allowed Māori to apply to the Native Land Court to “inquire and ascertain who ought to succeed” to Māori land or land derived from a Crown grant.²² In respect of Māori land, the Native Land Court was to be “guided by Native custom or usage”. In respect of land derived from a Crown grant, the Court was to be “guided by the law of New Zealand”. Te Kōti Matua | High Court (the High Court) commented on this statute in the 1890 decision of *Pahoro v Cuff*:²³

By “The Native Succession Act, 1881,” as amended in 1882, the Native Land Court is required, in granting succession orders respecting lands held under Crown grant, to guide itself by the law of New Zealand as nearly as it can be reconciled with Native custom ... as this Court has no cognisance of Native custom except through references to the Native Land Court, it cannot overrule a decision of the Native Land Court on any question within the jurisdiction of that Court which requires for its determination a knowledge of Native custom. The amending Act of 1882 seems indeed to make Native custom paramount in questions of succession, even to lands held by Natives under Crown grant. If the law of the colony respecting descents and successions cannot be reconciled with Native custom, the latter it would seem must prevail.

- 6.12 The High Court’s interpretation is notable in that it deferred to the Native Land Court’s understanding of native custom where it could not be reconciled with “the law of the colony”.

Recognising “native rights” to certain resources

- 6.13 Another approach taken in legislation was to recognise some existing customary rights to resources. This method is similar to the first approach of providing for matters to be determined according to custom. However, the difference is that it purports to recognise pre-existing rights rather than providing a legislative basis for recognition of customs.

¹⁷ A few examples include the Native Lands Acts 1862 and 1865, Native Succession Act 1881, Native Land Court Act 1894, Native Lands Act 1909 and the Native Lands Act 1931. These are some of the major Acts, but numerous examples can be found in Acts passed every year.

¹⁸ “Papakura — claim of succession” (12 April 1867) *New Zealand Gazette* 19.

¹⁹ Native Lands Act 1865, s 30.

²⁰ “Papakura — claim of succession” (12 April 1867) *New Zealand Gazette* 19 at 19–20.

²¹ “Papakura — claim of succession” (12 April 1867) *New Zealand Gazette* 19 at 19.

²² Native Succession Act 1881, s 3.

²³ *Pahoro v Cuff* (1890) 8 NZLR 751 (HC) at 756.

- 6.14 For example, customary fishing rights were recognised in the Fish Protection Act 1877.²⁴ It gave the Governor in Council power to create fishing districts and to regulate fishing within those districts, including the power to grant exclusive rights to a fishery.²⁵ Section 8 of the Act provided:²⁶

Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.

- 6.15 Provisions of this type did not necessarily mean affirmation of customary rights. Commenting on a similar provision in the Fisheries Act 1908, Stout CJ held that the provision was only a saving provision for rights that existed separately from the Act. He said:²⁷

There is no attempt in the Fisheries Act, 1908, to give rights to non-Maoris not given to Maoris. All have the right to fish in the sea and in tidal rivers who obey the regulations and restrictions of the statute. This statute has not given, and no New Zealand statute gives, any communal or individual rights of fishery, territorial or extra-territorial, in the sea or tidal rivers ... It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right ...

- 6.16 This case was considered good law until the case of *Te Weehi v Regional Fisheries Officer* in 1986.²⁸

Attempting to recognise specific customs through prescriptive drafting

- 6.17 A less common method of recognising tikanga in statute was attempting to recognise specific customs through prescriptive drafting. Rather than provide for “native customs” more generally, these statutes attempted to recognise a particular custom. An early example of this is seen in the Native Exemption Ordinance 1844. The Ordinance’s Preamble indicates an intention to gradually introduce English laws and customs:²⁹

... it is greatly to be desired that the whole aboriginal native population of these Islands, in their relations and dealings amongst themselves, be brought to yield a ready obedience to the laws and customs of England: And whereas this end may more speedily and peaceably be attained by the gradual than by the immediate and indiscriminate enforcement of the said laws, so that in course of time, the force of ancient usages being weakened and the nature and administration of our laws being understood ...

- 6.18 To achieve this gradual introduction, the Ordinance created exemptions from the “procedure and nature of the punishment” for several crimes. One of these exemptions was that Māori who were convicted of theft could pay up to four times the value of the

²⁴ The Commission has previously noted that the Act is not entirely clear. See *Te Aka Matua o te Ture | Law Commission Mataitai: Nga tikanga Maori me te Tiriti o Waitangi | The Treaty of Waitangi and Maori Fisheries* (NZLC PP9, 1989) at 146.

²⁵ Fish Protection Act 1877, ss 3–5.

²⁶ Fish Protection Act 1877, s 8.

²⁷ *Waipapakura v Hempton* (1914) 33 NZLR 1065 at 1071–1072. See the discussion in *Te Aka Matua o te Ture | Law Commission Mataitai: Nga tikanga Maori me te Tiriti o Waitangi | The Treaty of Waitangi and Maori Fisheries* (NZLC PP9, 1989) at 55–56.

²⁸ *Te Aka Matua o te Ture | Law Commission Mataitai: Nga tikanga Maori me te Tiriti o Waitangi | The Treaty of Waitangi and Maori Fisheries* (NZLC PP9, 1989) at 56; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC) at 692–693.

²⁹ Native Exemption Ordinance 1844, Preamble.

goods instead of facing punishment.³⁰ This has been described as an “obvious adaptation of the Māori customary institution of muru”.³¹

Establishing processes that enabled tikanga to operate

- 6.19 Another method is including processes in legislation that enable tikanga to operate. There are early examples of this approach, although it has become more popular since 1975.³²
- 6.20 An early example that has received mixed criticism is the Resident Magistrates Courts Ordinance 1846.³³ This Ordinance allowed two Native Assessors to sit with any magistrate in civil cases.³⁴ The Ordinance went further, giving these assessors the power to “hear and determine summarily all claims and demands whatsoever of a civil nature arising between persons of the Native race”.³⁵ Further, the assessors were able to determine the admissibility of evidence.³⁶ This was all with the view to providing for the “adaptation of law to the circumstances of both races”.³⁷
- 6.21 The role of the Native Assessor was continued in the Resident Magistrates Act 1867 and was not abolished until 1893.³⁸ Commentators have noted the merits of the Native Assessor role, with Dr Robert Joseph noting in particular:³⁹
- For its time, the Resident Magistrates system with Māori Assessors was perceived as a successful initiative. The critical factor contributing its success was direct involvement of local Māori leadership, adequate consultation with the local people about what laws would apply, and what role the chiefs should play in their enforcement.
- 6.22 On the other hand, some commentators have noted the way in which successive Acts related to resident magistrates encouraged Māori to assimilate into the new court system.⁴⁰
- 6.23 Another example is the Native Circuit Courts Act 1858. This Act provided for the establishment of districts and of Native Circuit Courts within those districts.⁴¹ These courts had both criminal and civil jurisdictions. Native Assessors could sit with magistrates on

³⁰ Native Exemption Ordinance 1844, s 7.

³¹ Robert Joseph “Re-creating legal space for the first law of Aotearoa-New Zealand” (2009) 17 *Taumauri | Waikato Law Review* 74 at 77–78. At fn 28, Joseph describes muru as “a ritualised compensatory institution where an offended party was allowed to take possessions owned by the offender party. The institution was an effective method for avoiding violent confrontations.”

³² See for example the Part 3A mediation process in *Te Ture Whenua Maori Act 1993* or the institution of the Family Group Conference established in the *Children, Young Persons, and Their Families Act 1989*.

³³ Other examples include the *Native Districts Regulation Act 1878* and the *Native Circuit Courts Act 1858*.

³⁴ *Resident Magistrates Courts Ordinance 1846*, s 19.

³⁵ *Resident Magistrates Courts Ordinance 1846*, s 19.

³⁶ *Resident Magistrates Courts Ordinance 1846*, s 21.

³⁷ *Resident Magistrates Courts Ordinance 1846*, Preamble.

³⁸ *Te Aka Matua o te Ture | Law Commission Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 20.

³⁹ Robert Joseph “Re-creating legal space for the first law of Aotearoa-New Zealand” (2009) 17 *Taumauri | Waikato Law Review* 74 at 78. See also *Te Aka Matua o te Ture | Law Commission Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 20.

⁴⁰ Both David V Williams and Mark Hickford have argued that the role of the Native Assessor encouraged Māori to assimilate into the court system. See David V Williams *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (Waitangi Tribunal Publications, Wai 262 #K003, 2001) at 20–21.

⁴¹ *Native Circuit Courts Act 1858*, ss 1 and 2.

these courts. Alternatively, two or more Native Assessors could sit together as a court with all the powers and functions of a Native Circuit Court.⁴²

Establishing geographic areas where Māori custom operated in some limited form

6.24 Another common approach in early statutes was to establish geographic areas where Māori customs operated in some limited form. An approach to recognising custom that relied on geographic boundaries was a more workable approach when Māori still retained well-established tribal bases under customary ownership. Where this is the case in overseas jurisdictions, a geographic approach is still being used.⁴³

6.25 The earliest example from Aotearoa New Zealand is found in the New Zealand Constitution Act 1852 (UK).⁴⁴ It provided for “particular districts” to be set aside where native customs “so far as they are not repugnant to the general principles of humanity” would apply “in all their relations to and dealings with each other”.⁴⁵ This power was never used, despite calls for districts to be set aside by various Māori movements.⁴⁶ The Act did not provide for tikanga to govern relationships between Māori and non-Māori in these districts. However, this was the intention when the Act was prepared and approved by Parliament in London in 1846.⁴⁷ The original version of the Act had a provision stating:⁴⁸

Within such districts (as may be declared) the laws, customs, and usages of the aboriginal inhabitants, so far as they are not repugnant to the general principles of humanity, shall for the present be maintained.

6.26 The Native Committees Act 1883 provided for a similar geographical approach, albeit in a much more limited way. It provided for districts to be created and for the establishment of a “Native Committee” by election for each district.⁴⁹ The Native Committee had the power to sit as a court of arbitration and determine disputes between “Natives usually resident in the district, where the cause of the dispute has arisen within the district and the matter does not exceed twenty pounds in value”.⁵⁰ The parties had to agree to be bound by the decision.⁵¹

Providing that custom is of no legal effect

6.27 Another possible approach is for legislation to expressly provide that a certain custom has no legal effect. There are relatively few examples of this approach.

⁴² Native Circuit Courts Act 1858, s 33.

⁴³ The First Nations reserves in both Canada and the United States are prominent examples.

⁴⁴ For a comprehensive discussion of the New Zealand Constitution Act 1852 see Robert Joseph ‘*The Government of Themselves: Case Law, Policy and Section 71 of the New Zealand Constitution Act 1852*’ (Te Mātāhauariki Institute, University of Waikato, Hamilton, 2002).

⁴⁵ New Zealand Constitution Act 1852, s 71.

⁴⁶ Robert Joseph “Colonial biculturalism? The recognition & denial of Māori custom in the colonial & post-colonial legal system of Aotearoa/New Zealand” (paper prepared for Te Mātāhauariki Research Institute, Te Whare Wananga o Waikato | University of Waikato FRST Project, 1998) at 6.

⁴⁷ Alex Frame “Colonising attitudes towards Māori custom” [1981] *New Zealand Law Journal* 105 at 106.

⁴⁸ Alex Frame “Colonising attitudes Towards Māori custom” [1981] *New Zealand Law Journal* 105 at 106.

⁴⁹ Native Committees Act 1883, s 4.

⁵⁰ Native Committees Act 1883, s 11.

⁵¹ Native Committees Act 1883, s 11.

- 6.28 One example is the Adoption Act 1955. The Act provides that adoptions in accordance with Māori custom are of no force and effect.⁵² The Act is still in force and continues to affect legal recognition of whāngai (raising or adopting children according to tikanga). For example, Te Kōti Pira | Court of Appeal has held that the Adoption Act precludes a whāngai child from making a claim under the Family Protection Act 1955 unless they have been formally adopted.⁵³
- 6.29 Another example is the Native Land Laws Amendment Act 1895, which amended the principal Act to prevent ōhākī (a customary oral expression of testamentary wishes) from being recognised as a legally valid distribution of property.⁵⁴

Ignoring tikanga

- 6.30 It may seem unusual to describe ignoring tikanga as a method of engagement. However, in circumstances where there was overlap or similarity between the areas covered by statute and tikanga, an absence of legislative direction to consider tikanga could mean those administering the legislation could not consider tikanga or were less likely to.
- 6.31 An example is the Guardianship Act 1968. Under the Act, the only guardians as of right were the natural birth mother and father of the child.⁵⁵ Although the Act did not directly mention tikanga or custom, commentators on the Act have suggested that the Act was clearly inconsistent with a Māori world view.⁵⁶
- 6.32 The Wills Act 2007 provides another example. The Act makes no mention of ōhākī, effectively precluding ōhākī from being a valid testamentary distribution of property by requiring that a will must be in writing.⁵⁷

Some observations about statutory engagement before 1975

- 6.33 Some overarching observations can be made about the different methods by which statute engaged with tikanga prior to 1975.

⁵² Adoption Act 1955, s 19. There is an exception in s 19(2) for adoptions made before the commencement of the Native Land Act 1909.

⁵³ *Keelan v Peach* [2003] 1 NZLR 589 (CA) at [43]. However, 2021 amendments to Te Ture Whenua Maori Act 1993 provide that Te Kooti Whenua Māori | Māori Land Court may determine whether someone is a whāngai for the purposes of a claim under the Family Protection Act 1955 that relates to Māori freehold land: see Te Ture Whenua Maori Act 1993, s 115. For a description of whāngai see Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 134–135.

⁵⁴ For a description of ōhākī see Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 385–386. Section 33 of the Native Land Laws Amendment Act 1895 provided that “No interest in land or personal estate shall pass by any unwritten will or *ohaki*”. Up until this point, the common law had recognised ōhākī. See the discussion of ōhākī in T Bennion and J Boyd *Succession to Maori Land, 1900–52* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Rangahaua Whanui series, 1997) at 11.

⁵⁵ Guardianship Act 1968, s 6. If the parents are not married or not living together as husband and wife, the mother would be the only guardian as of right.

⁵⁶ See Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 24–25 and Te Aka Matua o Te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 56.

⁵⁷ See Wills Act 2007, ss 6, 8 and 11. Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 386.

Recognition was sometimes used as a tool for assimilation

- 6.34 Not every mention of custom was clearly designed to assimilate or extinguish custom. Particularly in the areas of Māori land and succession, government did appear to have a willingness to allow custom to continue to operate, albeit as “incorporated custom”.⁵⁸ However, recognition of tikanga in statute was sometimes used as a tool for assimilation. As Justice Joseph Williams (writing extra-judicially) says:⁵⁹

... examples of recognition were intended to be points along a journey to jurisdictional amalgamation, rather than dots to be joined to demonstrate continuity of recognition of ongoing custom to the present day.

- 6.35 Other commentators have also argued that the limited recognition of custom early on by the government was largely intended as a temporary or transitional measure.⁶⁰

Legislative direction was not always followed

- 6.36 Despite various Acts requiring courts to recognise or make determinations according to “native custom”, the cases indicate that this was not always done, particularly in cases outside of the Native Land Court.⁶¹ In *Willoughby v Pana Waihopi*, the Court remarked:⁶²

... Judges have acted on the assumption that they might invoke Native custom to determine the succession to the freehold lands of Maoris ... A body of custom has been recognized and created in that Court which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be owned in severalty, or in the shape approaching severalty represented by tenancy in common. Many of the customs set up by that Court must have been founded with but slight regard for the ideas which prevailed in savage times.

- 6.37 On this assessment, the sometimes-strong direction from the legislature to determine matters according to “native custom” was not always followed. Some judges may have seen fit to apply tikanga “by analogy”,⁶³ meaning that they recognised tikanga by analogising it with English legal concepts that they understood. Others created legal rules

⁵⁸ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 10.

⁵⁹ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 10.

⁶⁰ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 22–23; Alex Frame “Colonising attitudes towards Māori custom” [1981] *New Zealand Law Journal* 105 at 106; David V Williams *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (Waitangi Tribunal Publications, Wai 262 #K003, 2001) at ch 1.

⁶¹ Te Aka Matua o te Ture | Law Commission *Mataitai: Nga tikanga Maori me te Tiriti o Waitangi | The Treaty of Waitangi and Maori Fisheries* (NZLC PP9, 1989) at 135; Alan Ward *A Show of Justice: Racial ‘amalgamation’ in nineteenth century New Zealand* (2nd ed, Auckland University Press, Auckland, 1995) at 202 and 231–232 discussing Chief Judge Fenton in particular. For a collection of cases with commentary from the Native Land Court, where custom was regularly applied by judges (albeit as they understood it and for the purposes of extinguishing native title), see Richard Boast *The Native Land Court 1862–1887* (Thomson Reuters, Wellington, 2013); Richard Boast *The Native Land Court Volume 2, 1888–1909: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2015); Richard Boast *The Native/Māori Land Court Volume 3, 1910–1953: Collectivism, Land Development and the Law* (Thomson Reuters, Wellington, 2019).

⁶² *Willoughby v Panapa Wahopi* (1910) 29 NZLR 1123 at 1149–1150.

⁶³ Te Aka Matua o te Ture | Law Commission *Mataitai: Nga tikanga Maori me te Tiriti o Waitangi | The Treaty of Waitangi and Maori Fisheries* (NZLC PP9, 1989) at 135.

or “customs” based upon a sense of justice that required them (as they saw it) to help Māori move on from “ideas which prevailed in savage times”.⁶⁴

Statutes did not resolve differences between prevailing English legal theory and tikanga

6.38 Despite clear statutory references to “native customs”, the pre-1975 statutes did not appear to resolve differences between tikanga and prevailing English legal theory. The legislature appears to have been unwilling to shed critical assumptions based upon English legal theory about what law is or how it should operate in order to engage with tikanga. Where the legislature made the attempt to engage with tikanga beyond references to custom, the statutes did little to go beyond a superficial understanding. Alternatively, where the role of engaging with tikanga was passed on to the courts through statutory references to “native custom”, the courts struggled to apply “native custom” as it is properly understood by reference to mātauranga Māori.

ENGAGEMENT WITH TIKANGA AFTER 1975

6.39 By 1975, the loss of land and other resources had resulted in an exodus of Māori from traditional papakāinga into urban centres, disconnecting many Māori from their tribal base. Where tikanga survived, this was only in isolated communities largely beyond the reach of outside influence.⁶⁵

6.40 The 1970s also saw numerous Māori-led protests, bringing national attention to areas such as land loss, revitalisation of te reo Māori and the social and economic position of Māori.⁶⁶ Resulting social and political developments led to a shift in approach to statutes engaging with tikanga. This includes the language used to engage tikanga within statutes, with references to “native customs” replaced by general references to “tikanga” or the incorporation of Māori words that engage a particular tikanga concept. In many ways, this statutory shift from recognising tikanga as observable behaviours to acknowledging the deeper system that drives those behaviours preceded the similar change now occurring within the common law.

6.41 Several notable developments in the post-1975 period include:

- (a) increasing use of kupu Māori (Māori words) within statutes;
- (b) provisions requiring Māori groups to be involved in decision making;
- (c) principles provisions;
- (d) provisions allowing courts to obtain cultural reports;
- (e) requiring statutory bodies to have Māori representation;
- (f) te Tiriti o Waitangi | Treaty of Waitangi (the Treaty) settlement Acts; and
- (g) recognition of Te Awa Tupua and Te Urewera as legal persons.

⁶⁴ *Willoughby v Panapa Wahopi* (1910) 29 NZLR 1123 at 1150.

⁶⁵ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 11. Māori who lived in urban centres faced different issues again, including near total land loss. See for example *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987).

⁶⁶ See Basil Keane “Ngā rōpū tautohetohe — Māori protest movements” (20 June 2012) *Te Ara: the Encyclopedia of New Zealand* <teara.govt.nz>.

Increasing use of kupu Māori within statutes

- 6.42 In early statutes, the use of te reo Māori was largely a matter of necessity as most Māori did not speak English.⁶⁷ In the nineteenth century, this meant that many proclamations, statutes and judgments were translated in te reo Māori.⁶⁸ However, once Māori were able to speak English widely and the perceived need to use te reo Māori diminished, so did the commitment to using it. The period of 1900–1975 saw a “dramatic decline in the civic status of te reo Māori”.⁶⁹
- 6.43 As a result of political pressure driven by community action, statutes began to use kupu Māori more frequently from 1975 onwards.⁷⁰ Some Acts were even redrafted to include kupu Māori and Māori concepts in place of English equivalents that had been used previously.⁷¹ Some statutes began to include sections in te reo Māori, and a small number of statutes have been published in both English and te reo Māori.⁷² These modern examples represent something very different to the earlier use of te reo Māori. Rather than being a literal translation from English to Māori, kupu Māori may now need to be understood and interpreted according to tikanga.⁷³ Ross Carter explains:⁷⁴
- Māori language in legislation is about bilingual, but could also involve bijural, legislation; that is, legislation the interpretation of which depends on both the common law and law in accordance with tikanga Māori.
- 6.44 Despite these significant shifts, te reo Māori is not fully recognised as “an ordinary language of legal enactment”.⁷⁵ While it is now common to find isolated kupu Māori in statutes, substantial use of te reo Māori remains relatively rare.

Provisions requiring Māori groups to be involved in decision making

- 6.45 Some statutes provide for shared decision making between government and Māori, particularly in the resource management area. Much of this is found in Treaty settlement

⁶⁷ See Tai Ahu “Te reo Māori as a language of New Zealand Law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) for a comprehensive discussion of the use of te reo Māori in legislation.

⁶⁸ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 11. Ahu notes that a standing order of the House in 1868 required Bills and Acts to be translated into Māori.

⁶⁹ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 12.

⁷⁰ Te reo Māori movements such as the petition to Parliament led by Ngā Tamatoa, the establishment of various whare wānanga and the Waitangi Tribunal report on te reo Māori were all factors. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Reo Māori Claim* (Wai 11, 1986). Some earlier examples of statutes include the use of kaitiakitanga in the Resource Management Act 1991 and the use of whānau, hapū and iwi in the Children, Young Persons, and Their Families Act 1989.

⁷¹ See the Protected Objects Amendment Act 2006. Among other things, this renamed the Antiquities Act 1975 and replaced the definition of “artifact” with “taonga tūturu”.

⁷² See Te Ture mō Te Reo Māori 2016 and Te Ture mō Mokomoko (Hei Whakahoki i te Ihī, te Mana, me te Rangatiratanga) 2013 for examples of Acts published entirely in both English and te reo Māori.

⁷³ Tai Ahu has argued that definitions of kupu Māori within legislation need to be removed and the Interpretation Act 1999 amended to require kupu Māori to be interpreted according to tikanga. See Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 94.

⁷⁴ Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 186.

⁷⁵ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 13.

statutes, which we discuss below. However, the Resource Management Act 1991 (RMA) is an example of incorporating such a provision in a general statute. The RMA was amended in 2017 to provide for:⁷⁶

... iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act.

- 6.46 The amendment allows “iwi authorities” to invite local government authorities to develop a Mana Whakahono a Rohe (iwi participation arrangement) over a particular rohe (region) with a view to joint participation in the management and care of that rohe.⁷⁷ Although Mana Whakahono a Rohe are limited in certain respects, they attempt to enable Māori to exercise obligations of kaitiakitanga (guardianship) and manaakitanga (care) for natural resources through mutual agreement with local government.
- 6.47 Although they are tempered by the limitations of the RMA, Māori involvement through Mana Whakahono a Rohe arrangements allows tikanga to influence environmental management. Importantly in this context, the tikanga comes from “iwi authorities”, which in theory represent the iwi with mana whenua (authority over land according to tikanga) over a particular area.
- 6.48 Another example is Te Urewera Act 2014, a settlement Act that establishes a comprehensive management scheme for Te Urewera.⁷⁸ By comparison with the Mana Whakahono a Rohe arrangements in the RMA, Te Urewera Act 2014 may be a stronger example of shared decision making as Tūhoe have a majority on the Board that manages Te Urewera.⁷⁹

Principles provisions

- 6.49 An increasingly common statutory way to recognise tikanga is to provide for it within a principles provision.⁸⁰ These provisions require those applying the Act to do so in accordance with the principles set out.⁸¹ When the principles reference tikanga, the effect is to require decision makers to consider tikanga concepts.⁸²
- 6.50 Examples of principles provisions referring to tikanga can be found in the Town and Country Planning Act 1977 and the RMA. The Town and Country Planning Act provided for the recognition of several matters of “national importance”.⁸³ These included “[t]he

⁷⁶ Resource Legislation Amendment Act 2017.

⁷⁷ See Resource Management Act 1991, pt 5, sub-pt 2.

⁷⁸ The Act establishes Te Urewera Board to act on behalf of Te Urewera and provide for its governance, with two-thirds of the Board appointed by Tūhoe Te Uru Taumatua. The Board is given “all the powers reasonably necessary to achieve its purpose and perform its functions”, which include preparing a management plan for Te Urewera and making bylaws for Te Urewera. Te Urewera Act 2014, ss 19–21.

⁷⁹ Te Urewera Act 2014, s 21.

⁸⁰ See Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 166–176 for a discussion of principles provisions.

⁸¹ Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 171.

⁸² Some other notable Acts that contain principles provisions with a tikanga element are the Coroners Act 2006, Mental Health (Compulsory Assessment and Treatment) Act 1992, Sentencing Act 2002, Climate Change Response Act 2002, Te Ture Whenua Māori Act 1993, Te Aratuku Whakaata Irirangi Māori Act 2003, Marine and Coastal Area (Takutai Moana) Act 2011, Heritage New Zealand Pouhere Taonga Act 2014, Te Urewera Act 2014, Te Ture mō Te Reo Māori 2016 and Education and Training Act 2020.

⁸³ Town and Country Planning Act 1977, s 3. This Act was the predecessor to the Resource Management Act 1991.

relationship of the Maori people and their culture and traditions with their ancestral land”.⁸⁴ Initially, this was restricted to land owned by Māori but was expanded by the courts in 1987 to include all land over which Māori had an ancestral connection.⁸⁵ The RMA expanded this to virtually all natural resources.⁸⁶

- 6.51 Section 7 of the RMA lists other matters that must be regarded when exercising powers under the Act, including kaitiakitanga.⁸⁷ As defined in the Act, kaitiakitanga means “the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship”.⁸⁸ In *Takamore Trustees v Kapiti Coast District Council*, the High Court held that section 7 created an obligation not just to hear and understand the views of tangata whenua regarding kaitiakitanga where it is relevant but also to allow those views to influence decision making in a substantial way.⁸⁹
- 6.52 Examples can also be found in the Children, Young Persons, and Their Families Act 1989 (now the Oranga Tamariki Act 1989). As enacted, the Act provided for general principles to guide the exercise of powers under the Act, including:⁹⁰
- ... wherever possible, a child’s or young person’s family, whanau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whanau, hapu, iwi, and family group.
- 6.53 In 2017, the principles sections within the Act were expanded to include references to mana tamaiti (a child or young person’s intrinsic value and inherent dignity), whakapapa (connections) and whanaungatanga (relationship, kinship).⁹¹ The Act also provides that a holistic approach must be taken by those administering the Act, which includes considerations of a child’s whakapapa and cultural identity.⁹²
- 6.54 Some have criticised the approach of using principles provisions in legislation, on the basis that principles are easy to understand in the abstract but are not easy to apply in specific situations.⁹³

⁸⁴ Town and Country Planning Act 1977, s 3(1)(g). The previous Town and Country Planning Act of 1953 contained no reference to Māori or Māori culture. The recognition of the relationship between Māori and the whenua was a significant development in the statutory recognition of tikanga in the resource management space. The requirement for decision makers to consider Māori connections to virtually all land in Aotearoa New Zealand is something that might not have been possible even a few decades prior. Williams notes that this “changed the game in an obviously important way”. See Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 17.

⁸⁵ *Royal Forest and Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 9.

⁸⁶ Resource Management Act 1991, s 6.

⁸⁷ Resource Management Act 1991, s 7(a).

⁸⁸ Resource Management Act 1991 s 2.

⁸⁹ *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC).

⁹⁰ Children, Young Persons, and Their Families Act 1989, s 5(a).

⁹¹ Oranga Tamariki Act 1989, s 5(1)(b)(iv). “Mana tamaiti” is defined as the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person. See Oranga Tamariki Act 1989, s 2.

⁹² Oranga Tamariki Act 1989, s 5(1)(b)(vi).

⁹³ Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 168.

Provisions requiring statutory bodies to have Māori representation

6.55 Another approach that is sometimes used is to require Māori representation on statutorily established bodies. This is not a new phenomenon. Examples from as early as the nineteenth century may be found.⁹⁴ However, differences lie in the detail and the intent of the statute. In early examples of Māori representation on statutory bodies, it was intended to encourage “higher civilisation and contentment of the Maoris themselves if they were authorised and encouraged in such laudable desires”.⁹⁵ Today, the significant number of statutes requiring Māori representation on statutory bodies suggests that these statutes aim to enable a distinctly Māori perspective to influence decision making.⁹⁶

Allowing courts to obtain cultural reports

6.56 In areas that involve complex decisions and the exercise of discretion such as criminal law and family law, courts are now often empowered to obtain cultural reports to inform their decision making. The precursor to cultural reports is found in the Criminal Justice Act 1985, which allowed for offenders being sentenced to call witnesses to speak to the ethnic or cultural background of the offender.⁹⁷ This was specifically designed to help meet the needs of Māori offenders.⁹⁸

6.57 The Sentencing Act 2002 adopted a similar provision and it is now common practice to have pre-sentence reports on “information regarding the personal, family, whanau, community, and cultural background, and social circumstances of the offender”.⁹⁹

6.58 The Oranga Tamariki Act 1989 also enables the court to request a cultural and community report on “the heritage and the ethnic, cultural, or community ties and values of the child ... or the child’s ... family, whanau, or family group”.¹⁰⁰

Treaty settlement Acts

6.59 Treaty settlement Acts are a unique development in the engagement of tikanga and legislation.¹⁰¹ They are fundamentally different from other legislation because their purpose is to give legal effect to agreements between the Crown and iwi or hapū that settle claims relating to the Crown’s breaches of the Treaty. The settlement process will have involved lengthy kōrero (discussion) between iwi, hapū and the Crown.

6.60 Usually, a settlement Act will contain a brief history of the iwi or hapū and the Crown actions that require redress, usually in both te reo Māori and English. For example, the Preamble to the Waikato Raupatu Claims Settlement Act 1995 contains a history of the

⁹⁴ See for example the Native Schools Act 1867 and the Maori Councils Act 1900.

⁹⁵ Maori Councils Act 1900, Preamble.

⁹⁶ See for example Education and Training Act 2020, s 127(d); Climate Change Response Act 2002, s 5H; Arts Council of New Zealand Toi Aotearoa Act 2014, s 10(4); Heritage New Zealand Pouhere Taonga Act 2014, s 10; Kāinga Ora — Homes and Communities Act 2019, s 10.

⁹⁷ Criminal Justice Act 1985, s 16. The court was required to hear the witness, with limited exceptions.

⁹⁸ *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at 35, citing the speech of Michael Cullen during the second reading of the Bill. See (1985) 463 NZPD 4795.

⁹⁹ Sentencing Act 2002, s 26(2)(a).

¹⁰⁰ Oranga Tamariki Act 1989, s 187.

¹⁰¹ There are now nearly 50 settlement Acts.

Kīngitanga movement and the invasion and raupatu (conquest) of Waikato lands.¹⁰² An apology from the Crown is then recorded that acknowledges the effects of Crown action towards the particular iwi or hapū.

- 6.61 The operative provisions of settlement Acts can be broadly categorised into commercial redress and cultural redress. Commercial redress involves the transfer of assets to established post-Treaty settlement entities. Cultural redress can involve much more nuanced forms of redress and varies widely across iwi and hapū. For example, the Ngāi Tahu Claims Settlement Act 1998 provided for the renaming and vesting of Aoraki Mount Cook in Ngāi Tahu on the condition that, after a period, Ngāi Tahu would return it on behalf of the people of Aotearoa New Zealand.¹⁰³
- 6.62 Settlement Acts often provide definitions of the relevant iwi or hapū, with different approaches between legislation. Some settlement Acts provide extensive lists of all hapū or whānau that make up the relevant iwi or hapū.¹⁰⁴ Others define the iwi or hapū as including all persons descending from a common ancestor.¹⁰⁵
- 6.63 Some settlement Acts have also defined tikanga as including “Māori customary law”.¹⁰⁶ Legislative acknowledgement of tikanga as “law” is not an insignificant development, even if this is mostly found in settlement legislation. Other than settlement Acts, only the Oranga Tamariki Act defines tikanga as including “customary law”.¹⁰⁷
- 6.64 Finally, all settlement Acts provide that the settlement agreement reached is full and final and the Crown is released from all obligations and liabilities to the iwi or hapū arising from their breaches of the Treaty.¹⁰⁸

Recognition of places as legal persons

- 6.65 Some settlement Acts have affirmed the identity of places as legal persons. For example, both Te Awa Tupua (referring to the Whanganui River) and Te Urewera (a forested area formerly designated by the Crown as a National Park) have been recognised in statutes as legal persons with all the rights, powers, duties and liabilities of legal persons.¹⁰⁹

¹⁰² See also for example Ngāi Tahu Claims Settlement Act 1998, Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, Ngāti Awa Claims Settlement Act 2005 and Tūhoe Claims Settlement Act 2014, although nearly every settlement Act contains similar provisions.

¹⁰³ Ngāi Tahu Claims Settlement Act 1998, ss 15–16. Other forms of cultural redress include the renaming of places, declaration of whenua rāhui, vesting of fee simple in cultural redress properties, acknowledgement by the Crown of the cultural, spiritual and historical association of iwi and hapū to their whenua and the establishment of reserves.

¹⁰⁴ See for example Waikato Raupatu Claims Settlement Act 1995, s 7.

¹⁰⁵ See for example Ngāti Awa Claims Settlement Act 2005, s 13.

¹⁰⁶ See for example Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 7; Ngāti Tūwharetoa Claims Settlement Act 2018, s 12; and Ngāti Rangi Claims Settlement Act 2019, s 12.

¹⁰⁷ Oranga Tamariki Act 1989, s 2.

¹⁰⁸ See for example Tūhoe Claims Settlement Act 2014, s 15 and Ngāti Awa Claims Settlement Act 2005, s 15.

¹⁰⁹ Te Urewera Act 2014, s 11; Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.

6.66 Additionally, Te Urewera Act 2014 provides:¹¹⁰

- (1) Te Urewera is ancient and enduring, a fortress of nature, alive with history; its scenery is abundant with mystery, adventure, and remote beauty.
- (2) Te Urewera is a place of spiritual value, with its own mana and mauri.
- (3) Te Urewera has an identity in and of itself, inspiring people to commit to its care.

CONCLUSION

6.67 In this chapter we have given a high-level historical overview of the statutory recognition of tikanga. We have shown how early legislation gave some limited recognition to, for example, “native custom”, but at the same time was also explicitly used as a tool directed towards the assimilation of Māori to European ways of life. A shift that began in the 1970s brought changes to the ways that statutes recognise, interpret and apply tikanga. Legislative recognition of tikanga has increased post-1975 and has been more meaningful. However, there remain limitations. In the following chapter, we turn to consider the influence of tikanga in the modern legal landscape in more detail, by considering how eight different areas of the law have engaged with tikanga.

¹¹⁰ Te Urewera Act 2014, s 3. For a thorough examination of the Act more broadly see Jacinta Ruru “Tūhoe-Crown settlement — Te Urewera Act 2014” [October 2014] Māori Law Review 16.

CHAPTER 7

Tikanga and state law today

INTRODUCTION

7.1 In this chapter, our focus moves beyond the overview which Chapters 5 and 6 have provided of general common law and statutory approaches to tikanga. We now turn to summarise how tikanga has been addressed in a range of specific areas of the law:¹

- (a) tikanga and environmental law;
- (b) tikanga and criminal law;
- (c) tikanga and family law;
- (d) tikanga and the law of judicial review;
- (e) tikanga and the New Zealand Bill of Rights Act 1990;
- (f) tikanga and evidence;
- (g) tikanga and Māori land; and
- (h) tikanga in the Marine and Coastal Area (Takutai Moana) Act 2011.

TIKANGA AND ENVIRONMENTAL LAW

7.2 Tikanga has been a feature of environmental law for more than 30 years. It features most prominently in the Resource Management Act 1991 (RMA), associated statutory planning instruments and case law that has developed.² Government bodies dedicated to environmental protection and administration engage with tikanga and with Māori, including Te Papa Atawhai | Department of Conservation, Manatū Mō Te Taiao | Ministry for the Environment and local government bodies. Several te Tiriti o Waitangi | Treaty of

¹ There are other areas of the law that we do not cover. See for example Khylee Quince and Jayden Houghton “Privacy and Māori concepts” in Nikki Chamberlain and Stephen Penk (eds) *Privacy Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2023) 43; *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117 at [55] concerning tikanga and class actions; and *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 concerning tikanga and employment law.

² For a discussion of the RMA and tikanga, see *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352. There are numerous other environmental statutes that provide for Māori interests, such as the Heritage New Zealand Pouhere Taonga Act 2014, Conservation Act 1987, Fisheries Act 1996 and Environment Act 1986.

Waitangi (the Treaty) settlement Acts also expressly recognise and incorporate tikanga in respect of the environment.³

The Resource Management Act 1991

7.3 The RMA provides that “the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga” and “the protection of protected customary rights” are both matters of national importance that must be recognised and provided for.⁴ In addition, decision makers under the RMA must have regard to kaitiakitanga.⁵ As Chapter 6 describes, the RMA defines kaitiakitanga as “the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources and includes the ethic of stewardship”.⁶ Other Māori concepts defined by the RMA include tangata whenua, mana whenua and tikanga Māori. According to these definitions:⁷

- (a) Tangata whenua means, in relation to a particular area, “the iwi, or hapu, that holds mana whenua over that area”.
- (b) Mana whenua means “customary authority exercised by an iwi or hapu in an identified area”.
- (c) Tikanga Māori means “Maori customary values and practices”.

7.4 Te Kōti Matua | High Court (the High Court) in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* has explained that these terms need to be applied according to tikanga Māori:⁸

The RMA is replete with references to kupu Māori, including Māori, iwi, hapū, kaitiakitanga, tangata whenua, mana whenua, tāonga, taiapure, mahinga mataitai and tikanga Māori. Parliament plainly anticipated that resource management decision-makers will be able to grasp these concepts and where necessary, apply them in accordance with tikanga Māori.

7.5 People exercising functions under the RMA must also take into account the principles of the Treaty.⁹ The significance of this requirement was affirmed by the Privy Council in *McGuire v Hastings District Council*, noting that these “are strong directions, to be borne in mind at every stage of the planning process”.¹⁰

7.6 The RMA expressly contemplates that “iwi authorities” will be involved in developing “Mana Whakahono a Rohe” or iwi participation arrangements.¹¹ The purpose of a Mana Whakahono a Rohe is to:¹²

³ We discuss some prominent examples in Chapter 6.

⁴ Resource Management Act 1991, ss 6(e) and (g).

⁵ Resource Management Act 1991, s 7(a).

⁶ Resource Management Act 1991, s 2.

⁷ Resource Management Act 1991, s 2.

⁸ *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [64].

⁹ Resource Management Act 1991, s 8.

¹⁰ *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].

¹¹ Resource Management Act 1991, s 58M.

¹² Resource Management Act 1991, s 58M.

... provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes.

- 7.7 Other provisions enable Māori, iwi and hapū to participate in resource management decision making, including the transfer of functions and powers to an iwi authority and recognition of tikanga where appropriate in Environment Court hearings.¹³ The RMA also enables the appointment of Environment Court Commissioners with knowledge and expertise in matters relating to the Treaty and kaupapa Māori.¹⁴ The Environment Court, when discharging its obligations under the RMA, does not have the role of conferring, declaring or affirming tikanga-based rights, powers and or authority.¹⁵ Rather, it may make evidential findings about tikanga-based claims as a part of discharging its obligations to Māori under the RMA.¹⁶

Engaging with the spiritual dimension of tikanga

- 7.8 From the early years of RMA litigation, courts and local authorities acknowledged that the Māori world view was holistic and that there was no necessary division between spiritual or metaphysical and physical matters.¹⁷ However, especially in the early years of the RMA, courts sometimes struggled to incorporate the spiritual or metaphysical dimension into their decision making. This had implications for how the merits of a particular proposal were assessed.
- 7.9 On occasion, the Environment Court has given less weight to spiritual or metaphysical matters where there were no related physical effects.¹⁸ For example, in *Mahuta v Waikato Regional Council* the Environment Court said in regard to the relationship between Waikato-Tainui and the Waikato River that “[a] central tenet of this relationship is the metaphysical aspect of the Waikato River, its mauri, and associated metaphysical phenomena”.¹⁹ Having made that finding, the Court nevertheless granted a resource consent that involved discharges from a dairy factory into the Waikato River. The Court reasoned:²⁰

It is our judgment that because of the community value of the proposed expansion of the dairy factory, and because the cultural interests of Waikato-Tainui people would be provided for in so many other ways which avoid tangible harm to the river, the perceptions which are not represented by tangible effects do not deserve such weight as to prevail over the proposal and defeat it.

- 7.10 There were also instances where the Environment Court simply found that the claimed effect was not justiciable. In *Beadle v Minister of Corrections*, a case concerning a then proposed prison in Ngawha, the Environment Court considered that effects on the local taniwha (a guardian) named Takauere were not capable of adjudication.²¹ The Court said

¹³ Resource Management Act 1991, ss 33, 36B and 269(3).

¹⁴ Resource Management Act 1991, s 253(e).

¹⁵ *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [135].

¹⁶ *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [135].

¹⁷ *Haddon v Auckland Regional Council* [1994] NZRMA 49 (PT) at 63.

¹⁸ *Hamilton v Far North District Council* [2015] NZEnvC 12; *Verstraete v Far North District Council* [2013] NZEnvC 108.

¹⁹ *Mahuta v Waikato Regional Council* NZEnvC Auckland A91/98, 29 July 1998 at [71].

²⁰ *Mahuta v Waikato Regional Council* NZEnvC Auckland A91/98, 29 July 1998 at [268].

²¹ *Beadle v Minister of Corrections* NZEnvC Wellington A074/02, 8 April 2002 at [440], [441] and [445].

there was no reliable basis for deciding conflicting claims about “mythical, spiritual, symbolic or metaphysical beings” and considered that it was not compelled to find that the taniwha exists if not persuaded that it exists by the evidence.²² On appeal, the High Court upheld the Environment Court’s decision to grant consent for the prison.²³ However, the High Court said that if the Environment Court had excluded the taniwha from its assessment entirely it would have failed to properly recognise and provide for the relationship of Māori with their culture and traditions regarding their taonga.²⁴

A rule of reason approach to engaging with the spiritual dimension of tikanga

7.11 In other cases, courts have applied a “rule of reason” approach to engaging with the spiritual dimension of tikanga, which provides the courts with a path to evaluating evidence about Māori values and metaphysical matters.

7.12 An explanation of the “rule of reason” approach can be found in *Ngati Hokopu Ki Hokowhitu v Whakatane District Council*. In this case, Te Rūnanga o Ngāti Awa applied for consent for a subdivision that was opposed by members of a local hapū, Ngāti Hokopu. The Environment Court considered the RMA requirement to recognise and provide for the “relationship” of Māori with their taonga, first drawing on the concept of whanaungatanga. The Court said whanaungatanga denotes that “in traditional Māori thinking relationships are everything — between people, between people and the physical world, and between people and atua (spiritual entities)”.²⁵ It also noted that there is “no rigid distinction between physical beings, tipuna (ancestors) atua (spirits) and taniwha”.²⁶ The Environment Court then explained the “rule of reason” approach:²⁷

That “rule of reason” approach if applied by the Environment Court, to intrinsic and other values and traditions, means that the Court can decide issues raising beliefs about those values and traditions by listening to, reading and examining (amongst other things):

- whether the values correlate with physical features of the world (places, people);
- people’s explanations of their values and their traditions;
- whether there is external evidence (e.g Maori Land Court Minutes) or corroborating information (e.g waiata, or whakatauki) about the values. By “external” we mean before they became important for a particular issue and (potentially) changed by the value-holders;
- the internal consistency of people’s explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held.

In a Court of course, values are ascertained by listening to and assessing evidence dispassionately with the assistance of cross-examination and submissions. Further, there are “rules” as to how to weigh or assess evidence.

²² *Beadle v Minister of Corrections* NZEnvC Wellington A074/02, 8 April 2002 at [440].

²³ *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC).

²⁴ *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC) at [41].

²⁵ *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* [2002] NZEnvC 421, (2002) 9 ELRNZ 111 at [39].

²⁶ *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* [2002] NZEnvC 421, (2002) 9 ELRNZ 111 at [42].

²⁷ *Ngati Hokopu Ki Hokowhitu v Whakatane District Council* [2002] NZEnvC 421, (2002) 9 ELRNZ 111at [53].

7.13 That “rule of reason” approach was applied earlier in *Tainui Hapu v Waikato District Council*. In this case, the Planning Tribunal (now the Environment Court) rejected an application for a television translator on a hill known as Horea,²⁸ noting that the whole area was closely associated with deep respect for the appellant’s ancestors.²⁹ The Council appealed to the High Court, which held that a “rule of reason approach” should apply. The High Court said, “the question is whether objectively, the particular kind of activity is intrinsically offensive to an established waahi tapu or other cultural considerations”.³⁰ The Court explained that Tainui see Horea in metaphysical and cultural terms.³¹ The Court went on, saying:³²

The developer derives her justification from the belief that she stands on “the common good”; in this case, better television signals. Strip the land of dignity, and doubtless the justification is powerful. But for others — as for Tainui here — what occurs is then culturally debilitating: what is lost is something to do with the integrity, and the spirit of a place, that no element of economic advancement can ever justify.

Measuring environmental impacts by reference to tikanga

7.14 There is now a large body of jurisprudence that assesses Māori interests by reference to tikanga.³³ For example, where persons holding mana whenua give credible and reliable evidence about the effect of a proposed activity from a tikanga perspective, that evidence should be determinative as to the relevant effects from a tikanga perspective.³⁴

Assessing oral evidence of tikanga

7.15 An issue for the Environment Court concerns how tikanga-based claims can be proved.³⁵ In some cases, the Court has cast doubt on whether oral tradition is capable of verification and whether it is too vague to be useful.³⁶ However, the Court in *Ngāti Hokopu* offered the following guidance as to the assessment of evidence:³⁷

... we have to bear in mind that Ngāti Awa, and Maori generally, have a culture in which oral statements are the accepted method of discourse on serious issues, and statements of

²⁸ *Tainui Hapu v Waikato District Council* PT A75/96, 21 August 1996.

²⁹ *Tainui Hapu v Waikato District Council* PT A75/96, 21 August 1996.

³⁰ *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC) at 371.

³¹ *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC) at 371.

³² *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC) at 371.

³³ See for example *Ngāti Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZEnvC 50; *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203 at [238]; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352; *Ngāti Rangī Trust v Manawatu-Wanganui Regional Council* NZEnvC A67/2004, 18 May 2004; *Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 (NZEnvC); *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZRMA 523 (HC); *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2014] NZEnvC 125; *Re Waiheke Marinas Ltd* [2015] NZEnvC 218; *Sustainable Matatā v Bay of Plenty Regional Council* [2015] NZEnvC 90, (2015) 18 ELRNZ 620; *Puwerā Māori Ancestral Land Unincorporated Group v Whangarei District Council* [2016] NZEnvC 94; *Wilson v Waikato Regional Council* [2021] NZEnvC 131; *Bay of Islands Maritime Park Inc v Northland Regional Council* [2022] NZEnvC 228; *Ngā Kaitiaki o Te Awa o Ngaruroro* [2022] NZEnvC 227.

³⁴ *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] 3 NZLR 882 at [65]–[66].

³⁵ *Nga Uri o Wiremu Mormona Raua Ko Whakarongohau Pita Inc (Pita Whanau) v Far North District Council* NZEnvC Auckland A14/08, 13 February 2008; *Ngai Te Hapu Inc v Bay of Plenty Council* [2017] NZEnvC 73.

³⁶ *St Lukes Group Ltd v The Auckland City Council* NZEnvC Auckland A132/01, 3 December 2001.

³⁷ *Ngāti Hokopu Ki Hokowhitu v Whakatane District Council* [2002] NZEnvC 421, (2002) 9 ELRNZ 111 at [56].

whakapapa are very important as connecting individuals to their land. In the absence of other evidence from experts on tikanga Māori, the evidence of tangata whenua must be given some weight (and in appropriate cases considerable, perhaps determinative, weight). In the end the weight to be given to the evidence in any case is unique to that case.

- 7.16 There is now clear High Court authority that evidence of oral tradition is not to be discounted simply because of its oral nature.³⁸

Resolving issues of mana

- 7.17 A recurring issue in environmental cases is identifying those who exercise mana (authority, responsibilities) in respect of a particular area. Disputes on this issue can arise both within Māori communities and between Māori communities.³⁹ The Environment Court has generally adopted a cautious approach to the resolution of claims to mana whenua.⁴⁰ For example, in *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* (a case concerning the grounding of a container ship, MV Rena) the Court had to determine whose claims to kaitiakitanga and rangatiratanga or customary authority should be recognised, and whose tikanga should be applied.⁴¹ In resolving the competing claims, the Court considered ancestral connections, continuous occupation, proximity to the reef, the nature of the cultural and customary associations with the reef, the use of the area as a fishing ground and the manner in which different groups had exercised their kaitiakitanga.⁴²
- 7.18 In *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd*, the High Court commented on the Environment Court's approach to recognition of mana whenua status. It observed that while the Environment Court was reluctant to do so, it would make assessments of relative mana whenua in order to discharge its obligations.⁴³ However, the High Court also said that:⁴⁴

... any assessment of this kind will be predicated on the asserted relationship being clearly grounded in and defined in accordance with tikanga Māori and mātauranga Māori and that any claim based on it is equally clearly directed to the discharge of the statutory obligations to Māori and to a precise resource management outcome.

- 7.19 The Environment Court's decision in *Director-General of Conservation v Taranaki Regional Council* illustrates the type of assessment needed when considering mana whenua status. In that case, a group of residents who described themselves as Poutama claimed tangata whenua status.⁴⁵ Some, but not all, of the group were Māori. One of those residents, whose property would be directly and severely affected by the proposal to reroute a State Highway, identified a whakapapa link to a different local hapū through her grandmother, a link she had not previously been aware of until the proceedings. Poutama

³⁸ *Takamore Trustees v Kapiti District Council* [2003] 3 NZLR 496 (HC) at [68] per Ronald Young J.

³⁹ For example, *Beadle v Minister of Corrections* NZEnvC Wellington A074/02, 8 April 2002; and *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352.

⁴⁰ See for example *Tawa v Bay of Plenty Regional Council* PT A018/95, 24 March 1995 at [35]–[36]; *Tūwharetoa Māori Trust Board v Waikato Regional Council* [2018] NZEnvC 93 at [128]–[129]; *Luxton v Bay of Plenty Regional Council* PT A049/94, 14 June 1994; and *Paihia & District Citizens Assn Inc v Northland Regional Council* PT A077/95, 10 August 1995.

⁴¹ *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73 at [82].

⁴² *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73 at [85].

⁴³ *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [130]–[131] and [133].

⁴⁴ *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [133].

⁴⁵ *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203 at [17].

opposed the application. However, the proposal was generally supported by Ngāti Tama, the widely recognised hapū (local tribe) of the affected area. Ngāti Tama also opposed any claim by Poutama to kaitiaki or mana whenua status.

- 7.20 In declining to acknowledge Poutama as kaitiaki or mana whenua, the Environment Court referred to whakapapa and whanaungatanga.⁴⁶ The Court noted that Poutama did not whakapapa (have genealogical connection) to the affected land and that there was no corroborating evidence in the form of waiata (song) or whakataukī (proverb) that Poutama had a relationship to the land in tikanga terms.⁴⁷ The Court also found there was no recognition of Poutama as a hapū by neighbouring iwi or hapū.⁴⁸ The Court therefore found that Poutama had not established any proper basis for claiming kaitiaki status in accordance with tikanga.⁴⁹

TIKANGA AND CRIMINAL LAW

- 7.21 The genesis of modern engagement between tikanga and the criminal law can be found in the Department of Justice report *The Maori and the Criminal Justice System: A New Perspective | He Whaipaanga Hou*, authored by Moana Jackson.⁵⁰ A key finding of this report was that engagement with tikanga is needed to improve outcomes for Māori within the criminal justice system.⁵¹
- 7.22 Despite this, the Crimes Act 1961 and the Sentencing Act 2002 (the two main Acts that provide for Aotearoa New Zealand’s criminal law) do not directly engage with tikanga. Additionally, the Crimes Act is partially a code, meaning that it applies to all offences for which an offender may be tried in Aotearoa New Zealand.⁵² This can make criminal law resistant to change in ways that other areas of the law are not. As the authors of *Criminal Law in Aotearoa New Zealand* observe:⁵³

There have been some efforts over the last four decades to recognise Māori cultural values in various adaptations of the criminal justice process. None of these are directed at recognising and applying tikanga Māori as a system of law.

- 7.23 Efforts to recognise tikanga in the criminal justice system have included:
- (a) tikanga increasingly being considered when a court is exercising its discretion in determining an appropriate sentence;
 - (b) increased incorporation of tikanga in initiatives such as solutions-focused courts and rehabilitative programmes; and

⁴⁶ *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203 at [237] and [319].

⁴⁷ *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203 at [320].

⁴⁸ *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203 at [320].

⁴⁹ *Director-General of Conservation v Taranaki Regional Council* [2019] NZEnvC 203 at [339].

⁵⁰ Moana Jackson *The Maori and the Criminal Justice System: A New Perspective | He Whaipaanga Hou* (Department of Justice, Study Series 18, 1987–1988, part 2).

⁵¹ See discussion in Moana Jackson *The Maori and the Criminal Justice System: A New Perspective | He Whaipaanga Hou* (Department of Justice, Study Series 18, 1987–1988, part 2) from 259.

⁵² Crimes Act 1961, s 5. See also Geoffrey Palmer “The reform of the Crimes Act 1961” (1990) 20 *Victoria University of Wellington Law Review* 9 at 13.

⁵³ Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 36.

- (c) the emergence of tikanga in specific areas outside the Crimes Act such as extradition and posthumous continuation of criminal proceedings.

Arguments made for recognising tikanga as an alternative criminal justice system

7.24 Before discussing efforts to recognise tikanga in the criminal law, it is worth noting that Māori defendants have occasionally argued that they should be dealt with according to tikanga, not tried under the Crimes Act. For example, in *R v Mason*, counsel for the defendant asked whether:⁵⁴

... some form of parallel or alternative criminal jurisdiction based on Maori custom is available to Maori and, in this particular case, to Mr Mason so that the serious allegations made against him can be tried in that forum.

7.25 The High Court answered in the negative, noting that the need to rebuild customary practices made an alternative customary system unviable.⁵⁵ However, the Court did refer to the nineteenth century consideration of tikanga as having the character and authority of the law.⁵⁶ Speaking to potential issues the Court saw in having two separate systems, it endorsed observations from Te Kōti Pira | Court of Appeal (the Court of Appeal) in *R v Talalaina* that “[t]he law of New Zealand must be administered in the interests of our society as a whole”.⁵⁷ On appeal, the Court of Appeal upheld this decision, saying: “tikanga is not presently a viable legal process for serious crime even if continuity of custom could be demonstrated”.⁵⁸ A series of other cases have followed and affirmed the *Mason* decisions.⁵⁹

7.26 In an earlier case, *R v Iti*, the defendant had discharged live rounds on the marae ātea as part of a “historically unique occasion when the Waitangi Tribunal entered the Ruatoki Valley to hear Tuhoe grievances dating from the nineteenth century”.⁶⁰ Counsel for the defendant put forward the defence that the discharge was lawful according to tikanga Tūhoe. However, Hammond J (on behalf of the Court) held that, although the evidence established that the discharge of a firearm at Tauarau Marae was consistent with custom, the Arms Act 1988 “limited the customary right”.⁶¹

Consideration of tikanga in sentencing

7.27 There are provisions in the Sentencing Act that allow a court to take into account an offender’s cultural background during sentencing. Section 8(i) of the Sentencing Act requires as a principle of sentencing that a court:

... must take into account the offender’s personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose.

⁵⁴ *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 at [6].

⁵⁵ *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 at [47]–[48].

⁵⁶ *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 at [13] and [28].

⁵⁷ *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695 at [49]–[53]; *R v Talalaina* (1991) 7 CRNZ (CA) at 36.

⁵⁸ *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464 at [3] and [41].

⁵⁹ See *Main v Police* [2018] NZHC 1828; *Ferri v Police* [2018] NZCA 181 at [8].

⁶⁰ *R v Iti* [2007] NZCA 119, [2008] 1 NZLR 587 at [3].

⁶¹ *R v Iti* [2007] NZCA 119, [2008] 1 NZLR 587 at [49].

- 7.28 The Sentencing Act allows the court to direct that a cultural report be prepared that can include this information.⁶² It also allows an offender to request a court to hear any person speak to the cultural background of the offender and how that relates to their offending.⁶³ The provisions relating to the cultural background of an offender can be traced to section 16 of the Criminal Justice Act 1985.⁶⁴ This section “was a conscious attempt to recognise the importance of trying to meet the needs of Māori offenders”.⁶⁵
- 7.29 These provisions have enabled courts to consider cultural factors when sentencing, including tikanga. For example, in *Henare v R*, the Court of Appeal considered whether the sentencing judge should have recognised the impact of Mr Henare’s state of whakamā when sentencing him. In Chapter 3, we refer to whakamā as “the outward expression of inward disintegration” and note the responsibility others may have to redress this.⁶⁶ The Court found that whakamā reflected upon the mana of Mr Henare and his whānau.⁶⁷ Applying this to the sentencing context, the Court commented that whakamā may be a “unique mitigating factor when sentencing a Māori defendant”.⁶⁸ On further appeal, Te Kōti Mana Nui | Supreme Court (the Supreme Court) affirmed that the potential effect of whakamā in sentencing is a matter of general or public importance. However, it did not arise on the facts of the particular case.⁶⁹ The earlier case of *R v Mason* had also considered the relevance of whakamā. In that case, the High Court accepted that Mr Mason experienced various stages of whakamā leading up to his offending but found that it could not be an excuse for the serious crimes that he committed.⁷⁰
- 7.30 Whanaungatanga is another potentially relevant matter. In *Solicitor-General v Heta*, the High Court found that systemic deprivation may remove an offender from their whānau.⁷¹ In such cases, there may be tikanga dimensions to a successful rehabilitation. It may be open to courts to regard this as a relevant factor when determining a sentence, given the important part that rebuilding these whanaungatanga connections will play.
- 7.31 Overall, despite case law discussing the impact of cultural reports, the authors of *Criminal Law in Aotearoa New Zealand* have said that:⁷²

⁶² Sentencing Act 2002, s 26.

⁶³ Sentencing Act 2002, s 27.

⁶⁴ *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [35].

⁶⁵ *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [35], citing Michael Cullen at the second reading of the Criminal Justice Bill. See (1985) 463 NZPD 4795.

⁶⁶ Joan Metge *In and Out of Touch: Whakamaa in Cross-Cultural Context* (Victoria University Press, Wellington, 1986) at 77.

⁶⁷ *Henare v R* [2020] NZCA 188 at [25].

⁶⁸ *Henare v R* [2020] NZCA 188 at [26].

⁶⁹ *Henare v R* [2020] NZSC 96 at [13].

⁷⁰ *R v Mason* [2012] NZHC 1849, [2012] 2 NZLR 695 at [39].

⁷¹ *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [64].

⁷² Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 39.

... [w]hilst significant, cultural reports are considered after the defendant has already pleaded or been found guilty of a criminal offence, are not necessarily funded or introduced as a matter of course, are not always appreciated by the sentencing judge, and arguably simply make a stage that should always have gathered this kind of information more efficient.

Tikanga and rehabilitation programmes

- 7.32 Where a person pleads guilty to or is found guilty of an offence, the court can allow them to participate in a rehabilitation programme before they are sentenced.⁷³ These rehabilitation programmes have started to incorporate tikanga.
- 7.33 Te Whare Whakapiki Wairua | Alcohol and Other Drug Treatment Court was established in 2012. It focuses on breaking the cycle of offending by treating the causes of the offending, particularly offending driven by alcohol and/or drug substance use disorders.⁷⁴ The Court features a Pou Oranga: a Māori cultural advisor with experience of wellness and substance use recovery.⁷⁵ It also embeds tikanga in the Court's process, using karakia (incantations or prayers) to open and close proceedings and practising himene (hymns) and waiata (song).⁷⁶
- 7.34 Te Kōti Rangatahi | Rangatahi Court formed in 2008. It operates on the same basis as Te Kōti Taiohi | Youth Court except that proceedings are primarily designed for young Māori people.⁷⁷ Proceedings are held on marae (sometimes the marae associated with the offender) with the assistance of kaumātua and kuia (male and female elders).⁷⁸ The Court process starts with a pōwhiri (welcome).⁷⁹ The participants are expected to learn and deliver a mihi (acknowledgement).⁸⁰
- 7.35 Te Kooti o Matariki | Matariki Court is a court that provides for participation in a culturally focussed rehabilitation programme. It is based in Kaikohe and was established in 2010. The local iwi, Ngāpuhi, are involved in the programme. The Matariki Court incorporates tikanga in various ways. For example, the participant's whānau are brought into Court and the prosecutor and kaumātua guide the Court in how proceedings are conducted, including using karakia and mihi where appropriate for the parties.
- 7.36 The authors of *Criminal Law in Aotearoa New Zealand* have commented that “[s]pecial efforts to embed Māori values and processes within these solutions-focused courts are

⁷³ Sentencing Act 2002, s 25(1)(d).

⁷⁴ Te Tāhū o te Ture | Ministry of Justice “Alcohol and Other Drug Treatment Court” <www.justice.govt.nz>.

⁷⁵ Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at fn 187.

⁷⁶ Te Tāhū o te Ture | Ministry of Justice *Alcohol and Other Drug Treatment Court Outcomes Evaluation 2018–19* (June 2019) at 13.

⁷⁷ District Courts Act 1947, s 4(4).

⁷⁸ Te Kāhui Ture o Aotearoa | New Zealand Law Society “Te Ao Mārama coming into the light” (25 June 2021) <www.lawsociety.org.nz>.

⁷⁹ Te Kōti Taiohi o Aotearoa | Youth Court of New Zealand “Rangatahi Courts & Pasifika Courts” <www.youthcourt.govt.nz>. See also Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 27.

⁸⁰ Te Kōti Taiohi o Aotearoa | Youth Court of New Zealand “Rangatahi Courts & Pasifika Courts” <www.youthcourt.govt.nz>.

seen within the Matariki Court and Rangatahi Courts with some positive effect”.⁸¹ However, Associate Professor Khylee Quince has described solutions-focused courts as “the Indigenous window dressing of existing Pākehā institutions”.⁸² It is worth noting that these specialist courts only operate upon referral from a court with jurisdiction to sentence an offender.⁸³

Other criminal law-related initiatives that engage tikanga

- 7.37 Other programmes dedicated to restorative justice and therapeutic jurisprudence utilise tikanga. Examples include Te Whānau Awhina, Te Pae Oranga Iwi Community Panels, Kowhiritanga, Te Kupenga, Te Tirohanga, and kaupapa Māori drug treatment.
- 7.38 Te Whānau Awhina is a restorative justice programme run out of Hoani Waititi Marae. This programme began as a “by Māori for Māori” initiative but now can be accessed by non-Māori.⁸⁴ The process starts with a hui to discuss the offending with the offender, their whānau, the victim and (where possible) the victim’s whānau, members of Te Whānau Awhina and a community panel.⁸⁵
- 7.39 Te Pae Oranga Iwi Community Panels are designed for iwi/Māori institutions and police to deal with offending.⁸⁶ Once someone commits an offence, police can refer them to a local service agency that runs the programme.⁸⁷ The programme uses tikanga and kaupapa Māori restorative justice practices.⁸⁸ However, the authors of *Criminal Law in Aotearoa New Zealand* have criticised Te Pae Oranga Iwi Community Panels for relying on police discretion to divert offenders, and on offenders admitting guilt. They have also observed that state law still provides the overarching framework for the process.⁸⁹
- 7.40 Another initiative, Te Ao Mārama, focuses on incorporating te reo Māori and tikanga into solutions-focused judging in Te Kōti-ā-Rohe | District Court (the District Court). The pioneer of this initiative, Chief Judge Taumaunu, has explained that Te Ao Mārama incorporates best practices developed in the District Court’s solutions-focused specialist

⁸¹ Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 38, referring to Kaipuke Ltd *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (Ministry of Justice, Wellington, 2012); Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 27. For calls by Māori to expand the Rangatahi Courts and Matariki Court, see *Ināia Tonu Nei — Now is the Time: We Lead, You Follow* (report prepared for Te Tāhū o te Ture | Ministry of Justice, July 2019) at 27.

⁸² Khylee Quince “Therapeutic jurisprudence and Māori” in Warren Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Wellington, 2015) 347 at 347.

⁸³ Sentencing Act 2002, s 25.

⁸⁴ Pita Sharples “Te Whānau Awhina: an indigenous programme for restorative justice by the Māori of New Zealand (Inaugural Conference of Restorative Practices International, Queensland, Australia, 17 October 2007) <www.scoop.co.nz>.

⁸⁵ Pita Sharples “Te Whānau Awhina: an indigenous programme for restorative justice by the Māori of New Zealand” (Inaugural Conference of Restorative Practices International, Queensland, Australia, 17 October 2007) <www.scoop.co.nz>.

⁸⁶ These panels were formed in Hutt Valley, Gisborne and Manukau in 2013.

⁸⁷ Ngā Pirihimana o Aotearoa | New Zealand Police “Te Pae Oranga Iwi Community Panels” <www.police.govt.nz>.

⁸⁸ Ngā Pirihimana o Aotearoa | New Zealand Police “Te Pae Oranga Iwi Community Panels” <www.police.govt.nz>.

⁸⁹ Julia Tolmie, Kris Gledhill, Fleur Te Aho and Khylee Quince *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 38.

courts into its mainstream criminal jurisdiction.⁹⁰ He says “[t]his includes adopting plain language and culture and processes that incorporate tikanga and te ao Māori”.⁹¹

Tikanga and specific areas of the criminal law

Extradition

7.41 Tikanga has had some consideration in an extradition context. In *Tukaki v Commonwealth of Australia*, the Court of Appeal was prepared to take judicial notice of whanaungatanga when interpreting and applying the Extradition Act 1999.⁹² Counsel for Mr Tukaki had argued that the family unit from which he would be removed if extradited extended beyond his immediate family to include his hapū and iwi. However, this was not found to be “oppressive” under the Act. The Court acknowledged that although whanaungatanga could be a relevant consideration in determining whether extradition would be “oppressive”, cultural considerations will always be relevant to extradition and each culture defines the family unit differently. The appeal was dismissed.

Posthumous continuation of proceedings

7.42 In *Ellis v R*, the Supreme Court unanimously held that there is jurisdiction, upon application, to continue an appeal process after the death of an applicant if it is in the interests of justice to do so.⁹³ Although the judges were split on the exact formulation of that test, they all agreed that tikanga may be a relevant consideration.⁹⁴ The Court’s approach to tikanga is discussed in Chapter 5.

TIKANGA AND FAMILY LAW

7.43 Together with environmental law, family law is an area that has seen relatively significant engagement with tikanga.⁹⁵ This may be because, as Justice Joseph Williams (writing extra-judicially) says, “the whanau persists as an institution in the hearts and minds of Māori people”.⁹⁶

7.44 The Department of Social Welfare report *Puao-te-Ata-tu* marks the start of this engagement.⁹⁷ The report, commissioned to hear a Māori perspective on the operations

⁹⁰ Te Kōti-ā-Rohe o Aotearoa | District Court of New Zealand “Transformative Te Ao Mārama model announced for District Court” (11 November 2020) <www.districtcourts.govt.nz>.

⁹¹ Te Kōti-ā-Rohe o Aotearoa | District Court of New Zealand “Transformative Te Ao Mārama model announced for District Court” (11 November 2020) <www.districtcourts.govt.nz>.

⁹² *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597.

⁹³ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [5]–[7].

⁹⁴ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [10]–[11].

⁹⁵ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 17. Williams noted that Māori relationships with the environment and Māori collective relationships are “co-equal” cores of Māori culture.

⁹⁶ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 24.

⁹⁷ The Maori Perspective Advisory Committee *Puao-te-Ata-tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988). See also Alison Cleland “Protection of mana tamaiti (tamariki): the right to cultural connectedness” (2021) 10 *New Zealand Family Law Journal* 141 at 141.

of the Department of Social Welfare,⁹⁸ became a primary driver for the enactment of the Children, Young Persons, and Their Families Act 1989 (now the Oranga Tamariki Act 1989). Since then, tikanga has begun to be recognised in a range of family law areas, including:

- (a) care and protection of young people;
- (b) guardianship;
- (c) whāngai and adoption, succession to Māori land, and family protection;
- (d) surrogacy; and
- (e) taonga in relation to succession and relationship property.

7.45 In addition, tikanga is being increasingly considered and used in Te Kōti Whānau | Family Court (the Family Court) procedure such as opening the Court in te reo Māori or using mihi, pepeha (tribal sayings) and karakia where these are appropriate for the parties.⁹⁹

Care and protection of young people

7.46 Following *Puao-te-Ata-tu*, the Children, Young Persons, and Their Families Act (CYFA) responded to this report's calls to recognise tamariki Māori and their place within whānau, hapū and iwi.¹⁰⁰ The CYFA, like earlier legislation, was designed to provide for the “care and protection” of young people where the Department of Social Welfare (as it was then called) had determined that intervention was required.¹⁰¹ However, the CYFA took a fresh approach.¹⁰² When speaking at the Bill's second reading, Hon Michael Cullen said:¹⁰³

The Bill incorporates the most far-reaching changes to our children and young persons' legislation since the Child Welfare Act 1925 ... The Bill recognises that the well-being of children and young persons is bound in with the well-being of their families. For that reason, the word “families” has been included in the title of the amended form of the Bill.

7.47 In line with the spirit of *Puao-te-Ata-tu*, the CYFA provided for the recognition, at least in principle, of children and young persons within their “kin matrix” of whānau, hapū and iwi and other family groups.¹⁰⁴ In particular, the CYFA's general principles included that whānau, hapū and iwi should participate in decision making and that connections to whānau, hapū and iwi should be strengthened and maintained.¹⁰⁵

⁹⁸ The Maori Perspective Advisory Committee *Puao-te-Ata-tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988) at Preface.

⁹⁹ Annis Summerville “Tikanga in the Family Court — the gorilla in the room” (2016) 8 *New Zealand Family Law Journal* 157 at 160.

¹⁰⁰ The Maori Perspective Advisory Committee *Puao-te-Ata-tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988) at Preface. The government accepted the “spirit and recommendations” of the report. See Mark Henaghan, Bill Atkin, Shonagh Burnhill and Anna Chapman *Family Law in New Zealand* (20th ed, LexisNexis, Wellington, 2021) at 459–460.

¹⁰¹ See the long titles of both the Children and Young Persons Act 1974 and the Children, Young Persons, and Their Families Act 1989. See also Mark Henaghan, Bill Atkin, Shonagh Burnhill and Anna Chapman *Family Law in New Zealand* (20th ed, LexisNexis, Wellington, 2021) at 459. The CYFA also contains a pt IV, dedicated to the Youth Justice system.

¹⁰² See an account of this changed approach in *Chief Executive of Oranga Tamariki — Ministry for Children v BH JA* [2021] NZFC 210, [2021] NZFLR 201 at [14]–[17].

¹⁰³ (27 April 1989) 497 NZPD 10246.

¹⁰⁴ See the long title of the CYFA and ss 4–5, 7 and 13. See also commentary in Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 24.

¹⁰⁵ Children, Young Persons, and Their Families Act 1989, s 5.

- 7.48 The CYFA also introduced the family group conference mechanism for enabling whānau participation in decision making.¹⁰⁶ To that end, conference processes are regulated in any way thought fit,¹⁰⁷ the child or young person’s whānau are entitled to attend as of right (although subject to the opinion of a Care and Protection Co-ordinator),¹⁰⁸ and whānau are empowered to make decisions regarding the care and protection of the child or young person.¹⁰⁹ Extra-judicially, Justice Joseph Williams has said that the family group conference “tries to replicate, albeit in a very attenuated form, the old social control role of the whanau under tikanga”.¹¹⁰
- 7.49 Where court intervention is required, courts are enabled to obtain a cultural report on “the heritage and the ethnic, cultural, or community ties and values of the child ... or the child’s ... family, whanau, or family group”.¹¹¹
- 7.50 The CYFA was amended several times between 2016 and 2019. These amendments included changing its name to the Oranga Tamariki Act 1989 (OTA).¹¹² Although the operative provisions were largely unchanged,¹¹³ significant changes were made to the principles provisions. In particular, the OTA now recognises concepts of mana tamaiti, whakapapa and whanaungatanga in addition to the place of a child within their family, whānau, hapū, iwi and family group.¹¹⁴ Mana tamaiti, whakapapa and whanaungatanga are defined as follows:¹¹⁵

mana tamaiti (tamariki) means the intrinsic value and inherent dignity derived from a child’s or young person’s whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person

whakapapa, in relation to a person, means the multi-generational kinship relationships that help to describe who the person is in terms of their mātua (parents), and tūpuna (ancestors), from whom they descend

whanaungatanga, in relation to a person, means—

(a) the purposeful carrying out of responsibilities based on obligations to whakapapa:

(b) the kinship that provides the foundations for reciprocal obligations and responsibilities to be met:

(c) the wider kinship ties that need to be protected and maintained to ensure the maintenance and protection of their sense of belonging, identity, and connection ...

¹⁰⁶ Children, Young Persons, and Their Families Act 1989, ss 20–38.

¹⁰⁷ Oranga Tamariki Act 1989, s 26.

¹⁰⁸ Oranga Tamariki Act 1989, s 22(b)(ii).

¹⁰⁹ Oranga Tamariki Act 1989, s 29.

¹¹⁰ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 *Taumauri | Waikato Law Review* 1 at 24.

¹¹¹ Oranga Tamariki Act 1989, s 187.

¹¹² The amendments had their genesis in a Manatū Whakahiato Ora | Ministry of Social Development report prepared by an expert panel with a mandate to “determine how to transform the lives of our vulnerable children once and for all”. See Mark Henaghan, Bill Atkin, Shonagh Burnhill and Anna Chapman *Family Law in New Zealand* (20th ed, LexisNexis, Wellington, 2021) at 461.

¹¹³ With the exception of the special guardianship provisions that we discuss below.

¹¹⁴ See Oranga Tamariki Act 1989, ss 5 and 13.

¹¹⁵ Oranga Tamariki Act 1989, s 2.

7.51 In practice, these principles tend to be most relevant when a child has been uplifted from their family and the Family Court must decide about their placement under the OTA.¹¹⁶ Tension can arise if the court must decide whether to place a child within their whānau, hapū or iwi or elsewhere. An example of this tension can be found in cases about “special guardianship”, an arrangement where a person is appointed as a special guardian of a child or young person and has exclusive rights, including the ability to restrict other guardians’ access to the child.¹¹⁷ In *Chief Executive of Oranga Tamariki – Ministry for Children v BH JA*, the Family Court said that a special guardianship order that places the child outside of their whānau, hapū or iwi will generally be “fundamentally irreconcilable with principles of wellbeing that speak to mana, whakapapa and whanaungatanga”.¹¹⁸ The Court continued:¹¹⁹

While special guardianship is a legal relationship of and between identified individuals in relation to a child, the legal assignment of exclusive decision-making and limited means for reconsideration of guardianship and custody and access arrangements is incompatible with responsibilities for the child that arise from whakapapa and kinship connection and with the notion of affording protection to the child and the kinship group.

7.52 In *Re WH*, the Family Court interpreted whakapapa, whanaungatanga and mana tamaiti differently. In that case, the Family Court held that *BH* was authority for the proposition that the principles of whakapapa, whanaungatanga and mana tamaiti in the OTA “bear such weight that they will in almost all cases prevent the making of a special guardianship order”.¹²⁰ The Family Court said that, to the extent *BH* suggested the particular circumstances of the child do not usually have an impact on the significance of whakapapa, whanaungatanga and mana tamaiti, the Court respectfully disagreed.¹²¹ It also said that the approach taken in *BH* would have the effect of “demoting the paramountcy rule which demands consideration of all factors affecting a child”.¹²² In the Court’s view, where the principles of whakapapa, whanaungatanga and mana tamaiti are unable to be applied in practical terms, a different guardianship solution will be needed.¹²³

7.53 Despite *Re WH*, the approach in *BH* was affirmed by the High Court in *McHugh v McHugh*.¹²⁴ The principles of whakapapa, whanaungatanga and mana tamaiti have yet to be considered by the Court of Appeal or the Supreme Court.

¹¹⁶ See discussion in Mark Henaghan, Bill Atkin, Shonagh Burnhill and Anna Chapman *Family Law in New Zealand* (20th ed, LexisNexis, Wellington, 2021) at 471.

¹¹⁷ Special guardianship confers some exclusive rights to the special guardian with minimal ability for review by others and substantially restricts other guardians’ ability to gain access to the child or amend the special guardian’s exclusive rights. Special guardianship does not go so far as adoption in that it still allows other guardians to retain some rights, with limited ability to review guardians’ and special guardians’ respective guardianship rights. See Oranga Tamariki Act 1989, s 113B.

¹¹⁸ *Chief Executive of Oranga Tamariki – Ministry for Children v BH JA* [2021] NZFC 210, [2021] NZFLR 201 at [39]–[41].

¹¹⁹ *Chief Executive of Oranga Tamariki – Ministry for Children v BH JA* [2021] NZFC 210, [2021] NZFLR 201 at [34].

¹²⁰ *Re WH* [2021] NZFC 4090, [2021] NZFLR 216 at [69].

¹²¹ *Re WH* [2021] NZFC 4090, [2021] NZFLR 216 at [70].

¹²² *Re WH* [2021] NZFC 4090, [2021] NZFLR 216 at [70].

¹²³ *Re WH* [2021] NZFC 4090, [2021] NZFLR 216 at [71].

¹²⁴ *McHugh v McHugh* [2022] NZHC 1174 at [93] and [116].

7.54 Another example outside of special guardianship is *Moana's Mother v Smith*.¹²⁵ The High Court said that cases concerning the placement of children will involve a holistic assessment of a child's best interests and wellbeing, considering all of the principles in the OTA as a whole integrated system.¹²⁶ The Court said that placing a child where they can develop a sense of belonging and attachment is of equal importance to placing them within their kin matrix, but preference should always be given to the kin group where possible.¹²⁷ Nevertheless, the Court found on the facts before it that the child should remain in a placement outside the whānau and hapū, with access orders in favour of the child's whānau. The Court relied on the evidence of a psychologist as to the harm that would be caused by a "reverse uplift", saying the tikanga evidence could not address the risk of trauma from a change of placement.¹²⁸

Guardianship outside the care and protection framework

7.55 Tikanga can also be engaged when courts are considering guardianship arrangements for a child outside of the OTA. Guardianship is defined in the Care of Children Act 2004 (COCA) as "having, in relation to [a] child, all duties, powers, rights and responsibilities that a parent of the child has in relation to the upbringing of the child".¹²⁹

7.56 Both the OTA and the COCA contain guardianship provisions and will often overlap in practice.¹³⁰ However, there are key differences in the Acts' objectives, purposes and principles. The focus of the OTA is state intervention to keep children safe. The COCA focuses on adjusting rights and responsibilities in relation to children in the private sphere (for example, custody arrangements between separated parents).¹³¹ Where orders have been made under the OTA, they will generally prevent the court from dealing with the same issues under the COCA.¹³²

7.57 Like the OTA, the COCA provides that the welfare and best interests of a child must be the first and paramount consideration in any proceeding involving guardianship of the child.¹³³ The COCA sets out principles that relate to a child's welfare and best interests, which include:¹³⁴

¹²⁵ *Moana's Mother v Smith* [2022] NZHC 2934.

¹²⁶ *Moana's Mother v Smith* [2022] NZHC 2934 at [44]–[57].

¹²⁷ *Moana's Mother v Smith* [2022] NZHC 2934 at [55]–[56].

¹²⁸ *Moana's Mother v Smith* [2022] NZHC 2934 at [127]–[136].

¹²⁹ Care of Children Act 2004, s 15.

¹³⁰ See Oranga Tamariki Act 1989, s 110 and Care of Children Act 2004, pt 2; *Hughes v Ministry of Social Development* [2014] NZHC 3093 at [78]. The OTA also defines guardianship by reference to section 15 of the COCA as having all duties, powers, rights and responsibilities that a parent of a child has in relation to the upbringing of the child.

¹³¹ *Hughes v Ministry of Social Development* [2014] NZHC 3093 at [62]–[63]; Care of Children Act 2004, ss 3–5; Oranga Tamariki Act 1989, ss 4–5 and 13. See also *Chief Executive of Oranga Tamariki-Ministry for Children v MQ* [2021] NZFC 9089; [2021] NZFLR 1 at [34] where the Court said: "The [Oranga Tamariki Act 1989] is primarily a child protection statute, the [Care of Children Act 2004] a prescription for resolution of guardianship and care disputes."

¹³² *DSW v H* (Te Kōti Whānau | Family Court, Otahuhu, CYPF 048/171/98, 29 November 1999) at 8.

¹³³ Care of Children Act 2004, s 4. We note that amendments were made to the principles provisions in the COCA in 2014 by placing the principle that a child's safety must be protected from all forms of violence at the head of the principles set out in that section. See *Low v Way* [2015] NZCA 153, [2015] NZFLR 547 at [8].

¹³⁴ Care of Children Act 2004, s 5.

(e) a child should continue to have a relationship with both of his or her parents, and that a child’s relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:

(f) a child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

7.58 Both the OTA and the COCA require a child’s welfare and best interests to be the paramount consideration, with the child’s connection to their whānau, hapū and iwi being part of that consideration. The COCA, however, lacks the references to mana tamaiti, whakapapa and whanaungatanga that are in the OTA.

7.59 The COCA has been criticised for taking an individualistic approach rather than considering a child’s place within their kin group.¹³⁵ For example, the COCA requires whānau, hapū and iwi members to seek leave to apply for parenting orders, while parents, step-parents and guardians can apply as of right.¹³⁶

Whāngai and family law

7.60 Whāngai is a Māori practice where a child is raised by someone other than their birth parents, usually another relative.¹³⁷ Rather than being a way of dealing with children who lack parents, the concept and practice of whāngai is firmly rooted in whanaungatanga.¹³⁸ Whāngai has persisted as an institution in te ao Māori¹³⁹ despite the legal difficulties caused by the Adoption Act 1955 and its predecessors.¹⁴⁰

Whāngai and adoption

7.61 Section 19 of the Adoption Act provides that “no adoption in accordance with Maori custom shall be of any force or effect, whether in respect of intestate succession to Maori land or otherwise”.¹⁴¹ Significantly, this means whāngai relationships between a whāngai

¹³⁵ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 Taumauri | Waikato Law Review 1 at 25, citing Bill Atkin “Harmonising family law” (2006) 37 Victoria University of Wellington Law Review 465 at 477.

¹³⁶ Care of Children Act 2004, s 47.

¹³⁷ The term “whāngai” is also the verb “to feed”. Some hapū prefer other terms such as “atawhai” or “taurima” to refer to the practice of caring for a child other than a birth child, and there are variances about the nature of the relationship that these terms denote: see Professor Milroy’s explanation in *Hohua — Estate of Tangi Biddle* (2001) 10 Rotorua Appellate MB 43 (10 APRO 43) and Waihoroi Shortland’s explanation in *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 15. For discussion of whāngai generally, see Merata Kawharu and Erica Newman “Whakapaparanga: social structure, leadership and whāngai” in Michael Reilly, Suzanne Duncan, Gianna Leoni, Lachy Paterson, Lyn Carter, Matiu Rātima and Poia Rewi (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, Auckland, 2018) 48 at 59–63; Geo Graham “Whangai tamariki” (1948) 57 *Journal of the Polynesian Society* 268; Mihiata Pirini “The Māori Land Court: exploring the space between law, design, and kaupapa Māori” (LLM Dissertation, Te Whare Wānanga o Ōtākou | University of Otago, 2020) at 18–21; Michael Sharp “Māori estates: wills” in *Wills and Succession* (online looseleaf ed, LexisNexis) at [16.12]; and Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 Taumauri | Waikato Law Review 1 at 5.

¹³⁸ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 Taumauri | Waikato Law Review 1 at 5.

¹³⁹ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 Taumauri | Waikato Law Review 1 at 25.

¹⁴⁰ The position in the Adoption Act 1955 has its origins in the Native Lands Act 1909, s 161.

¹⁴¹ Adoption Act 1955, s 19.

child and their mātua whāngai (parents under a whāngai arrangement) are not formally recognised under state law.

- 7.62 The Adoption Act requires a court to be satisfied that an adoption order will promote the welfare and interests of the child.¹⁴² Although the Act prevents whāngai arrangements from having any legal effect, tikanga has become relevant when assessing a child's welfare and best interests through an interpretive approach to the Act that is coloured by the principles of the Treaty.¹⁴³ The High Court has said:¹⁴⁴

... familial organisation of one of the peoples a party to the Treaty, must be seen as one of the taonga, the preservation of which is contemplated. Accordingly we take the view that all Acts dealing with the status, future and control of children, are to be interpreted as coloured by the principles of the Treaty of Waitangi. Family organisation may be said to be included among those things which the Treaty was intended to preserve and protect.

- 7.63 However, the Court noted that family and whānau units of any community may be dysfunctional in reality and therefore unable to meet the idealised values of the family or whānau group.¹⁴⁵ In each case, the court will therefore need to assess the extent to which the whānau can reasonably uphold those idealised values.¹⁴⁶

- 7.64 In an adoption case, *Re Bartha*, the Family Court said that care for a Māori child should first and foremost be provided by their whānau, hapū or iwi, but in reality that may not always be a feasible option.¹⁴⁷ The Court granted an adoption order to a non-Māori family with the support of the whānau, saying:¹⁴⁸

In this case the whānau themselves identified and approved the applicants as parents who would support the children's whakapapa and whanaungatanga and who would walk alongside the whānau. That is consistent with the Māori view that whatever the law might say, adoptive parents do not replace a child's blood whānau but rather add to it.

Whāngai and family protection

- 7.65 Whāngai are not eligible to make a claim for further provision from the estate of their mātua whāngai under the Family Protection Act 1955 (FPA).¹⁴⁹ In *Keelan v Peach*, the Court of Appeal held that a whāngai who had not been formally adopted was not eligible to claim under the FPA. The Court relied on section 19 of the Adoption Act.¹⁵⁰
- 7.66 However, in 2021 Te Aka Matua o te Ture | Law Commission (the Commission) recommended that whāngai should be included in the succession regime as a category

¹⁴² Adoption Act 1955, s 11.

¹⁴³ *BP v Director-General of Social Welfare* [1997] NZFLR 642 (HC) at 646–648.

¹⁴⁴ *BP v Director-General of Social Welfare* [1997] NZFLR 642 (HC) at 646.

¹⁴⁵ *BP v Director-General of Social Welfare* [1997] NZFLR 642 (HC) at 648.

¹⁴⁶ *BP v Director-General of Social Welfare* [1997] NZFLR 642 (HC) at 648.

¹⁴⁷ *Re Bartha* [2016] NZFC 7039 at [24]–[26].

¹⁴⁸ *Re Bartha* [2016] NZFC 7039 at [26].

¹⁴⁹ However, 2021 amendments to Te Ture Whenua Māori Act 1993 include an amendment that Te Kōti Whenua Māori | Māori Land Court may determine whether someone is a whāngai for the purposes of a claim under the FPA that relates to Māori freehold land: see Te Ture Whenua Māori Act 1993, s 115.

¹⁵⁰ *Keelan v Peach* [2003] 1 NZLR 589 (CA) at [43].

of children eligible to claim.¹⁵¹ The Commission said that the extent to which whāngai should receive provision from the estate of the matua whāngai and/or the estate of the birth parent is a question that should be informed by the tikanga of the relevant whānau.¹⁵² The Commission also considered that whāngai who have been formally adopted should remain eligible to claim against the estate of their birth parent, regardless of the terms of the Adoption Act.¹⁵³

Surrogacy

- 7.67 Surrogacy is a unique method of building a family that provides intended parents with an opportunity to have a child when they are otherwise unable to do so.¹⁵⁴ Surrogacy is to some extent regulated by the Human Assisted Reproductive Technology Act 2004 (HART Act). That Act includes a principle that the needs, values and beliefs of Māori should be considered and treated with respect.¹⁵⁵ Advisory Committee on Assisted Reproductive Technology Guidelines further require counselling to be “culturally appropriate” and to satisfy the Ethics Committee on Assisted Reproductive Technology that the counselling has provided for whānau and extended family involvement.¹⁵⁶
- 7.68 In 2022, the Commission published a report relating to surrogacy. The report recommended that the government commission Māori-led research to provide a better understanding of tikanga and surrogacy and Māori perspectives on surrogacy.¹⁵⁷

Taonga and family law

- 7.69 Taonga have been described in various ways, including that they are highly prized and valuable objects, resources, techniques, phenomena or ideas.¹⁵⁸ Taonga have associated tikanga including mana (power, prestige), tapu (sacredness), mauri (life force) and utu (reciprocity).¹⁵⁹

¹⁵¹ Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 159.

¹⁵² Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 159.

¹⁵³ Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 159.

¹⁵⁴ Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022) at 6.

¹⁵⁵ Human Assisted Reproductive Technology Act 2004, s 4(f).

¹⁵⁶ Advisory Committee on Assisted Reproductive Technology *Guidelines for family gamete donation, embryo donation, the use of donated eggs with donated sperm and clinic assisted surrogacy* (September 2020) at [B(3)]–[B(4)].

¹⁵⁷ Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022) at 7.

¹⁵⁸ For a fuller description see Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 90–91.

¹⁵⁹ Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 90–91.

Taonga and succession

- 7.70 Presently, taonga fall under general succession rules and are in theory treated as personal property of the deceased for the purposes of succession.¹⁶⁰
- 7.71 For example, in *Biddle v Pooley*, a case concerning two taiaha (long weapons) and a tewhatewha (weapon or axe) held by a recently deceased person, the High Court held that the taonga were held on trust by a member of the deceased's whānau on terms that required the trustee to care for the taonga with respect for tikanga.¹⁶¹
- 7.72 In 2021, the Commission recommended that succession to taonga should be determined by the tikanga of the relevant whānau or hapū and that taonga should not be available to meet any entitlement or claim to a deceased's estate.¹⁶² The Commission recommended that taonga should be defined within a tikanga construct and its meaning limited to items that are connected to te ao Māori.¹⁶³

Taonga and relationship property

- 7.73 Recognising that taonga are not like other property, the Property (Relationships) Act 1976 (PRA) excludes taonga from the definition of family chattels.¹⁶⁴ Taonga are not defined in the PRA and case law does not provide a conclusive definition. Initially, Courts took a broad approach to the meaning of taonga, including items that could be considered heirlooms.¹⁶⁵ Then, in *Sydney v Sydney*, the Family Court held that taonga should be defined within a tikanga construct. However, the concept could be applied pan-culturally provided the central elements of tikanga were shown to exist.¹⁶⁶
- 7.74 To date, no Māori have made a claim under the PRA in relation to taonga. In 2019, the Commission's report on relationship property recommended that taonga should be defined within a tikanga construct and should not be classified as relationship property in any circumstances.¹⁶⁷

¹⁶⁰ See Te Ture Whenua Maori Act 1993, ss 100–101; Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 90.

¹⁶¹ *Biddle v Pooley* [2017] NZHC 338 at [161]–[169].

¹⁶² Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 95–96. Succession to taonga is currently determined by general succession law. See Te Ture Whenua Maori Act 1993, ss 100–103 and 110.

¹⁶³ Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021) at 98.

¹⁶⁴ Property (Relationships) Act 1976, s 2(c)(i).

¹⁶⁵ See *Page v Page* (2001) 21 FRNZ 275 (HC); *Perry v West* DC Waitakere FP 239/01, 25 March 2003; *Perry v West* [2004] NZFLR 515 (HC).

¹⁶⁶ *Sydney v Sydney* [2012] NZFC 2685 at [54] and [58].

¹⁶⁷ Te Aka Matua o te Ture | Law Commission *Te Arotake i te Property (Relationships) Act 1976 | Review of the Property (Relationships) Act 1976* (NZLC R143, 2019) at 350.

TIKANGA AND THE LAW OF JUDICIAL REVIEW

- 7.75 Judicial review involves reviewing the exercise of public power by a public official in accordance with the law.¹⁶⁸ Tikanga has become especially relevant to judicial review as public officials increasingly have statutory obligations to take tikanga into account.¹⁶⁹ As Winkelmann CJ has noted, “cases in which tikanga values are mandatory or discretionary considerations are fertile grounds for judicial review, requiring judges to engage in this area”.¹⁷⁰ Tikanga can also be relevant to a public official’s actions where there is no statutory requirement to consider tikanga.¹⁷¹ According to Justice Matthew Palmer, writing extra-judicially, “the law of judicial review is a primary avenue by which the judiciary adjudicates on claims of indigenous rights”.¹⁷²
- 7.76 This section focuses on the contemporary status of tikanga in aspects of judicial review, specifically:
- (a) the impact of the Treaty on the law of judicial review;
 - (b) the emergence of tikanga as a factor in judicial review cases; and
 - (c) tikanga in the judicial review of the Treaty settlement process.

The impact of the Treaty on the law of judicial review

- 7.77 Before examining the direct impact of tikanga on the law relating to judicial review, we first briefly discuss how the Treaty has affected the law.
- 7.78 The Treaty is not directly enforceable in Aotearoa New Zealand courts,¹⁷³ and it was not until 1987 that the courts began to seriously consider the role of the Treaty in judicial review proceedings.¹⁷⁴ Nonetheless, the impact of the Treaty in public law has been described as “profound”.¹⁷⁵
- 7.79 The High Court’s decision in *Huakina Development Trust v Waikato Valley Authority* has been described as a “bedrock of Aotearoa’s judicial te Tiriti jurisprudence”.¹⁷⁶ In that case, the Huakina Development Trust challenged the Planning Tribunal’s decision to allow an application for a water right that enabled treated farm effluent to be disposed of in a stream that fed the Waikato River.¹⁷⁷ The Court found that “the Treaty is part of the fabric

¹⁶⁸ *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 at 388.

¹⁶⁹ Chief Justice Helen Winkelmann “The power of narrative — shaping Aotearoa New Zealand’s public law” (paper presented to conference “The Making (and Re-Making) of Public Law”, Dublin, 6–8 July 2022) at 13.

¹⁷⁰ Chief Justice Helen Winkelmann “The power of narrative — shaping Aotearoa New Zealand’s public law” (paper presented to conference “The Making (and Re-Making) of Public Law”, Dublin, 6–8 July 2022) at 13.

¹⁷¹ See *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27, which we discuss below.

¹⁷² Matthew S R Palmer “Indigenous rights, judges and judicial review” (paper presented to public law conference “Frontiers of Public Law”, Melbourne, 11–13 July 2018) at 2.

¹⁷³ *Te Heuheu Tūkino v Aotea District Māori Land Board* [1941] NZLR 590 (PC).

¹⁷⁴ See *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

¹⁷⁵ Chief Justice Helen Winkelmann “The power of narrative — shaping Aotearoa New Zealand’s public law” (paper presented to conference “The Making (and Re-Making) of Public Law”, Dublin, 6–8 July 2022) at 7.

¹⁷⁶ Alister Hughes “*Trans-Tasman Resources* and presuming consistency with te Tiriti o Waitangi” (2022) *New Zealand Law Journal* 325 at 326.

¹⁷⁷ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 188.

of New Zealand society”,¹⁷⁸ that it has a status “perceivable, whether or not enforceable, in law” and that it contains “promises which the Crown is obliged to perform”.¹⁷⁹ Because there was no requirement in the Act for a decision maker to consider the Treaty, the Treaty could only be relevant as an extrinsic aid in interpreting the relevant legislation.¹⁸⁰ *Huakina* is notable because the High Court found that the Treaty was a relevant consideration for a decision maker despite lack of specific direction to consider the Treaty within the relevant legislation.

- 7.80 In *New Zealand Maori Council v Attorney-General*, the applicant sought judicial review of the proposed transfer of all or any of the lands to state-owned enterprises under the State-Owned Enterprises Act 1986.¹⁸¹ Section 9 of this Act prevented the Crown from acting in a manner inconsistent with the “principles of the Treaty of Waitangi”.¹⁸² The Court found that this required the Crown, when selling state assets, to safeguard Māori interests arising from Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal (Waitangi Tribunal) claims for breaches of the Treaty.¹⁸³
- 7.81 The 1991 case of *Attorney-General v New Zealand Maori Council* was a challenge by the New Zealand Māori Council to the government’s process for implementing its broadcasting policy.¹⁸⁴ The relevant Act, the Radiocommunications Act 1989, did not contain a Treaty clause. Nevertheless, the Court of Appeal found that “the Crown, as a Treaty partner, could not act in conformity with the Treaty or its principles without taking into account any relevant recommendations by the Waitangi Tribunal”.¹⁸⁵
- 7.82 An approach that requires the Crown to observe or take into account Treaty principles as articulated by the courts continues to frame the public conversation between Māori and the Crown.¹⁸⁶ We expect this approach will continue to be relevant due to legislation increasingly including references to the Treaty. It is also possible that the Treaty will form the basis of a claim for judicial review of a decision maker’s treatment of tikanga. In *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)*, the High Court explained:¹⁸⁷

... 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. Whether there are such legal obligations, and what exactly they require, depends on the statutory and factual context in which the issue arises.

¹⁷⁸ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

¹⁷⁹ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 206.

¹⁸⁰ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 224.

¹⁸¹ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

¹⁸² State Owned Enterprises Act 1986, s 9.

¹⁸³ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

¹⁸⁴ *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA).

¹⁸⁵ *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) at 135.

¹⁸⁶ See Matthew S R Palmer “Indigenous rights, judges and judicial review in New Zealand” (paper presented to public law conference “Frontiers of Public Law”, Melbourne, 11–13 July 2018): as at 2018, Palmer identified at least 27 cases that invoke the Treaty directly in judicial review proceedings. In 2021, at least 35 statutes contained explicit references to the Treaty. See Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 89.

¹⁸⁷ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [587].

- 7.83 Although the Treaty provides an avenue for claimants to challenge the exercise of public power, the Crown can choose to bind itself to the Treaty principles through legislative incorporation or can, by statutory design, minimise its obligations arising from the Treaty. This means the Crown can ultimately determine the extent to which it is held accountable to the Treaty principles, subject only to the political consequences it faces.¹⁸⁸

The development of tikanga as a factor in judicial review proceedings

- 7.84 Tikanga has been taken into account as a factor in judicial review proceedings independently of the Treaty. The High Court has held that:¹⁸⁹

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.

- 7.85 As we discussed in Chapter 5, in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* the Supreme Court held that there was an obligation on a decision maker to consider tikanga because “tikanga-based customary rights and interests” were “existing interests” under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.¹⁹⁰ The tikanga-based customary rights and interests included kaitiakitanga of the iwi of their relevant rohe (region).¹⁹¹ They also included rights claimed but not yet granted under the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act).¹⁹² The Court also found that tikanga must be taken into account as “other applicable law” under the Act where appropriate.¹⁹³
- 7.86 In *Te Pou Matakana Ltd v Attorney-General*, the High Court upheld a judicial review claim by a Māori health provider about Manatū Hauora | Ministry of Health refusing to release information about Māori who had not been vaccinated against COVID-19. One of the reasons for the Court’s decision was that the Ministry of Health did not have adequate regard to the Treaty and its principles “as informed by tikanga”.¹⁹⁴
- 7.87 As we also discussed in Chapter 5, in *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* the Crown and the iwi Raukawa sought judicial review of the Waitangi Tribunal’s preliminary determination to exercise its power to return possession of land to Māori for two significant areas of land.¹⁹⁵ In respect of one of the land areas, the iwi who stood to receive the land did not have mana whenua. The High Court held that tikanga binds the Waitangi Tribunal in the exercise of its functions. On the particular facts, it had acted

¹⁸⁸ See the discussion in Matthew S R Palmer “Indigenous rights, judges and judicial review in New Zealand” (paper presented to public law conference “Frontiers of Public Law”, Melbourne, 11–13 July 2018) at 4–7, where Palmer concludes, “[g]iven the constitutional arrangements, indigenous rights are, ultimately, protected politically in New Zealand.”

¹⁸⁹ *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27 at [75].

¹⁹⁰ Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 59(2)(a). See *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [8] and [154]–[155] per William Young and France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.

¹⁹¹ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [154].

¹⁹² *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [8].

¹⁹³ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [169] per William Young and France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.

¹⁹⁴ *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942, [2022] 2 NZLR 148 at [134].

¹⁹⁵ *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142.

unlawfully.¹⁹⁶ The Supreme Court, by majority, overturned the High Court’s decision and applied a more contextualised approach to the question of mana whenua.¹⁹⁷ The Supreme Court held that although mana whenua is a “very important principle of tikanga” it is not absolute.¹⁹⁸ Tikanga is a “principles-based system of law that is highly sensitive to context and sceptical of unbending rules”.¹⁹⁹

- 7.88 Judicial review claims have also been upheld in part because it was consistent with tikanga to do so, despite there being no legislative requirement on the decision maker to consider tikanga. In *Sweeney v The Prison Manager, Spring Hill Corrections Facility*, the High Court issued a declaration that the revocation of Mr Sweeney’s specified visitor approval was unreasonable, given the negative impact on Mr Sweeney’s mana.²⁰⁰

Tikanga and the Treaty settlement process

- 7.89 The courts have previously refrained from adjudicating on the Treaty settlement process on the basis this would interfere with the legislative process and cut across the “non-interference” principle.²⁰¹ This had frustrated the attempts of many iwi and hapū to challenge the way the Crown conducted its settlement negotiations.²⁰² However, in its 2018 decision in *Ngāti Whātua Ōrākei*, the Supreme Court held that the principle of non-interference did not preclude the courts’ jurisdiction to make declarations about rights simply because the declaration sought may potentially be the subject of legislation.²⁰³ Ngāti Whātua Ōrākei were therefore able to pursue declarations as to their rights in specific areas of Tāmaki Makaurau.

- 7.90 In *Ngāti Whātua Ōrākei v Attorney-General (No 4)*, the High Court made several findings about how tikanga relates to judicial review of government decisions in the Treaty settlement process. The Court said:²⁰⁴

Tikanga is at the heart of overlapping customary interests between iwi. So, when the Crown makes decisions in redressing its own wrongs in relation to the Treaty that impact on the tikanga or interests at tikanga of an iwi, the Crown will have a duty to take tikanga into account.

¹⁹⁶ *Mercury Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142.

¹⁹⁷ *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [163].

¹⁹⁸ *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [76].

¹⁹⁹ *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [76].

²⁰⁰ *Sweeney v Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27 at [1].

²⁰¹ The non-interference principle refers to the principle that courts will generally not interfere with the legislative process: Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 126 and 577.

²⁰² See for example *Milroy v Attorney-General* [2005] NZAR 562 (CA) and *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 (CA).

²⁰³ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [46].

²⁰⁴ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [597].

7.91 The Court said that the duty to take tikanga into account also requires the Crown to take reasonable steps to understand, recognise and respect the tikanga of iwi or hapū.²⁰⁵ It said that ignoring tikanga when it is relevant in a Treaty settlement context would be unlawful.²⁰⁶ The Court was therefore critical of the Crown’s policy and approach to the Treaty settlement process because it did not explicitly acknowledge the Crown’s legal requirement to consider tikanga and to act reasonably having regard to tikanga.²⁰⁷ The Court said that this requirement would become critically important when there were overlapping interests between iwi or hapū seeking redress.²⁰⁸

TIKANGA AND THE NEW ZEALAND BILL OF RIGHTS ACT 1990

7.92 The New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) makes no mention of tikanga and does not explicitly affirm any Māori rights. For this reason, there is very little case law on the relationship between tikanga and the NZ Bill of Rights. Fleur Te Aho has noted that the intersection between the NZ Bill of Rights and tikanga involves a suite of undetermined and underexplored issues.²⁰⁹

7.93 However, tikanga is implicitly relevant to the NZ Bill of Rights through several sections, especially:

- (a) section 19, which contains the right to freedom from discrimination;
- (b) section 20, which contains the right for minorities to enjoy their culture; and
- (c) section 5, which provides that the rights contained in the NZ Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 19: freedom from discrimination

7.94 Section 19 provides:²¹⁰

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

7.95 On their face, both subsections (1) and (2) have the potential to protect the right of Māori to act in accordance with tikanga, although this potential remains unexplored. However, one decision from the Human Rights Review Tribunal (HRRT) also demonstrates the potential for section 19 to be used in the opposite way — to obstruct the exercise of tikanga.

²⁰⁵ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [603].

²⁰⁶ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [623].

²⁰⁷ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [622].

²⁰⁸ Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 127.

²⁰⁹ Fleur Te Aho “Māori and the Bill of Rights Act: a case of missed opportunities?” (2013) 11 *New Zealand Journal of Public and International Law* 183 at 184.

²¹⁰ Grounds of discrimination in the Human Rights Acts 1993 include sex, religious belief, ethical belief, colour, race, and ethnic or national origins.

- 7.96 *Bullock v Department of Corrections* concerned a poroporoaki (farewell) held by Ara Poutama Aotearoa | Department of Corrections for prisoners graduating from a course.²¹¹ According to the tikanga of the event, the front row was reserved for males and only males were invited to speak. The plaintiff, a female, claimed that this amounted to discrimination based on sex.
- 7.97 The HRRT said that the case involved a conflict between the protection of equal opportunity and cultural values. While it acknowledged the cultural significance of tikanga, it found that the tikanga of the event did constitute discrimination on the grounds of sex, writing:²¹²
- We are satisfied that the department expectations of the plaintiff when she attended the graduation (specifically, in that it expected she would not be a speaker, and it expected her to sit behind the men) amounted to detrimental treatment by reason of her sex: male employees employed on work of the same description as the plaintiff were not subjected to the same limiting expectations.
- 7.98 The *Bullock* decision was not appealed, and we are not aware of any other court or tribunal decisions addressing the relationship between section 19 and tikanga. Nevertheless, some scholars have expressed concern about the broader potential for section 19 to be used in this way to undermine the exercise of tikanga.²¹³

Section 20: rights of minorities

- 7.99 Section 20 provides:

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

- 7.100 Te Aho has identified a tension in relying on section 20, a minority rights provision, to protect Māori rights as tangata whenua.²¹⁴ Nevertheless, section 20 affords a degree of protection for tikanga as a right to enjoy one's culture.
- 7.101 In *Ministry for Primary Industries v Whati*, the District Court considered section 20 in the context of a mahinga kai (customary food gathering place). Mr Whati was gathering kaimoana (seafood) from a mahinga kai connected to his whānau without a permit. The Court found that Mr Whati was entitled to rely on section 20, saying:²¹⁵

... [section 20] clearly embodies the enjoyment of cultural rights by a member of the minority group. And cultural practices by minorities obviously include activities such as hunting and fishing ...

It does not take recondite reasoning to also conclude s 20 embodies common law customary rights. Thus, to the extent cognisable in law, Mr Whati was exercising his s 20 right on 23 December 2016 to enjoy his long held cultural practice of collecting seafood for a minority community event.

²¹¹ *Bullock v Dept of Corrections* (2008) 5 NZELR 379 (HRRT) at [2].

²¹² *Bullock v Dept of Corrections* (2008) 5 NZELR 379 (HRRT) at [90].

²¹³ For example Claire Charters "BORA and Maori: the fundamental issues" [2003] New Zealand Law Journal 459.

²¹⁴ Fleur Te Aho "Māori and the Bill of Rights Act: a case of missed opportunities?" (2013) 11 New Zealand Journal of Public and International Law 183 at 193.

²¹⁵ *Ministry for Primary Industries v Te Hira Charlie Ned Whati* [2020] NZDC 19801, [2020] DCR 287 at [40].

7.102 Although no NZ Bill of Rights arguments had been put before the Court, in *Takamore v Clarke* Elias CJ also commented on section 20, saying:²¹⁶

Cultural identification is an aspect of human dignity and always an important consideration where it is raised, as are the preferences and practices which come with such identification, as s 20 of the New Zealand Bill of Rights Act 1990 affirms.

7.103 However, section 20 is not without limit. In a case involving an application to move a criminal proceeding from a court to a marae so that it might proceed in accordance with tikanga, the judge observed:²¹⁷

Section 20 of the New Zealand Bill of Rights Act 1990 cannot be used as a barrier against equality before the law. The right to enjoy the culture, profess and practice the religion and use the language of a minority cannot be used as a weapon against equality or the other rights expressed in that Act.

Section 5: justified limitations

7.104 Section 5 provides that the rights and freedoms contained in the NZ Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.²¹⁸

7.105 As Professor Claire Charters has argued, section 5 has the potential to affirm the exercise of tikanga.²¹⁹ For example, in a case like *Bullock* it might be possible for a court to hold that an exercise of tikanga was a reasonable limit on section 19.

7.106 In *Whati*, the Court considered section 5 in the context of mahinga kai. It said:²²⁰

Section 5 of the Bill of Rights Act required that the discretion be exercised in a manner that did not unreasonably interfere with Mr Whati's rights under s 20 of the Bill of Rights Act.

7.107 In the circumstances, the Court found that a total prohibition on gathering kaimoana from the mahinga kai was a disproportionate (and therefore unreasonable) interference with that right.

7.108 However, Charters has also noted that section 5 has the potential to limit tikanga. Courts may not view tikanga as a justified limitation on a protected right,²²¹ or in certain circumstances a court might hold that an interference with tikanga is a reasonable limit on the cultural rights protected by section 20.

7.109 The potential of section 5 (whether to affirm or undermine exercises of tikanga) remains largely unexplored.

²¹⁶ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [12].

²¹⁷ *Police v Taurua* [2002] DCR 306 at [50].

²¹⁸ New Zealand Bill of Rights Act 1990, s 5.

²¹⁹ Claire Charters "BORA and Maori: the fundamental issues" [2003] New Zealand Law Journal 459 at 460.

²²⁰ *Ministry for Primary Industries v Te Hira Charlie Ned Whati* [2020] NZDC 19801, [2020] DCR 287 at 287.

²²¹ Claire Charters "BORA and Maori: the fundamental issues" [2003] New Zealand Law Journal 459 at 460.

TIKANGA AND EVIDENCE

- 7.110 The Evidence Act 2006 provides rules that govern the admissibility of evidence in many court proceedings. Because tikanga is routinely established by evidence in court proceedings, the rules concerning the admissibility of evidence are of particular importance for tikanga.²²²
- 7.111 Generally, all relevant evidence is admissible under the Evidence Act unless it is excluded by the Evidence Act or any other Act.²²³ There are several evidential rules that may affect the admissibility of tikanga evidence, including:²²⁴
- (a) the hearsay rule;
 - (b) the opinion rule; and
 - (c) section 9 relating to evidence admitted by way of an agreed statement.
- 7.112 We discuss each of these topics below. We also briefly examine the rules relating to evidence in the Māori Land Court and the Environment Court.

The hearsay rule

- 7.113 The Evidence Act defines a hearsay statement as a statement that was made by anyone other than the witness and is offered in evidence to prove the truth of its contents.²²⁵ Hearsay statements are generally not admissible.²²⁶ The general rule against hearsay is subject to exceptions. In particular, a hearsay statement can be admitted provided that the circumstances relating to it give reasonable assurance as to its reliability.²²⁷
- 7.114 Because mātauranga is often transmitted orally according to tikanga, it would usually be a hearsay statement and therefore must fall within an exception to be admitted.²²⁸ In 1991, the Commission noted the difficulties that the rule against hearsay can pose for Māori. It envisaged at the time that the reliability exception to the hearsay rule would enable reliable oral sources of tikanga to be admitted in the case of evidence from a recipient of a long-standing oral tradition.²²⁹

²²² See Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at 8–20 for a comprehensive discussion of tikanga and evidence.

²²³ Evidence Act 2006, s 7(1).

²²⁴ There are other rules for admitting evidence of mātauranga or tikanga both within and outside the Act. Under s 128(2), a judge or jury can take notice of uncontroverted facts, which may include mātauranga or tikanga. See for example *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [38]. Section 129 allows published material on mātauranga and tikanga to be admitted as matters of “public history” if a judge considers the sources are reliable. High Court Rule 9.36 and the High Court’s inherent jurisdiction both allow the appointment of pūkenga as independent court experts for opinions or advice on tikanga. See *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 at [36]. Lastly, the High Court may refer a question of tikanga to Te Kooti Pira Māori | Māori Appellate Court. See Te Ture Whenua Maori Act 1993, s 61.

²²⁵ Evidence Act 2006, s 4.

²²⁶ Evidence Act 2006, s 17.

²²⁷ Evidence Act 2006, s 18. The original maker of the statement must also be unavailable as a witness or undue expense or delay would be caused if they were required to be a witness.

²²⁸ See the discussion of the hearsay rule in Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [60].

²²⁹ Te Aka Matua o te Ture | Law Commission *Evidence Law: Hearsay* (NZLC PP15, 1991) at [60].

The opinion rule

- 7.115 Statements of opinion are generally not admissible under the Evidence Act.²³⁰ An exception is if the statement is given by an expert witness and is likely to provide substantial help to the fact finder.²³¹ An “expert” is defined as “a person who has specialised knowledge or skill based on training, study or experience”.²³²
- 7.116 Case law prior to the Evidence Act had already established that expert opinion evidence from those qualified in terms of Māori culture was admissible.²³³ In its work on the Evidence Code, the Commission expected this position would continue.²³⁴
- 7.117 As part of consultation in its third review of the Evidence Act, the Commission has said that as courts are increasingly being asked to consider tikanga and mātauranga in proceedings subject to the Evidence Act, “it is desirable to consider whether further clarity is required”.²³⁵ The Commission has asked whether the Evidence Act should introduce statutory exceptions to the rules against hearsay and opinion evidence for evidence of tikanga (and potentially mātauranga Māori).²³⁶

Agreed statements of fact

- 7.118 A judge may admit evidence that is otherwise inadmissible with the agreement of all parties.²³⁷ It was this mechanism that allowed an agreed statement of facts to be admitted in *Ellis v R*, which contained an “Agreed Statement of Tikanga”.²³⁸

How tikanga is established in practice

- 7.119 There are several methods by which tikanga can be established in practice. These include:
- (a) tikanga established as a matter of fact;
 - (b) tikanga established by expert evidence; and
 - (c) tikanga evidence as an exception to the rules against hearsay and opinion evidence.
- 7.120 We briefly explain these methods below.

²³⁰ Evidence Act 2006, s 23.

²³¹ Evidence Act 2006, s 25.

²³² Evidence Act 2006, s 4.

²³³ See for example *Ministry of Agriculture and Fisheries v Hakaria and Scott* [1989] DCR 289 at 294.

²³⁴ Te Aka Matua o te Ture | Law Commission *Evidence law reform: te ao Māori consultation* (unpublished consultation paper, 1997) at [34].

²³⁵ Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at 17.

²³⁶ Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at 20.

²³⁷ Evidence Act 2006, s 9.

²³⁸ See Hirini Moko Mead and Pou Temara Statement of tikanga, 31 January 2020, in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

Tikanga established as a matter of fact

- 7.121 The “orthodox” approach to establishing tikanga is to treat it as a matter of fact to be established by evidence.²³⁹ This is the same method by which foreign law is established.²⁴⁰
- 7.122 In *Ellis v R*, the Supreme Court expressed caution about this approach. Williams J was “somewhat uncomfortable” with the evidential approach to tikanga, suspecting that it was “simply a convenient and efficient way of getting unfamiliar material before the judge who had then to apply it”.²⁴¹ Williams J noted there are multiple techniques available to assist the courts to understand and apply tikanga.²⁴² Glazebrook J said that it is “not appropriate to refer to [tikanga] as having to be proved as a question of fact” because tikanga is not foreign law, it is part of the common law.²⁴³ Glazebrook J also said that the best approach to ascertaining tikanga will be contextual and subject to matters of accessibility and cost.²⁴⁴

Tikanga established by expert evidence

- 7.123 Tikanga evidence given by pūkenga has been routinely admitted in cases.²⁴⁵ These cases suggest that the expert evidence provisions are routinely being used to admit tikanga evidence. Expert evidence has rarely been challenged on admissibility grounds to date.²⁴⁶

Tikanga evidence as an exception to the hearsay and opinion rules

- 7.124 While there are many examples of tikanga evidence being admitted under the expert evidence rule, there is little case law relating to the admissibility of tikanga evidence and the hearsay or opinion rules.²⁴⁷
- 7.125 In *Proprietors of Wakatū Inc v Attorney-General*, the High Court commented on how the rules in the Evidence Act might apply to traditional oral evidence:²⁴⁸

²³⁹ See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95]; *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [36]; *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [47].

²⁴⁰ Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at [3.43]–[3.44].

²⁴¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [273].

²⁴² *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [273].

²⁴³ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at fn 151.

²⁴⁴ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [125].

²⁴⁵ See for example *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [2]; *Ngawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [48]; *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 at fn 78; *Ulrich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [37] and [39].

²⁴⁶ Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at 22.

²⁴⁷ Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at 16.

²⁴⁸ *Proprietors of Wakatū Inc v Attorney-General* HC Nelson CIV-2010-442-181, 7 December 2010 at [45], set out in *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 at [41]–[42].

In terms of the Evidence Act 2006, the admissibility gateways for traditional, oral evidence would appear to involve a mixture of rules relating to opinion and hearsay evidence, and general questions of relevance (probative value). As a matter of principle, and noting the approaches outlined in the various cases referred to, I think it would be surprising if appropriate evidence of oral history was not admissible simply because it did not fit easily within the concepts of hearsay and opinion evidence as it is most commonly dealt with.

Other evidential rules: Māori Land Court, Environment Court, Family Court and claims under the Takutai Moana Act

7.126 Proceedings in the Māori Land Court, Environment Court and Family Court and under the Takutai Moana Act have different evidential rules than those that apply under the Evidence Act.²⁴⁹ In these different jurisdictions, the approach taken might be described as more flexible than the rules in the Evidence Act.²⁵⁰ The courts are empowered in each instance to hear evidence that they think will assist the court, whether or not that evidence would be admissible under the Evidence Act.²⁵¹ These jurisdictions are also empowered to conduct court proceedings in less formal ways or in ways that specifically recognise *kawa* or *tikanga*.²⁵² Provisions allowing more flexibility are generally well accepted and are used to incorporate *tikanga* into court procedure where appropriate.

A moving landscape

7.127 The Supreme Court's decision in *Ellis v R* demonstrates that the rules of evidence are intimately connected with the development of *tikanga* and the common law. Currently, the orthodox method for ascertaining *tikanga* is to establish it as a matter of fact, usually done by expert evidence. If the courts shift away from establishing *tikanga* as fact, as the Supreme Court in *Ellis v R* identified may be desirable depending on the context, different methods of ascertaining *tikanga* will need to be found. It may be that courts will begin to take judicial notice of commonly understood *tikanga* so that the need for *tikanga* to be established by evidence diminishes over time.²⁵³ This raises the question of how this interaction can occur in a way which maintains the integrity of state law and *tikanga*. The ability to bring *tikanga* before the courts in a range of ways best suited to the nature of the dispute is an important aspect of the developing relationship between *tikanga* and the common law, as discussed in Chapter 8.

²⁴⁹ Te Ture Whenua Maori Act 1993, s 69(1); Resource Management Act 1991, s 276; Marine and Coastal Area (Takutai Moana) Act 2011, s 105, Family Court Act 1980, s 12A.

²⁵⁰ Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at 17.

²⁵¹ Te Aka Matua o te Ture | Law Commission *Te Arotake Tuatoru i te Evidence Act 2006 | The Third Review of the Evidence Act 2006* (NZLC IP50, 2023) at 17.

²⁵² Resource Management Act 1991, s 269; Te Ture Whenua Maori Act 1993, s 66; Family Court Act 1980, s 10.

²⁵³ For example in *Doney v Adlam* [2023] NZHC 363 at [81] the High Court considered *tikanga* without hearing any evidence from experts on *tikanga*. The judge in this case, Harvey J, is a former judge of the Māori Land Court.

TIKANGA AND MĀORI LAND: TE TURE WHENUA MAORI ACT 1993

- 7.128 Today, Māori land comprises approximately five per cent of the total land of Aotearoa New Zealand.²⁵⁴ In the North Island, it is closer to 14 per cent. All Māori land as defined by Te Ture Whenua Maori Act 1993 (TTWMA) is governed by TTWMA. In 2015, there were over 27,000 individual titles and 2.9 million ownership interests in those titles. The average number of owners in a single block was 85. The largest had thousands of owners. Those titles were managed by 5,835 trusts, 2,276 reservations and 159 incorporations established under TTWMA. Twenty-two per cent of Māori land had no management structure in 2015.²⁵⁵
- 7.129 There is a long and complex history of engagement between state law, Māori land and the Māori Land Court that we do not cover in detail in this Study Paper. The works of leading authors such as Professor Richard Boast,²⁵⁶ Professor Tā Hugh Kawharu,²⁵⁷ Professor Emeritus David V Williams,²⁵⁸ Tā Edward Taihakurei Durie,²⁵⁹ Chief Judge Caren Fox,²⁶⁰ and others provide a comprehensive analysis. Waitangi Tribunal reports also contain many of the detailed and complex histories that describe the effect of state law on Māori land both generally and in specific areas.²⁶¹
- 7.130 TTWMA is significant in placing tikanga at the forefront of its approach. In this section, we therefore provide a brief overview of TTWMA with some examples of cases under TTWMA that engage with tikanga. Before moving to discuss the cases, we first briefly introduce:
- (a) the background to TTWMA; and
 - (b) the tikanga-consistent philosophy of TTWMA and some of its key parts.

The background to TTWMA

- 7.131 The origins of TTWMA can be traced back through the complex history of native land laws dating back to the mid-nineteenth century.²⁶² The Waitangi Tribunal has recorded that nineteenth century native land legislation facilitated the alienation of Māori land to the Crown and settlers until a relatively small proportion of land remained in Māori

²⁵⁴ Caren Wickliffe, Stephanie Milroy and Matiu Dickson *Laws of New Zealand Overview of the evolution of Māori land law 1840–1993* (online ed) at [11]; Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015).

²⁵⁵ Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 98.

²⁵⁶ Richard Boast, Andrew Erueti, Doug McPhail and Judge N F Smith *Māori Land Law* (2nd ed, LexisNexis Butterworths, Wellington, 2004).

²⁵⁷ I H Kawharu *Māori Land Tenure: Studies of a Changing Institution* (Oxford University Press, Oxford, 1977).

²⁵⁸ David V Williams *Te Kooti Tango Whenua: The Native Land Court 1864–1909* (Huia Publishers, Wellington, 1999).

²⁵⁹ Edward Taihakurei Durie “Custom law” (unpublished draft paper, 1994).

²⁶⁰ Caren Fox “Ko te mana te utu: narratives of sovereignty, law and tribal citizenship in the Pōtikirua ki Te Toka-a-Taiau district” (PhD Thesis, Te Whare Wānanga o Awanuiārangī, 2023) at ch 10.

²⁶¹ See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 11–46 for a detailed description of the history of Te Ture Whenua Maori Act 1993.

²⁶² Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 11.

ownership by the early twentieth century.²⁶³ The Tribunal said that the operation of the Native Land Court and the legislative direction of native land laws during this time was driven by a policy to alienate Māori land for Crown and settler use.²⁶⁴ A key aspect of this process was conversion from customary tenure into the individual title that we are familiar with today.²⁶⁵ This form of title was starkly different to the system with which Māori were familiar. As the Tribunal has described that system:²⁶⁶

Māori saw themselves as users of the land rather than its owners ... They were born out of it, for the land was Papatuanuku, the mother earth who conceived the ancestors of the Māori people ... In all, the essential Māori value of land, as we see it, was that lands were associated with particular communities and, save for violence, could not pass outside the descent group ... Such was the association between land and particular kin groups that to prove an interest in land, in Māori law, people had only to say who they were ...

- 7.132 The Crown itself has also acknowledged in settlement legislation how unfair the native land laws were and how, cumulatively and in concert with other Crown measures, those laws effectively destroyed communal title and the tribal cohesion that customary land tenure supported.²⁶⁷
- 7.133 Around 1930, the Māori Land Court had largely finished its investigation of titles.²⁶⁸ Then from roughly 1930 to 1970, Crown policy was focused on large-scale Māori land development for economic benefit.²⁶⁹ The general approach for over a century was therefore conversion, alienation and ensuring whatever land was left in Māori hands was as economically viable as possible.
- 7.134 In 1974, amendments to the Maori Affairs Act 1953 introduced a focus on “the retention of Maori land in the hands of its owners, and its use or administration by them for their benefit”.²⁷⁰ Te Ture Whenua Maori Bill was introduced to Parliament in 1987, following Māori protest action and a report from the New Zealand Māori Council on Māori land policy.²⁷¹ After a lengthy process through Parliament, TTWMA was enacted in 1993.

²⁶³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 11.

²⁶⁴ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 14.

²⁶⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 11.

²⁶⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 23–24.

²⁶⁷ Ngāti Awa Claims Settlement Act 2005, s 8(5)(b).

²⁶⁸ Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 54.

²⁶⁹ Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 61; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 27–29. This can be seen in the direction taken in the Maori Affairs Act 1953 and the Maori Affairs Amendment Act 1967: see the Preambles to both Acts.

²⁷⁰ Maori Affairs Amendment Act 1974, pt II.

²⁷¹ See Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 74; New Zealand Māori Council *Kaupapa: Te Wahanga Tuatahi: a discussion paper on Māori affairs legislation* (Wellington, New Zealand Māori Council, 1983). Protest action included the events at Ōrākei (Bastion Point) and the 1975 Land March.

TTWMA philosophy and significant parts

- 7.135 TTWMA takes a significantly different approach to Māori land than its predecessors.²⁷² TTWMA recognises that land is a taonga tuku iho (treasure handed down) of special significance to Māori.²⁷³ Its purpose is therefore grounded in tikanga, acknowledging the importance of land for Māori as something which is handed down from ancestors. To that end, it promotes the retention of land by Māori and facilitates the occupation, development and use of that land for Māori benefit.²⁷⁴
- 7.136 TTWMA contains several parts that work together to give effect to the statutory purpose. It establishes the Māori Land Court (which we discuss further in Chapter 8) and Te Kooti Pīra Māori | Māori Appellate Court (the Māori Appellate Court). Other parts of TTWMA address:²⁷⁵
- (a) the determination of the status of land;
 - (b) the general prohibition on alienation of Māori land and exceptions;
 - (c) the administration of estates comprised of Māori land;
 - (d) governance structures over Māori land including trusts, incorporations and reservations; and
 - (e) dispute resolution.
- 7.137 We consider these briefly below.

Land status and restrictions on alienation

- 7.138 The Māori Land Court has jurisdiction to determine the status of any parcel of land, and no Māori land may change status except in accordance with TTWMA.²⁷⁶ In exercising its powers and functions under TTWMA, the Māori Land Court must always have regard to two fundamental principles relating to the retention and use of Māori land.²⁷⁷ It must promote and assist:²⁷⁸
- (a) the retention of Māori land and general land owned by Māori in the hands of its owners, and
 - (b) the effective use, management and development of such land.

²⁷² Compare Te Ture Whenua Maori Act 1993, Preamble and the provisions relating to Māori land in the Maori Affairs Act 1953. See also Caren Wickliffe, Stephanie Milroy and Matiu Dickson *Laws of New Zealand Overview of the evolution of Māori land law 1840–1993* (online ed) at [11].

²⁷³ Te Ture Whenua Maori Act 1993, Preamble.

²⁷⁴ Te Ture Whenua Maori Act 1993, Preamble. See also Caren Wickliffe, Stephanie Milroy and Matiu Dickson *Laws of New Zealand Overview of the evolution of Māori land law 1840–1993* (online ed) at [12].

²⁷⁵ This is not a comprehensive list. Other parts relate to records of ownership, duties and powers of the Court, powers of owners, leases, representation of owners, title reconstruction and improvement, occupation orders and surveys.

²⁷⁶ Te Ture Whenua Maori Act 1993, ss 120–131.

²⁷⁷ Te Ture Whenua Maori Act 1993, ss 2 and 17. See also the discussions in *Re Cleave* (1995) 3 NZ ConvC 192,245 (MAC) at 245–249 and *Valuer-General v Mangatu Inc* [1997] 3 NZLR 641 at 650.

²⁷⁸ Te Ture Whenua Maori Act 1993, s 17(1).

- 7.139 This, combined with a general prohibition on the alienation of Māori land, means that TTWMA imposes heavy restrictions on Māori land alienation.²⁷⁹
- 7.140 At times, the restrictions on alienation that are designed to keep Māori land in Māori ownership can mean that Māori are unable to leverage their land in order to develop it. Consequently, there can be some tension between the principles of retention and utilisation. As the authors of *Adams' Land Transfer* describe the tension:²⁸⁰

While it is obviously important that Māori land is retained in the hands of its owners, their whānau and their hapū, it is equally important that those owners have the ability to utilise the land. A crucial component for utilisation is access to money. The conflict arises when owners, for example, propose to mortgage the land or perhaps sell or lease a part of the land in order to raise monetary funds ...

- 7.141 In line with the objective of retention of land by Māori, TTWMA also places restrictions on succession to Māori land. Owners cannot leave their interests in Māori land to anyone in their will besides a limited class of people within the owner's hapū.²⁸¹ If an owner of Māori land dies without a will, the people entitled to inherit are limited to those as closely related to the deceased as possible.²⁸²

Governance structures

- 7.142 TTWMA establishes governance structures for managing Māori land, although owners are not limited to using these structures.²⁸³ Five types of specialised trusts can be established over Māori land to fit particular circumstances. They are:²⁸⁴
- (a) Ahu whenua trusts, which are designed for the benefit of any persons with ownership interests in the land.
 - (b) Whenua topu trusts, which are designed for the general benefit of the members of the iwi or hapū related to the land.
 - (c) Whānau trusts, which are designed for the benefit of the descendants of a named ancestor.
 - (d) Pūtea trusts, which are designed to manage minimal interests in land or unknown beneficiaries and enable them to pool their interests.
 - (e) Kai tiaki trusts, which are designed for the benefit of any person beneficially entitled who is unable to manage their interests, such as minors or persons under a disability.
- 7.143 Alternatively, owners may choose to vest their interests in a Māori incorporation established under TTWMA.²⁸⁵ Māori incorporations may be established to facilitate the

²⁷⁹ Te Ture Whenua Maori Act 1993, ss 145–146. Alienation is not limited to basic disposition of Māori land. It includes a wide variety of interests such as the making or grant of any lease, licence, easement, profit, mortgage, charge encumbrance or trust: see “alienation” defined in s 4.

²⁸⁰ *Adams' Land Transfer (NZ)* (looseleaf ed, LexisNexis) at TTWMA.5.2.

²⁸¹ Te Ture Whenua Maori Act 1993, s 108.

²⁸² Te Ture Whenua Maori Act 1993, s 109(1). The deceased's children, then siblings, then those “nearest in the chain of title” to the deceased are entitled.

²⁸³ Te Ture Whenua Maori Act 1993, s 21(2).

²⁸⁴ See Te Ture Whenua Maori Act 1993, ss 212–217.

²⁸⁵ Te Ture Whenua Maori Act 1993, s 147.

economic and commercial use of the land on behalf of the owners.²⁸⁶ Between 2005 and 2015, there were only three applications to the Court to establish a Māori incorporation.²⁸⁷

- 7.144 Lastly, owners may wish to establish a Māori reservation. The majority of marae around the country are administered under TTWMA as Māori reservations.²⁸⁸ While land is set apart as a reservation, it is unable to be alienated.²⁸⁹

Dispute resolution

- 7.145 Part 3A of TTWMA establishes a dispute resolution mechanism to enable parties to resolve disputes in accordance with the law and “as far as possible, in accordance with the relevant tikanga of the whanau or hapu with whom they are affiliated, for both the process and the substance of the resolution”.²⁹⁰ The Māori Land Court describes the process as a “free, tikanga-based mediation service”.²⁹¹ Mediation may be requested by any party or at the judge’s initiative,²⁹² but all parties must agree to it.²⁹³ The mediator may follow any procedures or admit any material they think fit.²⁹⁴

Cases

- 7.146 Cases heard under TTWMA contain sophisticated examples of engagement between tikanga and state law. This is not surprising given that TTWMA exists as a regime for Māori land and almost all applicants are Māori. These circumstances have generated a high level of engagement between tikanga and state law. We discuss below two areas of this engagement — the law relating to whāngai and to trusts established under TTWMA.

Whāngai

- 7.147 Whāngai may succeed to interests in Māori land under TTWMA.²⁹⁵ TTWMA defines whāngai as “a person adopted in accordance with tikanga Maori”.²⁹⁶ Amendments that came into effect in 2021 changed the legal framework for whāngai to succeed.²⁹⁷ These new provisions relating to whāngai and their “relationship of descent” remain largely

²⁸⁶ Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 113.

²⁸⁷ Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 113.

²⁸⁸ Caren Wickliffe, Stephanie Milroy and Matiu Dickson *Laws of New Zealand Overview of the evolution of Māori land law 1840–1993* (online ed) at [13]. Māori reservations can be used for other purposes such as wāhi tapu.

²⁸⁹ Te Ture Whenua Maori Act 1993, s 338(11)(b).

²⁹⁰ Te Ture Whenua Maori Act 1993, s 98I. The only excluded matters relate to the Māori Fisheries Act 2004, the Maori Commercial Aquaculture Claims Settlement Act 2004 and matters regarding representation.

²⁹¹ Te Kooti Whenua Māori | Māori Land Court “Dispute resolution service” <www.maorilandcourt.govt.nz>.

²⁹² Te Ture Whenua Maori Act 1993, s 98L.

²⁹³ Te Ture Whenua Maori Act 1993, s 98J.

²⁹⁴ Te Ture Whenua Maori Act 1993, s 98O.

²⁹⁵ See Te Ture Whenua Maori Act 1993, pt 4; *Grant v Grant* (2021) 104 Tairawhiti MB 122 (104 TRW 122) at [14]–[18].

²⁹⁶ Te Ture Whenua Maori Act 1993, s 4.

²⁹⁷ Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020, ss 30–31.

untested.²⁹⁸ Tikanga remains as a central consideration in determining whether a whāngai will succeed or not.²⁹⁹

- 7.148 The Māori Land Court has a two-step process to determine whether a person was a whāngai of the deceased and whether they are entitled to succeed to interests in Māori land according to tikanga.³⁰⁰ The results of this inquiry will vary because the tikanga regarding whāngai and succession varies among iwi, hapū and whānau.³⁰¹ In order to ascertain the relevant tikanga, the Māori Land Court relies on evidence from respected kaumātua and tohunga (Māori knowledge experts) who have knowledge of the relevant tikanga.³⁰² Usually, expertise in the relevant tikanga is demonstrated in part by the experts' whakapapa to the iwi or hapū in question. Where no expert evidence is available, the Māori Land Court relies on the relevant tikanga as established in prior cases.³⁰³
- 7.149 The practical application of tikanga regarding whāngai is by and large specific to a particular iwi or hapū. The Māori Land Court has been careful not to generalise the tikanga it hears in evidence and has relied on previous evidence of tikanga where the previous evidence pertained to the relevant iwi or hapū.³⁰⁴
- 7.150 The Māori Land Court has created a presumption that, for a whāngai to succeed to interests in Māori land, they must demonstrate a whakapapa connection to the land.³⁰⁵ A person with no whakapapa connection who is seeking to succeed as a whāngai bears the onus of demonstrating that they are entitled to do so.³⁰⁶ The Māori Land Court has said this is “consistent with well known principles of tikanga that rights to land are regulated by whakapapa” while also noting that some hapū have a more flexible approach.³⁰⁷
- 7.151 The Court's presumption that whāngai must have whakapapa connections to succeed has been developed from consistent evidence of the tikanga of different iwi and hapū. The presumption also responds to the reality that the Court does not always have sufficient evidence of the tikanga of an iwi or hapū before it and must proceed to make its decisions on some basis. While the rule of requiring whāngai to have whakapapa

²⁹⁸ We could only locate three cases that have considered the new provisions.

²⁹⁹ *Roberts v Paul Succession to Riana Margaret Eru* (2022) 254 Taitokerau MB 129 (254 TTK 129) at [16].

³⁰⁰ *Moses-Heeney — Estate of Eric Moses, Re* (2018) 201 Waiariki MB 122 (201 WAR 122) at [7].

³⁰¹ See for example *Hohua — Estate of Tangi Biddle or Hohua* (2001) 10 Waiariki Appellate MB 43 (10 AP 43); *Karauti — Estate of George Tukua* (2000) 116 Otorohanga MB 81 (116 OTO 81); *Milner v Milner — Estate of Warahi Te Keu Faenza Milner* (2008) 83 Ruatoria MB 108 (83 RUA 108); *Pomare — Estate of Peter Here Pomare* (2015) 103 Taitokerau MB 95 (103 TTK 95).

³⁰² Mihiata Pirini “The Māori Land Court: exploring the space between law, design, and kaupapa Māori” (LLM Dissertation, Te Whare Wānanga o Ōtākou | University of Otago, 2020) at 19, citing *Hohua — Estate of Tangi Biddle or Hohua* (2001) 10 Waiariki Appellate MB 43 (10 AP 43); *Coutts — Estate of James Pou* (2008) 129 Whangarei MB 145 (129 WH 145). See also *Retemeyer v Loloa — Estate of Tahuaka Waipouri* (2016) 129 Taitokerau MB 288 (129 TTK 288) at [48] and James Anson-Holland and others *Wills and Succession (NZ)* (online ed, LexisNexis) at [16.44].

³⁰³ See *Retemeyer v Loloa — Estate of Tahuaka Waipouri* (2016) 129 Taitokerau MB 288 (129 TTK 288) where the Court relied on the evidence given in *Karauti — Estate of George Tukua* (2000) 116 Otorohanga MB 81 (116 OTO 81) to establish the relevant tikanga.

³⁰⁴ See *Retemeyer v Loloa — Estate of Tahuaka Waipouri* (2016) 129 Taitokerau MB 288 (129 TTK 288) at [55]–[57] where evidence of Ngāti Mahuta tikanga was relied on, and *Pomare — Estate of Peter Here Pomare* (2015) 103 Taitokerau MB 95 (103 TTK 95) at [24] where Tūhoe tikanga was distinguished from the tikanga of Te Taitokerau district.

³⁰⁵ *Retemeyer v Loloa — Estate of Tahuaka Waipouri* (2016) 129 Taitokerau MB 288 (129 TTK 288) at [49].

³⁰⁶ *Roberts v Paul Succession to Riana Margaret Eru* (2022) 254 Taitokerau MB 129 (254 TTK 129) at [12].

³⁰⁷ *Retemeyer v Loloa — Estate of Tahuaka Waipouri* (2016) 129 Taitokerau MB 288 (129 TTK 288) at [49].

connections to succeed is not universal and some iwi and hapū have different tikanga, the Court's approach reflects the integral nature of whakapapa to establishing Māori rights to land in general.

Trusts under TTWMA

7.152 Trusts are commonly created under TTWMA as ownership structures over Māori land. This creates an area of often complex engagement between tikanga and state law that is worth exploring to show how the Māori Land Court manages these interactions. The Māori Land Court has the exclusive jurisdiction to constitute trusts under TTWMA and has all the same powers as the High Court in respect of such trusts.³⁰⁸ It also has jurisdiction in respect of the supervision of “every other trust constituted in respect of any Māori land and every other trust constituted in respect of any General land owned by Māori”.³⁰⁹ General trust law applies to trusts constituted under TTWMA to the extent that it is consistent with the TTWMA scheme.³¹⁰

7.153 The Court of Appeal's decision in *Kusabs v Staite* illustrates how tikanga and state law interact with respect to trustee duties. In that case, a rangatira for two hapū, Mr Moke, was acting as a trustee on two trusts that represented each hapū, creating a potential conflict of interest. Applying the usual strict approach to issues of conflict in cases of fiduciary duty, the High Court found that there was a conflict of interest.³¹¹ The Court of Appeal took a different view, focusing on how the reality of Māori land administration and ownership reflected tikanga and whanaungatanga. It said:³¹²

... whanaungatanga is blind to block boundaries. The same hapū will often own multiple blocks of separately administered land. On the other hand, sometimes multiple hapū will share ownership of a single block ...

Another implication of whanaungatanga is that most Māori landowners have multiple hapū affiliations. From these affiliations they will also derive multiple interests in other Māori land blocks ...

A third implication is that with shared ownership will come shared leadership. That is, rangatira will often be rangatira of more than one hapū. In the context of Māori land administration, that means those selected by owners to serve as trustees will sometimes be trustees for multiple blocks.

7.154 The Court said that if fiduciary duties were applied to Māori land administration without due regard to whanaungatanga, the expression of whanaungatanga may be frustrated.³¹³ Bearing this in mind, there was no real sensible possibility that Mr Moke's positions on the two trusts could give rise to a conflict.³¹⁴

7.155 The Māori Land Court also discussed trustee duties under tikanga in *Pokere v Bodger* — the first fully bilingual decision issued by a New Zealand court, in which the Court was

³⁰⁸ Te Ture Whenua Maori Act 1993, ss 211 and 237.

³⁰⁹ Te Ture Whenua Maori Act 1993, s 236(1)(b)–(c).

³¹⁰ *Fenwick v Naera* [2016] 1 NZLR 354, [2015] NZSC 68 at [55].

³¹¹ *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [116].

³¹² *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [121]–[123].

³¹³ *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [124].

³¹⁴ *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [134].

assisted by the appointment of Dr Ruakere Hond as pūkenga.³¹⁵ The case concerned the proposed demolition of a dwelling by the trustees of an ahu whenua trust established under TTWMA. The applicants argued that the dwelling was akin to a marae, that the trustees of the ahu whenua trust had tikanga duties, and that demolition of the dwelling would breach those duties. There were no express tikanga duties in the terms of the trust.

7.156 The Court explained that it had jurisdiction to undergo the tikanga analysis on the basis that the Māori Land Court has all the same powers of the High Court in relation to trusts, including the High Court’s inherent jurisdiction.³¹⁶ Because trustee duties should be performed by trustees having regard to the context and objectives of the trust, tikanga is relevant in the context of Māori land trusts.³¹⁷

7.157 The Court focused its tikanga analysis on mana. The Court discussed the mana of the relevant tūpuna (ancestor), the mana relationships to taonga, the mana of the whenua, kāinga (home) and place, and the mana of the people. The questions “Ko wai te Whare nei?” (“Who is this Whare?”), “Nō wai te Whare nei?” (“To whom does the Whare belong?”) and “Mō wai te Whare nei?” (“Who is the Whare for?”) were also important.³¹⁸ These questions, framed by reference to mana, set the context for establishing the tikanga duties. The Court said:³¹⁹

In a trust context, whanaungatanga duties will generally be achieved if the trustees are clear where the mana is located, because if that is clear, then the trustees will know who they need to involve and on what basis.

7.158 On the facts, the Court found that the trustees had not breached their duties under tikanga or orthodox trustee duties.³²⁰

TIKANGA IN THE MARINE AND COASTAL AREA (TAKUTAI MOANA) ACT 2011

7.159 The Takutai Moana Act provides this chapter’s final illustration of engagement between tikanga and state law. We introduce the Act by considering its history, before turning to litigation. Many of the rights and interests that can be established under the Takutai Moana Act require consideration of tikanga.

History

7.160 The Takutai Moana Act replaced the Foreshore and Seabed Act 2004 (2004 Act).³²¹ The 2004 Act was the Crown’s response to *Ngati Apa*, a Court of Appeal case that held customary title in the foreshore and seabed had never been extinguished by statute and could therefore be pursued in the courts.³²²

³¹⁵ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210).

³¹⁶ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [91].

³¹⁷ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [94].

³¹⁸ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [73]–[82].

³¹⁹ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [116].

³²⁰ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [138].

³²¹ Marine and Coastal Area (Takutai Moana) Act 2011, Preamble; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) at 3–4.

³²² *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

7.161 The Crown's response was to pass the 2004 Act, driven by the policy that the foreshore and seabed belongs to and in principle is accessible by all New Zealanders.³²³ The 2004 Act vested ownership of the foreshore and seabed in the Crown and removed the jurisdictions of the High Court and Māori Land Court to inquire into any question of foreshore and seabed ownership.³²⁴ The policy was met with “near-universal opposition” among Māori and resulted in an immediate Waitangi Tribunal inquiry.³²⁵ The Tribunal identified multiple breaches of the Treaty and the rule of law in the 2004 Act as well as finding that the 2004 Act was unfair to Māori.³²⁶ After a Ministerial Review Panel set up in 2009 found the 2004 Act to be “severely discriminatory against whānau, hapū and iwi”,³²⁷ the government sought to replace the 2004 Act. This resulted in the Takutai Moana Act, which was enacted in 2011.

Purpose

7.162 The purpose of the Takutai Moana Act is to:³²⁸

- (a) establish a durable scheme to ensure the protection of the legitimate interests of all New Zealanders in the marine and coastal area of Aotearoa New Zealand;
- (b) recognise the mana tuku iho (inherited right or authority) exercised in the marine and coastal area by iwi, hapū, and whānau as tangata whenua;
- (c) provide for the exercise of customary interests in the common marine and coastal area; and
- (d) acknowledge the Treaty of Waitangi.

7.163 The Takutai Moana Act establishes the common marine and coastal area. This is the area between the mean high-tide mark and the outer limits of the territorial sea, less any freehold land or other areas with special status.³²⁹ No person owns or is capable of owning the common marine and coastal area.³³⁰ The Takutai Moana Act preserves the general public's rights of access and recreational use of this area.³³¹

7.164 The Takutai Moana Act also specifically restores any customary interests that were extinguished by the Foreshore and Seabed Act 2004 and gives them legal expression “in accordance with this Act”.³³² The Court in *Re Edwards* noted that, although the Takutai

³²³ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 83.

³²⁴ Foreshore and Seabed Act 2004, ss 10, 12 and 13.

³²⁵ Marine and Coastal Area (Takutai Moana) Act 2011, Preamble; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 1 Report* (Wai 2660, 2020) at 4.

³²⁶ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 121–125.

³²⁷ Marine and Coastal Area (Takutai Moana) Act 2011, Preamble.

³²⁸ Marine and Coastal Area (Takutai Moana) Act 2011, s 4.

³²⁹ Marine and Coastal Area (Takutai Moana) Act 2011, s 9. The areas with special status are a conservation area under the Conservation Act 1987, a national park under the National Parks Act 1980 or a reserve under the Reserves Act 1977.

³³⁰ Marine and Coastal Area (Takutai Moana) Act 2011, s 11.

³³¹ Marine and Coastal Area (Takutai Moana) Act 2011, ss 26–28.

³³² Marine and Coastal Area (Takutai Moana) Act 2011, s 6(1).

Moana Act purports to restore customary interests, it only does so in the manner specified in the Takutai Moana Act.³³³

Key rights and interests recognised under the Takutai Moana Act

7.165 The Takutai Moana Act recognises customary interests in the common marine and coastal area in two ways: through customary marine title and through protected customary rights. Applicants must apply to the High Court to have these interests recognised and the High Court may refuse or grant the application. All applications were required to have been received by 1 April 2017.³³⁴ Many have yet to be heard.

Customary marine title

7.166 For customary marine title to be recognised, an applicant must hold the specified area “in accordance with tikanga” and have “exclusively used and occupied it from 1840 to the present day without substantial interruption”.³³⁵ The requirement for exclusivity can include “shared exclusivity” between two or more applicant groups, and customary marine title may therefore be jointly held by more than one applicant group.³³⁶ The Takutai Moana Act provides some clarification on what constitutes a “substantial interruption” by providing that the use of the common marine and coastal area by persons who are not members of the applicant group for fishing and navigation does not constitute a substantial interruption.³³⁷

7.167 The rights granted by customary marine title are less than the full range of rights under both traditional Western property rights and “rights that Māori would have enjoyed and exercised in the foreshore and seabed as at 1840”.³³⁸ Nevertheless, customary marine title provides for a number of rights for the title holder, including resource management rights, the right to grant conservation permission, the right to create a planning document and a wāhi tapu (sacred area) protection right.³³⁹

7.168 With respect to wāhi tapu protection rights, the wāhi tapu area must have defined boundaries and prohibitions or restrictions that are to apply within the wāhi tapu.³⁴⁰ Restrictions under a wāhi tapu can affect rights of access and use for the general public, for example if a rāhui is imposed.³⁴¹

³³³ *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [32].

³³⁴ Marine and Coastal Area (Takutai Moana) Act 2011, s 100.

³³⁵ Marine and Coastal Area (Takutai Moana) Act 2011, s 58.

³³⁶ *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [168]–[170]. We note that this decision may be subject to appeal as it raises novel points of law concerning the Takutai Moana Act 2011.

³³⁷ Marine and Coastal Area (Takutai Moana) Act 2011, s 59(3).

³³⁸ *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [32]–[33] and [55].

³³⁹ Marine and Coastal Area (Takutai Moana) Act 2011, pt 3, sub-pt 3; *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [49].

³⁴⁰ Marine and Coastal Area (Takutai Moana) Act 2011, s 79.

³⁴¹ *Re Ngāti Pāhauwera* [2021] NZHC 3599 at [111]–[113].

Protected customary rights

7.169 The second way in which the Takutai Moana Act allows Māori interests to be recognised is through protected customary rights.³⁴² A protected customary right can be any right that meets the recognition criteria under the Takutai Moana Act.³⁴³ For a protected customary right to be recognised, it must have been continuously exercised since 1840, never have been extinguished as a matter of law, and be exercised in accordance with tikanga.³⁴⁴

Establishing the relevant tikanga

7.170 Both customary marine title and protected customary rights therefore require an applicant to establish that they hold a specified area or exercise a right in accordance with tikanga. The burden is on the applicant group to prove the requirements.³⁴⁵ However, the Takutai Moana Act provides that “it is presumed, in the absence of proof to the contrary, that a customary interest has not been extinguished”.³⁴⁶

7.171 When hearing an application, the High Court may receive as evidence “any oral or written statement, document, matter, or information that the Court considers to be reliable, whether or not that evidence would otherwise be admissible”.³⁴⁷ Evidence that the applicant group holds the area in accordance with tikanga will inevitably contain detailed whakapapa and tribal histories. It is likely that much of the evidence is tapu. The High Court’s role is to weigh up the evidence to determine if the tests for marine customary title and protected customary rights are met and it does not act as the “final arbiter defining the whakapapa of the applicants”.³⁴⁸ It is nevertheless important to highlight that the Takutai Moana Act provides for the only way for iwi, hapū and whānau to get recognisable rights under state law in the common marine and coastal area. Therefore, while the High Court’s decision does not affect the tikanga of the applicant groups, it does significantly impact the ability for iwi, hapū and whānau to exercise their tikanga over the common marine and coastal area.

7.172 Applications under the Takutai Moana Act may relate to large areas of the common marine and coastal area and contain large amounts of evidence on tikanga. Where interests between applicant groups overlap, the evidence may also be contested. This is apparent in the cases that have been dealt with to date, which have had large numbers of interested parties as well as contested evidence between iwi and hapū.

7.173 In addition to hearing evidence, the Court has powers to refer a question of tikanga to the Māori Appellate Court and to obtain the advice of a pūkenga who has knowledge and experience of tikanga.³⁴⁹

³⁴² Marine and Coastal Area (Takutai Moana) Act 2011, pt 3, sub-pt 2.

³⁴³ Some specific activities are excluded: see Marine and Coastal Area (Takutai Moana) Act 2011, s 51(2).

³⁴⁴ Marine and Coastal Area (Takutai Moana) Act 2011, s 51(1).

³⁴⁵ Marine and Coastal Area (Takutai Moana) Act 2011, s 106.

³⁴⁶ Marine and Coastal Area (Takutai Moana) Act 2011, s 106.

³⁴⁷ Marine and Coastal Area (Takutai Moana) Act 2011, s 105.

³⁴⁸ *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [301].

³⁴⁹ Marine and Coastal Area (Takutai Moana) Act 2011, s 99.

CONCLUSION

7.174 In this chapter, we have considered the development of tikanga in state law in eight areas. Our review shows how widely tikanga is now present in these areas of law and the increasing confidence of the courts and the legislature generally in tikanga engagement. It also highlights some areas where there is uncertainty about how the interface of tikanga with state law will play out and many ways in which, in spite of tikanga concepts' wide use and recognition, limitations remain. Part Three therefore considers ways of supporting decision makers' continuing engagement with tikanga, both in the courts and in a policy context.

Part Three

Future engagement

Decorated panels formed an important finish to the large meeting-houses and the carved houses of chiefs of any standing. A carved house without lattice-work stitched in patterns, no matter how simple, had an air of incompleteness, or even poverty, that the old-time Maori felt was not in keeping with the prestige that a well-carved house should convey.

Tā Te Rangi Hiroa¹

¹ Te Rangi Hiroa (P H Buck) "Maori decorative art: no 1, house-panels (arapaki, tuitui, or tukutuku)" (1921) 53 Transactions and Proceedings of the Royal Society of New Zealand 452 at 452.

INTRODUCTION TO PART THREE

1. As Part Two shows, tikanga is increasingly interacting with state law. Judges must adjudicate on what tikanga means and how it should be applied in a wide range of contexts. The government sector engages with tikanga too: tikanga may be involved both when implementing existing law and when developing new law. The extent to which state law now addresses tikanga may not be well appreciated. As we explored in Part Two, some examples include:
 - (a) common law recognition of tikanga-based rights and interests in land and other natural resources through the customary law doctrine;
 - (b) environmental law decisions about tikanga-based relationships and tikanga concepts, including whanaungatanga, mauri, kaitiakitanga and mana;
 - (c) family law decisions requiring the application of whanaungatanga, whakapapa and mana;
 - (d) the common law incorporation of tikanga values, including whanaungatanga, mana and tapu, utu and ea;
 - (e) public law declarations and decisions in respect of mana whenua, mana moana and mana tangata;
 - (f) criminal law and procedure applying tikanga values and processes, including whanaungatanga, utu, ea, muru and whakamā;
 - (g) personal property law which requires consideration of taonga; and
 - (h) te Tiriti o Waitangi | Treaty of Waitangi cases that address tikanga, including mana and rangatiratanga.
2. The diverse contexts in which state law and tikanga are engaging present challenges for both. While tikanga remains an independent system, incorporating tikanga concepts into state law has the potential to shift the location for the development of tikanga to state law institutions. This carries a real risk of undermining the mana of tikanga institutions. There is a risk of tikanga being misunderstood, misapplied and assimilated unless engagement between state law and tikanga is undertaken carefully. There is a need above all to be mindful of tikanga as an integrated system of concepts sourced from and practised within Māori communities. Equally, state law must operate and safeguard its law-making processes in accordance with well-settled constitutional norms. Maintaining the certainty and accessibility of the law is central to the notion of the rule of law that underlies Aotearoa New Zealand's legal system.
3. Part Three of this Study Paper considers these challenges. Respectively, Chapters 8 and 9 consider common law and public sector engagement with tikanga. These chapters evaluate the capacity of both the common law and the public sector to appropriately incorporate tikanga into state law within existing constitutional arrangements. They also propose strategies for engaging with tikanga that seek to maintain the integrity and coherence of both tikanga and state law. The chapters envisage a weaving of tikanga and state law values which retains the integrity of both.
4. To conclude the Study Paper, Chapter 10 briefly reflects on the key contributions made by the paper, leaving open the potential for other ways of recognising tikanga that might, in future, come to fruition.

CHAPTER 8

Principles for common law engagement

INTRODUCTION

- 8.1 This chapter discusses the capacity of the courts to mediate the challenges of intersection between tikanga and the common law. It provides principles and strategies for engagement.
- 8.2 The first section of the chapter offers an account of what the common law is and how judges work, commonly referred to as the common law method. The section defines and discusses the common law method within the constitutional context of Aotearoa New Zealand. It explores the capacity of the common law method to rise to the challenges posed.
- 8.3 The second section discusses key points of intersection between tikanga and case law. We identify three main categories of tikanga-related state law — tikanga-based customary law, tikanga values and tikanga as law. We suggest they are a helpful starting point for future engagement.
- 8.4 Following this, the chapter provides strategies and guidance on how the courts might best engage with tikanga. It draws on the account of tikanga given in Part One of this Study Paper and builds incrementally on the common law as it presently exists. The three strategies discussed are:
- (a) commencing any engagement with a “tikanga lens”, an approach that we illustrate by giving case law examples;
 - (b) tools for judicial engagement; and
 - (c) enabling broader or better adjudication processes that facilitate engagement with tikanga.
- 8.5 These include the role of the Māori Land Court and the use of arbitration for adjudicating tikanga disputes.

THE COMMON LAW METHOD

- 8.6 The common law method, as a method of incremental change and institutional discourse, has the capability to develop the law through embracing tikanga provided that appropriate existing boundaries of the method are adhered to. These boundaries or

guardrails assist to maintain the independence and integrity of both the common law and tikanga. Before moving to this discussion, it is helpful to first outline what we mean by the common law and the common law method.

Defining the common law and the common law method

8.7 The common law evolved over hundreds of years from customary practices of various localities in England to become “general customs; which are the universal rule of the whole kingdom”.¹ In modern times, it has evolved further to become a body of law that is principally authored by the judiciary.² The common law can be defined as the “principles of substantive law derived from judicial precedent that the courts establish through litigation”.³ The English common law that metaphorically arrived with Captain Cook and became the second law of Aotearoa New Zealand was derived from decisions of the English courts.⁴ The common law today is a body of principles derived from Aotearoa New Zealand courts, amended and adapted to meet the changing circumstances of this place.⁵

8.8 The “common law method” is distinct from the common law:⁶

The common law is the principles that can be extracted from the body of case law. The common law method is the process that courts use to decide the case before them which may, in a case such as this, require them to develop the common law to enable them to do that.

8.9 The distinctive value of the common law may be its process or method rather than its substance.⁷ The “process that courts use to decide the case before them” is a deceptively complex subject, despite the fact that lawyers and judges practise the method routinely.⁸ The following points can be made about the method.

¹ William Blackstone *Commentaries on the Laws of England (1765–9)* (University of Chicago Press, London, 1979) vol 1 at 67.

² Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 144.

³ Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 32; John Gardner “Some types of law” in Douglas E Edlin (ed) *Common Law Theory* (Cambridge University Press, New York, 2007) 51; John Burrows “Common law among the statutes: the Lord Cooke Lecture 2007” (2008) 39 Victoria University of Wellington Law Review 401 at 401.

⁴ Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 Taumauri | Waikato Law Review 1 at 4; Te Aka Matua o te Ture | Law Commission *Mataitai: Nga tikanga Maori me te Tiriti o Waitangi | The Treaty of Waitangi and Maori Fisheries* (NZLC PP9, 1989) at 90: “The common law was ‘the custom of the people of England’. It was fashioned by the history and the environment of the people of England and in modern times the English people who settled the various overseas communities.”

⁵ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95] per McGrath J for the majority: “the evolution of the common law in New Zealand reflects the special needs of this country and its society”; Helen Winkelmann “Picking up the threads: the story of the common law in Aotearoa New Zealand” (2021) 19 New Zealand Journal of Public and International Law 1 at 17; John Burrows “Common law among the statutes: the Lord Cooke Lecture 2007” (2008) 39 Victoria University of Wellington Law Review 401 at 406.

⁶ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [163].

⁷ Robert Goff “The future of the common law” (1997) 46 The International and Comparative Law Quarterly 745 at 749: “the major differences between the common law and what we may broadly call the civil law are to be found rather in the form than in the substance of our law, and still more in our judicial system and our procedure as seen in its broadest sense, together with our methods of legal reasoning”.

⁸ Sian Elias “Judicial review and constitutional balance” (2019) 17 New Zealand Journal of Public and International Law 1 at 4.

8.10 It entails a search for a statutory provision or common law principle that will decide or assist in deciding the case before the court.⁹ The common law includes decisions that interpret statutory provisions, and the common law in turn is influenced by statutes and the direction set by Parliament.¹⁰

8.11 Where statute and case law do not provide a determinative answer, the common law method allows the law to develop in a coherent and principled way to address that gap.¹¹ The development of the law through the common law method is incremental in the sense that it proceeds on a case-by-case basis.¹² Chief Justice Elias has said:¹³

The application of established principle to new situations or to developing social context, particularly in parallel with contemporary statutes and other trends, is the essence of the common law, which develops by analogy, case by case.

8.12 The common law method allows for a balance of continuity and change in the law to ensure that it serves contemporary society.¹⁴ The common law aims to retain a sense of integrity in the system as a whole as it develops.¹⁵

8.13 The evolution of the common law is not always one directional.¹⁶ The common law method allows for dialogue and debate about the correct direction for the law to take.¹⁷ Chief Justice Elias saw facilitating dialogue as one of the method's great strengths:¹⁸

I am a believer in the value of common law methodology. It has great virtues in explaining the exercise of judicial authority in reasons which must convince or else they will not long endure. The common law, as its great exponents have always acknowledged, is a method of change. It is a form of institutionalised discourse or method of argumentation. Its arguments survive only until defeated by better ones, usually responding to different social conditions and developments in knowledge and insight.

⁹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [164] per Winkelmann CJ.

¹⁰ John Burrows "Common law among the statutes: the Lord Cooke Lecture 2007" (2008) 39 Victoria University of Wellington Law Review 401 at 406; Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 281–288; Cathy Nijman "Ascertaining the meaning of legislation — a question of context" (2007) 38 Victoria University of Wellington Law Review 629 at 629; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

¹¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [165] per Winkelmann CJ.

¹² *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [167] per Winkelmann CJ. That is not to say that the developments must also be small in kind — sometimes the law requires that individual cases take large steps forward. The classic example is *Donoghue v Stevenson* [1932] AC 562 (HL).

¹³ *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 45; upheld in *Lange v Atkinson* [1998] 3 NZLR 424 (CA).

¹⁴ *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 45.

¹⁵ In Ronald Dworkin *Law's Empire* (Belknap Press, Cambridge, 1986), Dworkin argues that law is best interpreted through principles that justify and "fit" legal practice, enabling the law to speak with one voice. See elaboration in Steven Ross "Law, integrity, and interpretation: Ronald Dworkin's Law's Empire" (1991) 22 *Metaphilosophy* 265 at 273; see also Harlan F Stone "The common law in the United States" (1936) 50 *Harvard Law Review* 4 at 12: "we have the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication".

¹⁶ *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19 (HL) at 48 per Lord Hobhouse.

¹⁷ John Burrows "Common law among the statutes: the Lord Cooke Lecture 2007" (2008) 39 Victoria University of Wellington Law Review 401 at 413 cites contract law as an example of uncertainty in the common law: "In 1998 Lord Cooke himself reviewed a book of essays on the law of contract in honour of Guenter Treitel. He concluded that virtually every essay demonstrated how unclear and uncertain that area of the law was." See Robin Cooke "Review of consensus ad idem: essays in the law of contract in honour of Guenter Treitel" (1998) 114 *Law Quarterly Review* 505.

¹⁸ Sian Elias "Judicial review and constitutional balance" (2019) 17 *New Zealand Journal of Public and International Law* 1 at 11.

- 8.14 The common law method takes account of the values of contemporary Aotearoa New Zealand.¹⁹ Values provide an anchor, particularly those that transcend temporary political fluctuations such as the inherent dignity of the person or the right to a fair trial. Equally, as some of our societal values evolve, their contemporary iterations influence the law in new ways.²⁰
- 8.15 Judicial independence is crucial to the legitimacy of the common law method and upholding the rule of law.²¹ The human right to a fair hearing in public, where the court gives the parties equal treatment, is similarly critical.²²

The guardrails of the common law

- 8.16 The common law method has boundaries or “guardrails” that frame the limits of its law-making capacity. Some of the guardrails are internal to the method, and these are the focus of this chapter. Internal guardrails include the doctrine of precedent, incremental case-by-case development and appropriate consideration of the social and legislative context. The doctrine of precedent, or the principle that lower courts must follow the decisions of higher courts in similar cases, is a particularly critical guardrail.²³ It is aimed at ensuring consistency and predictability in the legal system and allows for the development of legal principles over time.²⁴
- 8.17 The external boundaries of the common law method are found in the constitutional context within which Aotearoa New Zealand courts operate. This includes the separation of powers, parliamentary supremacy and te Tiriti o Waitangi | Treaty of Waitangi (the Treaty).
- 8.18 The separation of powers in our Westminster democracy rests on the premise that the branches of government — the executive and the legislature as the political branch and

¹⁹ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94].

²⁰ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [110] per Glazebrook J; Sarah Down “Tikanga Māori — recognition but key questions unanswered — Ellis” [November 2022] Māori Law Review at 13.

²¹ Helen Winkelmann “Picking up the threads: the story of the common law in Aotearoa New Zealand” (2021) 19 New Zealand Journal of Public and International Law 1 at 15: “The notion of an impartial and passive judge is also vital to this model. The humanity in this process is its most essential feature. The judiciary’s claim to legitimacy rests in large part upon its ability to provide equal treatment before the law, and its commitment to affording all those who come before the courts the dignity of a fair hearing.” See too *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35; Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 8.

²² See *Universal Declaration of Human Rights* GA Res 217A (1948), art 10; Helen Winkelmann “Picking up the threads: the story of the common law in Aotearoa New Zealand” (2021) 19 New Zealand Journal of Public and International Law 1 at 15.

²³ This principle is also known as *stare decisis*: “to stand by things decided”. See Durgeshree Raman “The doctrine of precedent (*stare decisis*) revisited” [2022] New Zealand Law Journal 28 at 28; Douglas White “Originality or obedience? The doctrine of precedent in the 21st century” (2019) 28 New Zealand Universities Law Review 653 at 654 and 659. See also John Gardner “Some types of law” in Douglas E Edlin (ed) *Common Law Theory* (Cambridge University Press, New York, 2007) 51 at 86–87.

²⁴ Durgeshree Raman “The doctrine of precedent (*stare decisis*) revisited” [2022] New Zealand Law Journal 28 at 36; *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404 (CA) at 414, as cited in Douglas White “Originality or obedience? The doctrine of precedent in the 21st century” (2019) 28 New Zealand Universities Law Review 653 at 671.

the courts as the judicial branch — have distinctive roles.²⁵ For example, the courts tend to avoid developing the law in a way that might usurp the role of Parliament.²⁶

- 8.19 The principle of legislative supremacy ensures that the democratically elected legislature retains supreme law-making power.²⁷ Primary legislation trumps the common law in the event of an irreconcilable conflict.²⁸ Parliament can expressly overturn the effect of a court decision. Further, the courts do not have authority to strike down legislation that is inconsistent with the common law or principles of fundamental justice,²⁹ although the courts have an important role in determining the meaning to be accorded to that legislation.³⁰ The common law principle of legality requires the courts to read legislation as compatibly as possible with fundamental values protected by the common law, including human rights.³¹
- 8.20 The Treaty is a foundational constitutional document that is recognised by all three branches of government.³² The courts have increasingly emphasised the Treaty’s constitutional significance.³³ Although courts do not give direct effect to the Treaty, there are several situations in which they can apply it. First, where there is a Treaty clause in the relevant statute, the courts will give it legal effect.³⁴ Second, if it is salient to the decision, the courts regard the Treaty as a mandatory relevant consideration for administrative decision-makers.³⁵ Third, more recently the courts have sometimes

²⁵ Philip A Joseph “Separation of powers in New Zealand” (2018) 5 *Journal of International and Comparative Law* 485.

²⁶ See for example *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [259] per McGrath J; *R v Hines* [1997] 3 NZLR 529 (CA) at 539; *C v DPP* [1996] AC 1 (HL) at 28; see also the principle of non-interference in the legislative process in Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 577 and 578.

²⁷ Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 131: “put simply, what Parliament says, goes”.

²⁸ Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 131; Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 583 and see also at 576 and 582.

²⁹ Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 130; Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 611: “The orthodox view is that the courts would be powerless to stem the flow, beyond ‘reading down’ legislation as aggressively as principles of statutory interpretation might allow.”

³⁰ John Burrows “Common law among the statutes: the Lord Cooke Lecture 2007” (2008) 39 *Victoria University of Wellington Law Review* 401 at 406; Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 281–288; Cathy Nijman “Ascertaining the meaning of legislation — a question of context” (2007) 38 *Victoria University of Wellington Law Review* 629 at 629.

³¹ New Zealand Bill of Rights Act 1990, s 6; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131 per Lord Hoffmann.

³² Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 219.

³³ See *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [150] per Winkelmann CJ and France J and at [296] per Williams J.

³⁴ See for example the Conservation Act 1987, s 4 (which requires the Act to be administered consistently with the principles of the Treaty of Waitangi) as applied by the Court of Appeal in *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 558; Matthew S R Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, Oxford, 2022) at 222.

³⁵ For example, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC); see too Matthew S R Palmer “Indigenous rights, judges and judicial review in New Zealand” in Jason N E Varhaus and Shona Wilson Stark *The Frontiers of Public Law* (Hart Publishing, Oxford, 2020) 123 for a review of 53 judicial review cases that consider the Treaty.

required legislation to be read consistently with the principles of the Treaty without explicit statutory reference.³⁶

8.21 When the guardrails of the method are respected, the virtues of the common law can be demonstrated. The common law is:³⁷

... flexible, it is grounded in the practicality of individual fact situations, it is the refined product of the wisdom of many minds, it is free from political influence, and it is relatively stable.

8.22 These virtues give the common law its legitimacy as it develops to serve modern Aotearoa New Zealand.

The common law method and tikanga

8.23 Some may question whether tikanga is compatible with the common law method. It may be suggested that tikanga is an indigenous legal system that creates uncertainty when combined with the common law or that incorporating tikanga into the common law is a policy choice best left to Parliament or that incremental development is required to preserve the coherence of the common law. Several points can be made in response at the outset.

8.24 While it may fairly be observed that tikanga is more sensitive to context than the common law, this does not mean that tikanga itself is indeterminate or uncertain. As explained in Part One of this Study Paper, tikanga is a coherent body of connected principles that, when properly applied to facts, delivers determinate and consistent outcomes. Those outcomes are appropriate to their context because the principles are applied in a way that is sensitive to that context. The same can be said of the common law.

8.25 We do not consider that the common law will inevitably be rendered uncertain as a consequence of engaging with tikanga. First, tikanga sets its own boundaries and it has its own commitment to coherence. When applying “precedent” within tikanga, the concern is to ensure the correct values are identified and given their best expression.³⁸ When those boundaries are respected, tikanga will not be applied in alien contexts. To use an analogy, where there is no contractual relationship, the common law does not apply contractual principles.

8.26 Second, the greater the legal profession’s understanding of tikanga, the lower the risk of incoherence, inconsistency and uncertainty resulting from inadvertent misapplication or overstepping of boundaries. This Study Paper seeks to contribute to that understanding.

8.27 Third, the common law develops incrementally and cautiously, seeking to ensure ongoing relevance without unduly sacrificing certainty and predictability. For example, although in *Takamore v Clarke* Te Kōti Mana Nui | Supreme Court (the Supreme Court) found that the values of tikanga are part of the common law of Aotearoa New Zealand (a significant

³⁶ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [171]. See also Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 32, which recognise that, because of the constitutional significance of the Treaty, legislation should be read consistently with the principles of the Treaty.

³⁷ John Burrows “Common law among the statutes: the Lord Cooke Lecture 2007” (2008) 39 *Victoria University of Wellington Law Review* 401 at 411.

³⁸ Carwyn Jones “A Māori constitutional tradition” (2014) 12 *New Zealand Journal of Public and International Law* 187 at 193.

development), a tikanga approach was not decisive for any of the judges on the facts of the case.³⁹ In the later decision of *Ellis v R*, the Supreme Court gave important guidance on the status of tikanga, incrementally developing the law from *Takamore*. Again, however, tikanga was not decisive nor expressly incorporated into the majority’s test.⁴⁰

- 8.28 Fourth, we acknowledge that there are areas where tikanga and common law precedents might lead to different outcomes and that this may raise the potential for common law development that is not incremental. We do not think it should be assumed that this will occur. Indeed, for the reasons noted above, we think the contrary assumption is likely more accurate, but we also suggest that any such risk can be mitigated by use of a consistent and coherent framework for engagement with tikanga that is expressly rooted in common law incrementalism. This Study Paper proposes such a framework.
- 8.29 Fifth, in response to the concern that recognising another normative system alongside the common law may create uncertainty we note that there are other examples of a system existing alongside the common law. Equity, which is a loose constellation of doctrines reflecting general notions of good conscience and fairness, is an example.⁴¹ It has existed alongside and within the common law without losing its distinctive character.⁴² A further example is international customary law, which is automatically part of the common law applied directly by judges.⁴³
- 8.30 Outside of these examples, the common law method has shown great flexibility towards other legal systems. For example, foreign legal systems can be learned from insofar as their judgments may illuminate comparable legal issues.⁴⁴ Sophisticated conflict of laws principles have been developed to allow legal systems to sensibly co-exist. Central to these principles is the acceptance of multiple legal systems co-existing — or a “minimum commitment to pluralism”.⁴⁵ The principle of judicial comity is about “tolerating and maybe even embracing the foreign” at a basic level.⁴⁶

³⁹ *Clarke v Takamore* [2010] 2 NZLR 525 (HC); *Takamore v Clarke* [2011] NZCA 587, [2011] 1 NZLR 573; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

⁴⁰ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [11] and [142]–[145] per Glazebrook J and [315] per O’Regan and Arnold JJ.

⁴¹ Andrew Butler “Historical introduction” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (Thomson Reuters, Wellington, 2009) 2 at 2; Andrew Butler “Concluding observations: the state of equity, future developments and possible reform” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (Thomson Reuters, Wellington, 2009) 1269 at 1269.

⁴² Equity is not a stand-alone, independent legal system and it should not be thought that tikanga is being directly compared to equity in that sense. As outlined in Part One, tikanga is a normative system that is the first law of Aotearoa and continues to shape and regulate the lives of Māori: *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 summarises the majority view on this point at [22], referencing [107] and [110] per Glazebrook J, [168], [169] and [172] per Winkelmann CJ and [272] per Williams J.

⁴³ Kenneth Keith “Harkness Henry Lecture: the impact of international law on New Zealand law” (1998) 6 *Taumauri | Waikato Law Review* 1 at 22.

⁴⁴ The practice of looking to other common law jurisdictions is widespread. An example is the Canadian jurisprudence in *R v Smith* 2004 SCC 14, [2004] 1 SCR 385 on the content of “interests of justice”, which provided useful guidance for the majority judgment in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

⁴⁵ David McClean and Veronica Abou-Nigm (eds) *A Conflict of Laws* (10th ed, Sweet & Maxwell, London, 2021) at [2–203]. The editors further explain at [2–022] that: “[a] conflicts way of thinking is a way of thinking that seems to gravitate around the idea of bridging legal systems and cultures”.

⁴⁶ Jack Wass and Maria Hook *The Conflict of Laws in New Zealand* (Lexis Nexis, Wellington, 2020) at [1.29].

- 8.31 In our view, the above discussion suggests that the common law should be capable of operating alongside tikanga and engaging with it in appropriate contexts. The relationship between tikanga and the common law is already developing incrementally through the orthodox application of the common law method on a case-by-case basis.

The need for caution — *kia tūpato*

- 8.32 While we consider the common law method has the capacity to engage with tikanga, caution is needed in doing so.
- 8.33 First, we acknowledge that some academics and commentators reject any engagement between tikanga and the common law in the current constitutional context.⁴⁷ Some of these authors see a risk of distorting tikanga through an exercise that is “inherently assimilative”.⁴⁸ Moana Jackson made this point forcefully.⁴⁹ He argued that those who are redefining Māori rights and sourcing them within a pluralistic common law are only concerned with capturing Māori concepts in a way that is consistent with their law. In his view, “[t]hose who pursue such views are neo-colonists who neither understand nor respect Māori philosophy and culture. They are part of the attack on the indigenous soul”.⁵⁰ Conversely, there is a danger of the courts distorting tikanga and/or the common law through “seeing superficial parallels”.⁵¹
- 8.34 These are real risks and underscore the need for caution when the common law is engaging with tikanga. For example, we suggest courts should avoid trying to develop tikanga itself and should consider carefully whether an issue is suitable for judicial determination. As the Supreme Court said in *Ellis v R*, the courts must take care not to exceed their function when considering tikanga.⁵² Comments made by Te Aka Matua o te Ture | Law Commission (the Commission) in *Māori Custom and Values in New Zealand Law* remain relevant today:⁵³

Flexibility cannot be so great as to allow a proposition to be advanced as Māori custom law where it is in conflict with basic principles handed down from the ancestors. Certainty cannot be so paramount that past understandings of tikanga Māori should be adopted, along the lines of common law precedents, without continually being tested by the practical jurisprudence of Māori communal decision-making. So judges and decision-makers invited to give recognition to tikanga should bear in mind that the vitality of tikanga is being continuously replenished within the fora of te ao Māori.

- 8.35 Another constraint on courts is the principle that certain areas of law are unsuitable for judicial law making. Where there is a public policy context, the courts may sometimes be

⁴⁷ Ani Mikaere “Cultural invasion continued: the ongoing colonisation of tikanga Māori” (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 134; Moana Jackson “The Treaty and the word: the colonization of Māori philosophy” in Graham Oddie and Roy W Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992); Annette Sykes “The myth of tikanga in the Pākehā law” (2021) 8 *Te Tai Haruru Journal of Māori and Indigenous Issues* 7.

⁴⁸ Moana Jackson “Changing realities: unchanging truths” (1994) 10 *Australian Journal of Law and Society* 115 at 116.

⁴⁹ Moana Jackson “Changing realities: unchanging truths” (1994) 10 *Australian Journal of Law and Society* 115 at 116.

⁵⁰ Moana Jackson “Changing realities: unchanging truths” (1994) 10 *Australian Journal of Law and Society* 115 at 128.

⁵¹ Susan Glazebrook “The rule of law: guiding principle or catchphrase?” (2021) 29 *Taumauri | Waikato Law Review* 2 at 18.

⁵² *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [22].

⁵³ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 5.

ill equipped to weigh the considerations involved.⁵⁴ This is because the courts only decide the case before them and do not have the same tools as the executive and legislature to access relevant information, consult the community and do cost-benefit analyses.⁵⁵ However, the courts have long taken signals from Parliament as to the appropriate boundaries in this context,⁵⁶ and Parliament has provided clear signals that state law should engage with tikanga.⁵⁷

- 8.36 Despite the need for caution, the common law does have the capacity to engage with tikanga and to do so in a way that ameliorates the risks outlined. Provided that the boundaries of the common law method are kept at the fore, common law engagement with tikanga has real potential to contribute to the law of Aotearoa New Zealand.

THE CURRENT LAW ON ENGAGEMENT

- 8.37 The Supreme Court was unanimous in *Ellis v R* that tikanga has been, and will continue to be, recognised in the development of the common law of Aotearoa New Zealand in cases where it is relevant.⁵⁸ The *Ellis* case marks a significant milestone in the development of the common law relating to tikanga. It builds on earlier decisions, including *Attorney-General v Ngati Apa*,⁵⁹ *Takamore*,⁶⁰ and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.⁶¹ *Ellis v R* has also been applied in the subsequent Supreme Court decision of *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd*.⁶² We discuss the facts and reasoning of these cases in Chapter 5. This body of case law and other senior court authorities suggests that the common law has begun a distinct new chapter in its relationship to tikanga. Through these decisions, the common law has recognised tikanga as “custom”, “values”, “law”, a “source of law” and a “principles-based system of law”.⁶³
- 8.38 However, as Sarah Down and Professor Emeritus David V Williams observe: “there remains a lack of clarity as to when and how tikanga is part of the common law and precisely how these historical precedents are being relied on”.⁶⁴ In this section, we address this issue by identifying general principles on engaging with tikanga that arise

⁵⁴ *R v Hines* [1997] 3 NZLR 529 (CA) at 539.

⁵⁵ John Burrows “Common law among the statutes: the Lord Cooke Lecture 2007” (2008) 39 Victoria University of Wellington Law Review 401 at 411.

⁵⁶ *R v Hines* [1997] 3 NZLR 529 (CA) at 539; *C v DPP* [1996] AC 1 (HL) at 21 per Bridge J and 21 per Ackner J.

⁵⁷ See further the discussion in Chapter 10 on public agency engagement.

⁵⁸ See *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [19] and at [108]–[110] per Glazebrook J, [171]–[174] per Winkelmann CJ, [257]–[259] per Williams J and [279] per O’Regan and Arnold JJ.

⁵⁹ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

⁶⁰ *Takamore v Clarke* [2011] NZCA 587, [2011] 1 NZLR 573; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

⁶¹ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

⁶² *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767.

⁶³ *Attorney-General v Ngati Apa* [2003] 3 NZLR 644 (CA) (customs); *Takamore v Clarke* [2012] NZSC 116, [2013] NZLR 733 (values); *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [9] (law); *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [111] (a source of law); *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [76] (a principles-based system of law).

⁶⁴ Sarah Down and David V Williams “Building the foundations of tikanga jurisprudence” (2022) 29 Canterbury Law Review 27 at 37.

from case law. We also identify three categories of tikanga claims that have been heard by courts.

General principles for engaging with tikanga

8.39 Chapter 5 discussed Supreme Court and Te Kōti Pira | Court of Appeal (the Court of Appeal) authorities on how state law should engage with tikanga. The following points of general guidance can be extracted from these decisions:

- (a) Tikanga has been, and will continue to be, recognised in the development of the common law of Aotearoa New Zealand in cases where it is relevant.⁶⁵
- (b) Tikanga is the first law of Aotearoa New Zealand and continues to shape and regulate the lives of Māori.⁶⁶
- (c) When dealing with common law dispute resolution, if tikanga forms part of a person's heritage, the common law may require consideration of tikanga.⁶⁷ However, the potential relevance of tikanga to common law adjudication is not confined to Māori.⁶⁸
- (d) Tikanga must not be viewed through a non-Māori lens,⁶⁹ or shoehorned into an English law framework.⁷⁰ It should be defined by reference to tikanga as a complete system in which the core concepts are intertwined and exist as an interconnected matrix.⁷¹ Tikanga is a principles-based system of law, capable of adaptation according to context.⁷²
- (e) There are clear limits to common law engagement with tikanga. The courts must not exceed their function when engaging with tikanga, and care must be taken not to impair the operation of tikanga as a system of law and custom in its own right.⁷³
- (f) The common law cannot give effect to tikanga that is contrary to statute or to fundamental principles and policies of the law.⁷⁴
- (g) Where tikanga may clash with other values in society, existing principles or common law, this conflict will need to be worked through.⁷⁵

⁶⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [19]. The Court was unanimous on this point.

⁶⁶ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [22] summarising the tikanga majority at [107] and [110] per Glazebrook J, [168], [169] and [172] per Winkelmann CJ and [272] per Williams J.

⁶⁷ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [164] per Tipping, McGrath and Blanchard JJ.

⁶⁸ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239; *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Baldick v Jackson* (1910) 30 NZLR 343.

⁶⁹ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [297] per Williams J.

⁷⁰ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [33], as cited in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [169].

⁷¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [180] per Winkelmann CJ.

⁷² *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [76] per Winkelmann CJ, Glazebrook and Williams JJ.

⁷³ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [22] summarising the tikanga majority at [121]–[125] per Glazebrook J, [181] per Winkelmann CJ and [273] per Williams J.

⁷⁴ *Takamore v Clarke* [2012] NZSC 116, [2013] NZLR 733 at [95] per Elias CJ; *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [117] per Glazebrook J and [265] per Williams J.

⁷⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [119] per Glazebrook J, [182] per Winkelmann CJ and [266] per Williams J.

- (h) Whether tikanga conflicts with existing values and principles should be considered against the underlying tikanga values or principles rather than any particular observed tikanga practice.⁷⁶ Further, there is no presumption in favour of non-Māori legal norms.⁷⁷

8.40 With these general principles in mind, we turn to examine the three categories of tikanga claims with which the common law has engaged.

THREE CATEGORIES OF TIKANGA CLAIMS

8.41 The decisions noted above might be seen as modern developments of the old customary law approach, which we discuss in Chapter 5.⁷⁸ However, we suggest these authorities indicate the common law has evolved to now intersect with tikanga in relation to three categories of claims, which are:

- (a) claims based on tikanga as custom;⁷⁹
- (b) claims based on tikanga values;⁸⁰ and
- (c) claims based on tikanga as law.⁸¹

8.42 Where a claim is based on tikanga as custom, the court is asked to convert or transplant a tikanga-based practice (usually established by evidence) into a form of interest (mainly property) recognised by law.⁸² In a values case, the court is asked to consider tikanga values as part of the relevant context when developing the common law more broadly.⁸³ We identify a third and further type of claim, where the court is asked to make declarations or determinations about tikanga itself as law within Māori society.⁸⁴ Below, we summarise the courts' approach with respect to each category. Inevitably, in particular cases these categories may overlap to some extent and all tikanga-related cases will involve an inquiry as to what the relevant tikanga is.⁸⁵ But it is important to understand

⁷⁶ *Takamore v Clarke* [2012] NZSC 116, [2013] NZLR 733 at [96] per Elias CJ.

⁷⁷ *Attorney-General v Ngati Apa* [2003] NZCA 117, [2003] 3 NZLR 643 at [47] and [86]; *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18].

⁷⁸ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA); *Takamore v Clarke* [2011] NZCA 587, [2011] 1 NZLR 573; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

⁷⁹ *Attorney-General v Ngati Apa* [2003] 3 NZLR 644 (CA).

⁸⁰ *Takamore v Clarke* [2012] NZSC 116, [2013] NZLR 733 at [4].

⁸¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [22].

⁸² For example *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); *Arani v Public Trustee* [1919] NZPCC 1 at 1–2; *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [32]–[33]; *Re the Bed of the Wanganui River* [1955] NZLR 419 (CA) at 461 per North J; *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18]; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [9].

⁸³ For example the approach of the minority in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [10] and [210]–[211] per Winkelmann CJ and [236] per Williams J; see further at [212] per Winkelmann CJ and [238]–[244] per Williams J; *Kusabs v Staitte* [2019] NZCA 420, [2023] 2 NZLR 144 at [124] and [134]–[142]; *Takamore v Clarke* [2012] NZSC 116, [2013] NZLR 733 in particular per Elias CJ.

⁸⁴ For example: *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601; *Ngāti Whātua Ōrākei Trust v Attorney-General (No 5)* [2023] NZHC 74.

⁸⁵ *Te Rūnanga o Ngāti Whātua v Kingi* [2023] NZHC 1348 is an example of a case engaging all three categories. In that case, the Court resolved to strike out parts of a claim under the Marine and Coastal Area (Takutai Moana) Act 2011,

what type of claim is made as this defines what type of engagement the court is undertaking with tikanga and the implications of that for both tikanga and state law.

Category One: claims based on tikanga as custom

8.43 Claims based on tikanga as custom seek recognition of a tikanga-based custom or practice as giving rise to legally enforceable rights and interests in the common law. Historically, these have been called customary law claims.⁸⁶ As we discussed in more detail in Chapter 5, customary law claims can be divided into general custom claims and claims about customary property rights. Below, we briefly summarise the courts' approach to each type of claim. We also envisage that, as the law in this area continues to develop, these two sub-categories will merge. For present purposes we treat them as a single category of claim.

The courts' approach to general custom claims

8.44 The 1908 case of *Public Trustee v Loasby* long provided the criteria for when the court would accept a claim that a general (in other words, non-property) tikanga-based custom should be recognised in the common law as giving rise to enforceable rights and obligations. The tikanga had to be a generally practiced and longstanding custom, not contrary to statute, and reasonable.⁸⁷ This could include contemporary expressions of the custom.⁸⁸ In the Supreme Court's 2022 decision in *Ellis v R*, a majority agreed that the *Loasby* criteria for recognition of general custom should no longer apply.⁸⁹ Glazebrook J noted in particular that the requirements for generality, certainty and consistency did not accord with the nature of tikanga.⁹⁰ Her Honour also observed that the requirement for reasonableness wrongly imported notions of judging tikanga and assumed the superiority of Western values.⁹¹ The majority opinion addressing tikanga issues did not go on to articulate a replacement test.⁹²

concluding among other things that tikanga values were relevant to whether the claim should be struck out at [17]–[33] and [47]–[55]. The Court also found at [97]–[103] that some of the tikanga claims had no prospect of success and struck them out without the need for evidence on those matters, as the relevant tikanga were well settled.

⁸⁶ As we discuss in Chapter 5, when we refer to “customary law” or “tikanga as custom” we are referring to the common law doctrine inherited from English law which gives legal effect, within the common law, to selected rights or interests sourced in tikanga. We are not using “custom” or “customary law” as synonymous with tikanga itself.

⁸⁷ *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC); and see further discussion of *Loasby* in *Takamore v Clarke* [2011] NZCA 587, [2011] 1 NZLR 573 at [172] per Glazebrook J.

⁸⁸ *R v Iti* [2007] NZCA 119, [2008] 1 NZLR 587.

⁸⁹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [113]–[116] per Glazebrook J, [177] per Winkelmann CJ and [260] per Williams J.

⁹⁰ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [113]–[115] per Glazebrook J.

⁹¹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [115] per Glazebrook J.

⁹² In *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at fn 297 O'Regan and Arnold JJ note that “In the present case, the majority overrule the established test for incorporation of custom into the common law, but without saying how it will be replaced ... although we acknowledge Williams J does address the issues at [261]–[265]. We consider that the test set out in the incorporation cases should not be overruled without the Court being in a position to articulate what replaces it, especially as no counsel argued that it should be overruled.”

8.45 Nevertheless, we do not read the Supreme Court’s decision in *Ellis v R* as preventing further “custom” law claims.⁹³ The previously summarised general principles stated by courts for engaging with tikanga would logically apply to such claims, as would the requirement to establish the claimed tikanga-based custom. Below, we set out principles stated by the Court of Appeal in *Ngati Apa* that (while on their face pertaining to customary land rights or interests) may have some relevance here.⁹⁴ The main risk to guard against when recognising tikanga as custom is that state law supplants tikanga.

The courts’ approach to customary property rights claims

8.46 The Court of Appeal’s *Ngati Apa* decision set out the following principles relating to the recognition of claims to customary rights and interests in land:

- (a) The assumption of sovereignty did not displace pre-existing property held according to tikanga.⁹⁵
- (b) The precise nature and form of any customary land rights or interests must be defined by reference to tikanga and this will be “either known to lawyers or discoverable by them by evidence”.⁹⁶
- (c) Statutory extinguishment of customary land rights must be clear and plain.⁹⁷
- (d) There is no presumption in favour of adverse English common law norms.⁹⁸

8.47 The requirements for proof of customary property claims relating to land have been largely governed by statute since 1862.⁹⁹ Present examples of relevant statutes include Te Ture Whenua Maori Act 1993 and the Marine and Coastal Area (Takutai Moana) Act 2011 (Takutai Moana Act).¹⁰⁰ Te Ture Whenua Maori Act requires Māori customary land to be held “in accordance with tikanga Māori” and the Takutai Moana Act requires customary marine title to have been held since 1840 and in “accordance with tikanga”.¹⁰¹ The phrase “in accordance with tikanga Māori” has been held to mean “to make a determination

⁹³ An example of the potential type of tikanga-based claim that falls into this category is a claim that an area is subject to a rāhui or restricted use, as occurred in *Parininihi ki Waitotara v Ngā Ruahine Iwi Authority* [2004] 2 NZLR 201 (HC). As noted by the High Court in that case at [10], this claim gave rise to three key issues. Did the tohunga impose the rāhui? If so, what is the status of the rāhui in customary law? If the rāhui does exist, and gives rise to customary rights, do those rights amount to justification in law for the defendant’s conduct (in that case, an affirmative defence to the alleged intentional tort of trespass)?

⁹⁴ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA).

⁹⁵ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [15] and [32]–[33] per Elias CJ and [137]–[140] per Keith and Anderson JJ.

⁹⁶ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [32]–[33] and [54] per Elias CJ and [184] per Tipping J. The applicable tikanga may also be a matter for submission: see the observations of Glazebrook and Williams JJ in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [125] and [273] respectively.

⁹⁷ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [161] per Keith and Anderson JJ and [47] per Elias CJ.

⁹⁸ *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) at [33] and [86]–[87] per Elias CJ; see also *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18].

⁹⁹ Native Land Act 1862.

¹⁰⁰ The Marine and Coastal Area (Takutai Moana) Act 2011 governs customary marine title or marine rights. Te Ture Whenua Maori Act 1993 governs Māori customary land: see s 129.

¹⁰¹ Te Ture Whenua Maori Act 1993, s 129(2)(a); Marine and Coastal Area (Takutai Moana) Act 2011, ss 51 and 58.

according to tikanga Māori — from the inside”.¹⁰² Chapter 7 refers to some of the case law dealing with claims under these schemes.¹⁰³

- 8.48 With respect to customary property claims that relate to types of property other than land (for example, water or intellectual property), there is little case law directly on point.¹⁰⁴ There is some case law on recognition of a customary right to fisheries.¹⁰⁵ As a starting point, we suggest it would be logical for principles for the recognition of customary land claims set out in *Ngati Apa* to also apply to other types of property claims. Beyond this, in addition to the general principles for engaging with tikanga summarised in the previous section, the approach taken will need to be developed depending on the specific nature of the tikanga custom and any applicable common law and legislative context.¹⁰⁶

Category Two: tikanga values

- 8.49 The second category of tikanga claims is claims based on tikanga values. Claims that seek recognition of tikanga values can arise in a variety of contexts, including environmental law, employment law, sentencing and family law.¹⁰⁷ Recognition of tikanga values can also be relevant to the development of the common law itself and to the outcome in particular cases.¹⁰⁸
- 8.50 As noted by Elias CJ in *Takamore*, common law recognition of tikanga values does not involve a contest between competing rules of law.¹⁰⁹ Rather, the court weighs the tikanga values alongside other values that are material to the resolution of a dispute. This may involve developing the common law, but it does not develop tikanga itself or transform it into state law. The case of *Takamore* illustrates how tikanga values can influence the content and shape of the common law — in that case, by tikanga being included in the matters to be weighed by the court making a decision with respect to burial of a person. This process of weaving is the everyday work of the common law method.

¹⁰² *John da Silva v Aotea Māori Committee and Hauraki Māori Trust Board* (1998) 25 Tai Tokerau MB 212 (25 TTK 212); *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772 at [119]–[168]; *Re Reeder (of Ngā Pōtiki)* [2021] NZHC 2726, [2022] 3 NZLR 304 at [23]–[28].

¹⁰³ For an overview of the operation of the Takutai Moana Act see: *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772; *Re Reeder (of Ngā Pōtiki)* [2021] NZHC 2726, [2022] 3 NZLR 304.

¹⁰⁴ See most recently *Attorney-General v Trustees of Whaitiri Māori Reserves* [2023] NZHC 204; *Mercury NZ Ltd v Māori Land Court* [2023] NZHC 1644 at [79]–[95] on the issue of the Māori Land Court’s lack of jurisdiction to determine a claim to water.

¹⁰⁵ *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC) at 686–688.

¹⁰⁶ An example of custom law analysis can be found in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

¹⁰⁷ See for example *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101. In that case Customs had included within its institutional framework a commitment to, among other things, a “te ao Māori perspective” and “te ara tika” (we do what is right). It had also made express reference to “mana” as being an expected characteristic within the employment relationship. The Court considered that where, as here, the evidence demonstrates a commitment to act in accordance with tikanga, an employer should be obliged to do so in substance and that this required Customs to consider how applicable tikanga and tikanga values should inform its conduct and then to act accordingly: see generally at [128]–[142] and particularly at [138]. The Court also found that the tikanga values are relevant to all staff. At the time of publication of this Study Paper it was unclear whether the decision would be appealed.

¹⁰⁸ See also for example *Te Rūnanga o Ngāti Whātua v Kingi* [2023] NZHC 1348.

¹⁰⁹ *Takamore v Clarke* [2012] NZSC 116, [2013] NZLR 733 at [92].

- 8.51 However, *Takamore* also reveals the complexity of the common law’s engagement with tikanga values. None of the nine judges in three different courts involved in the *Takamore* litigation (Te Kōti Matua | High Court (the High Court), the Court of Appeal and the Supreme Court) favoured a result that would have been tikanga-consistent. One author suggests this is surprising from a Māori perspective, given the significance of the tikanga values engaged in that case (those that relate to the burial of a deceased person).¹¹⁰ While *Takamore* is authority for the common law recognition of tikanga values, it was also a case where tikanga values were not determinative of the outcome.
- 8.52 The fact that tikanga was not determinative in this case brings into focus the question of the weight afforded to tikanga. History has shown that there is a risk non-tikanga values may carry presumptive significance in the weighing exercise. There are, however, directions from modern decisions on tikanga as custom law that are relevant. They include statements made in *Ngati Apa* (subsequently affirmed by the Supreme Court in *Paki v Attorney-General*) that, to the extent that tikanga gives rise to cognisable interests, there is no presumption in favour of contrary non-tikanga values.¹¹¹
- 8.53 We consider that the minority decision in *Ellis v R* is consistent with this direction. The minority judges saw tikanga as relevant to the common law rule at issue, which was whether the interests of justice favoured continuing an appeal after the appellant’s death.¹¹² Winkelmann CJ and Williams J would have preferred an approach to assessing the interests of justice that “folded” tikanga considerations in.¹¹³ Winkelmann CJ’s approach included a consideration of tikanga values and concepts, which “provide a framework” for considering the issue of continuance and what the interests of justice require.¹¹⁴ The final test the Chief Justice proposed for assessing the interests of justice would have been “a development of the common law appropriate for Aotearoa New Zealand” that was “consistent with tikanga”.¹¹⁵ For example, consideration of one element — the “personal interest in having a miscarriage of justice addressed through the appellate process” — would have required direct consideration of the mana of the appellant and the appellant’s whānau.¹¹⁶
- 8.54 Williams J endorsed the framework proposed by Winkelmann CJ.¹¹⁷ Tikanga provided a “very helpful perspective on the issues” in the case.¹¹⁸ Williams J saw nuances within the methodology of engagement with tikanga, which he called the “difficult task ... in

¹¹⁰ Natalie Coates “The recognition of tikanga in the common law of New Zealand” [2015] New Zealand Law Review 1 at 12.

¹¹¹ *Attorney-General v Ngati Apa* [2003] NZCA 117, [2003] 3 NZLR 643 at [47] and [86]; *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277 at [18].

¹¹² As discussed in Chapter 5, the majority regarding the test for “interests of justice” (comprising Glazebrook, O’Regan and Arnold JJ) did not consider that tikanga was material to the development of the common law rule in issue: *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [11] and [142]–[145] per Glazebrook J and [315] per O’Regan and Arnold JJ.

¹¹³ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [10] and [210]–[211] per Winkelmann CJ and [236] per Williams J. See further at [212] per Winkelmann CJ and [238]–[244] per Williams J.

¹¹⁴ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [187].

¹¹⁵ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [212].

¹¹⁶ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [210(c)].

¹¹⁷ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [238].

¹¹⁸ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [256].

determining the weight the relevant tikanga principle should carry”.¹¹⁹ In his view, context will provide guidance but the “tikanga-as-an-ingredient” approach will often ensure that the common law of Aotearoa New Zealand develops along a path that is mindful of both legal traditions.¹²⁰

- 8.55 Williams J’s description of tikanga as an ingredient effectively captures the essence of the court’s role in claims based on tikanga values. The weight to be given to tikanga in a particular case will be a matter for the court, although we consider that the court does not approach the question of weight with an unfettered discretion. First, in line with the principle developed in cases addressing tikanga as customary law, there is no presumption in favour of English common law values. Second, the significance of the tikanga values in question will provide guidance as to the weight to be given. In some cases, the significance of the tikanga values will be such that they should be determinative. In other words, a genuine engagement with tikanga will assist with the weighing exercise that must be undertaken.¹²¹

Category Three: tikanga as law

- 8.56 The third and final category of tikanga claim is those that ask the court to make declarations or determinations about tikanga itself.¹²² This category of case effectively deals with tikanga where it is determinative and operating as law within Māori society, requiring the court to determine what the tikanga is. Unlike the prior two categories, the key conceptual difference in such cases is that courts are not concerned with state law filters or the exercise of weighing tikanga against other values. They may not be concerned with state law outcomes at all. This could include claims based on mana, tapu and noa that give rise to tikanga relational interests.¹²³ Claims to mana whenua, in the sense of the authority and responsibility to speak for the whenua (land), is an example of a tikanga relational interest.
- 8.57 At present, this category of tikanga recognition does not have the direct effect of displacing or superseding the common law or statute.¹²⁴ As Palmer J explained in *Ngāti Whātua Ōrākei (No 4)*, tikanga is also not directly binding on the Crown.¹²⁵ However,

¹¹⁹ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [267]–[269].

¹²⁰ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [269].

¹²¹ The approach taken by the Court of Appeal in *Kusabs v Staite* shows the Court giving decisive weight to the principle of whanaungatanga in the context of hapū trusts. In that case, the Court applied tikanga principles for the purpose of assessing whether a trustee on two hapū trusts was in a position of conflict when making decisions involving and affecting both trusts. The Court noted that bearing “both the principles of equity and whanaungatanga” in mind, there was no realistic prospect of a conflict: *Kusabs v Staite* [2019] NZCA 420, [2023] 2 NZLR 144 at [134].

¹²² For example *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601. See also the discussion in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [64]–[74] and [100]–[122].

¹²³ Our description here of “tikanga relational interests” is borrowed from the writings of the late Moana Jackson. See for example Moana Jackson “Tipuna title as a tikanga construct re the foreshore and seabed” (March 2010) <www.converge.org.nz>; Moana Jackson Affidavit, 24 April 2012 at [19], as cited in Natalie Coates and Horiana Irwin-Easthope “Kei raro i ngā tarutaru, ko ngā tuhinga o ngā tupuna | Beneath the herbs and plants are the writings of the ancestors: tikanga as expressed in evidence presented in legal proceedings” (paper prepared for Te Aka Matua o Te Ture | Law Commission, 2023) at [4.6].

¹²⁴ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [117].

¹²⁵ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [570].

determinations about tikanga may have an indirect effect through judicial review,¹²⁶ statute or as a matter of government policy such as in the context of the Crown’s obligations under the Treaty.¹²⁷ Findings about tikanga may also inform judicial engagement with tikanga values, including in cases involving the exercise of statutory discretion.¹²⁸

- 8.58 There is very little authority on the rules for engaging directly with tikanga from the courts of general jurisdiction to date. One example is the Supreme Court’s decision in *Pouākani*, where the Court had to consider competing tikanga claims in respect of land.¹²⁹ The issue was whether the potential resumption of land to non-mana whenua accorded with tikanga.¹³⁰
- 8.59 However, there is a wealth of authority from Te Kōti Taiao | Environment Court and Te Kooti Whenua Māori | Māori Land Court that can be drawn on. Although the Environment Court is not empowered to make declarations as to tikanga as such, these courts are routinely called on to resolve competing tikanga claims.¹³¹ The jurisprudence of those courts provides useful guidance for engaging with tikanga, including techniques for identifying and evaluating competing claims. Chapters 5 and 7 discuss some of this case law.
- 8.60 The Supreme Court’s directive in *Ellis v R* that the court must not impair the operation of tikanga as a system of law in its own right has its strongest application with respect to this category of claims.¹³²
- 8.61 With these principles and categories of tikanga claims in mind, we turn to briefly examine some key issues relating to the courts’ engagement with tikanga. These issues provide important context for the development of principled, coherent and sustainable strategies for courts’ future engagement.

Uncertainty about the role of tikanga and when it may be relevant

- 8.62 There is some uncertainty about how the common law relates to tikanga and when tikanga may be relevant. This is reflected in the language that courts have used to describe the developing relationship between the common law and tikanga such as referring to “dialogue” and referring to tikanga as both “law” and a “source of law”.¹³³ Areas of uncertainty may include the type of case or the context in which tikanga could

¹²⁶ *Ngāi Tai Kī Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368.

¹²⁷ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [355]–[358].

¹²⁸ See for example the discussion in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352; and more generally the discussion of environmental law in Chapter 7.

¹²⁹ *Wairarapa Moana Kī Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767.

¹³⁰ “Resumption” is a term used to describe the Waitangi Tribunal’s power to effectively direct the return of certain categories of land subject to Treaty of Waitangi claims: *Wairarapa Moana Kī Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at fn 1.

¹³¹ See for example *Pokere v Bodger — Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210); *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2020] NZHC 2768, [2021] 3 NZLR 352 at [68]–[74].

¹³² *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [120] and [122] per Glazebrook J, [181] per Winkelmann CJ and [270]–[271] per Williams J.

¹³³ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239. See for example discussion of the “dialogue” between tikanga and the common law at [268]–[272] per Williams J and discussion of tikanga as a “source of law” at [111] per Glazebrook J.

be relevant. *Ellis* has extended the potential relevance of tikanga to a case with no Māori parties, leading some commentators to express concern that the applicability of tikanga could be unclear in future cases or that tikanga may be reduced to generic application in ways that lack authenticity.¹³⁴

8.63 The approach we suggest is designed to respond to concerns about uncertainty. We consider that some concerns can be ameliorated with a focus on the tikanga normative framework that Chapter 3 described. This framework sets natural boundaries for the application of tikanga.

8.64 Further, uncertainty should not be confused with elasticity. Tikanga, like the common law, has fundamental principles of general application but can vary according to the context.¹³⁵ Variance is to be expected.¹³⁶ The common law has its own uncertainties which, as discussed above, are partially the result of dialogue and debate as the law changes, one of the common law method's great strengths.¹³⁷ As Glazebrook J emphasised in *Ellis v R*, the common law as it relates to tikanga will develop gradually, favouring certainty, consistency and accessibility:¹³⁸

The caselaw to date on tikanga as part of the common law has been relatively limited. Further development will be gradual as cases arise. Certainty, consistency and accessibility are strong values in our legal system. Precedent will still bind as it does conventionally, unless distinguishable. This is why the common law method is generally for the law to develop incrementally as it will continue to do with regard to the application of tikanga in the common law.

8.65 We acknowledge the concern that tikanga may be introduced to contexts where previously it has not featured, but we think this concern can be overstated. Tikanga performs like the common law.¹³⁹ It responds to the subject matter in dispute by reference to relevant principle and in light of prior experience and precedent.¹⁴⁰ Tikanga is likely to be relevant in areas where it already operates naturally or by statutory incorporation, for example, in environmental law, family law, inter-Māori relationships or Crown-Māori relationships. Tikanga values could also feature in other areas of the law where they have obvious application, for example, when dealing with taonga or surrogacy.¹⁴¹ But even here, the common law also moves incrementally. As yet, no case has found tikanga determinative of how a common law rule should be formulated.

¹³⁴ Sarah Down “Tikanga Māori — recognition but key questions unanswered — *Ellis*” [November 2022] *Māori Law Review* at 12.

¹³⁵ See further Chapter 3.

¹³⁶ *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142, [2022] 1 NZLR 767 at [74] per Winkelmann CJ, Glazebrook and Williams JJ.

¹³⁷ John Burrows “Common law among the statutes: the Lord Cooke Lecture 2007” (2008) 39 *Victoria University of Wellington Law Review* 401 at 406.

¹³⁸ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [127] per Glazebrook J.

¹³⁹ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 5.

¹⁴⁰ Carwyn Jones “A Māori constitutional tradition” (2014) 12 *New Zealand Journal of Public and International Law* 187 at 193.

¹⁴¹ Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022); Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person's property on death* (NZLC R145, 2021).

Developing expertise in engaging with tikanga

- 8.66 Because tikanga was so long eclipsed by state law it has not featured in general legal education until relatively recently.¹⁴² Consequently, the legal profession and judiciary are still developing expertise in engaging with tikanga. Both lawyers and judges have necessarily shown some caution in when and how to do so.
- 8.67 In the general courts, as demonstrated by the approach taken in *Ellis v R*, heavy reliance is often placed on expert evidence of applicable tikanga values or practices for resolving disputes. However, given the breadth and volume of potential engagement with tikanga across the various courts, this approach is unlikely to be sustainable. Consideration of how claims involving tikanga are best facilitated within the court system is needed, particularly in novel cases. Later in this chapter we recommend some options for enhancing tikanga dispute resolution processes.
- 8.68 In many ways, though, the demands which tikanga will place on the courts are not unfamiliar. Importantly, tikanga regulates relationships based on well-known tikanga concepts.¹⁴³ As is true in any case before the courts, the task will be to identify which of the tikanga concepts and the applicable principles, values or norms underpinning them are relevant to the resolution of the dispute.

STRATEGIES FOR ENGAGEMENT

- 8.69 In this section, we propose strategies for engaging with tikanga. These have been developed with the assistance of Professors Wiremu Doherty, Tā Hirini Moko Mead and Tā Pou Temara of Te Whare Wānanga o Awanuiārangi (the Awanuiārangi pūkenga). They respond to the issues outlined above and to larger underlying concerns about maintaining the integrity and coherence of both tikanga and the common law. Strategies for engaging with tikanga must necessarily evolve in a manner that is consistent with the common law method and that appropriately responds to concerns about the proper function of the common law.
- 8.70 The first strategy focuses on the tikanga lens and we hope will be useful to all practitioners and judges when faced with a tikanga issue. It responds to the directives of the Supreme Court that tikanga must be viewed as it is understood in te ao Māori.¹⁴⁴
- 8.71 The second set of strategies focuses on judicial engagement with tikanga by our courts of general jurisdiction. We suggest manaakitanga should be a guiding principle for judicial engagement. In this context, we mean an obligation to take care of the mana of tikanga. We discuss the “tools” that are currently available to the judiciary to facilitate this exercise when dealing with different types of tikanga claims.

¹⁴² Jacinta Ruru and others *Inspiring National Indigenous Legal Education for Aotearoa New Zealand’s Bachelor of Laws Degree: Phase One — Strengthening the Ability for Māori Law to Become a Firm Foundational Component of a Legal Education in Aotearoa New Zealand* (Ngā Pae o te Māramatanga, supported by the Michael and Suzanne Borrin Foundation, August 2020).

¹⁴³ See further Chapters 3 and 4.

¹⁴⁴ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [122] and [123] per Glazebrook J and [270]–[272] per Williams J; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [297] per Williams J.

- 8.72 Finally, the third strategy identifies some possible processes for resolving disputes within our existing court system and outside of the courts of general jurisdiction. Our focus has been on identifying new approaches that would be both consistent with manaakitanga and compatible with tikanga.

COMMENCING WITH A TIKANGA LENS

- 8.73 To ensure that common law recognition of tikanga is coherent from a tikanga perspective, we consider that any process for engagement with tikanga by legal practitioners and the courts must consider tikanga as it is understood within te ao Māori. We refer to this process as applying a tikanga lens. A tikanga lens is a fundamental requirement for maintaining the integrity of tikanga and the common law. It is important both to view tikanga as part of an integrated system of principles and also to understand that tikanga is pragmatic and can vary according to context. Properly understood, the fundamental concepts of tikanga also provide natural boundaries for its application by the common law which assists in maintaining the coherence of the common law.
- 8.74 We commence this section by referring to and briefly summarising our account of tikanga in Part One, which provides guidance on how to apply a tikanga lens. As we explain in the three chapters comprising that Part, any process of engagement should commence from within te ao Māori so that the cultural dimension of tikanga is properly understood. Tikanga should also be understood as an integrated framework of concepts. Following this overview, we focus primarily in this section on examples from case law that have applied a tikanga lens (of some kind) to assist in resolving tikanga issues. The cases both illustrate how courts have approached this task and may provide others with guidance.

Te ao Māori

- 8.75 Recognising that tikanga is grounded in a Māori world view is essential to understanding tikanga. As we explain in Chapter 2, we see the metaphor of te wharehenui as a helpful way of conceptualising te ao Māori and as a reference point for those wishing to engage with tikanga from within te ao Māori.
- 8.76 In short summary, within the wharehenui reality is multi-dimensional. There are multiple layers of consciousness and connection, which include the physical and the metaphysical. We also emphasise that it is not necessary for those engaging with tikanga to accept the world view within which tikanga is located. Rather, we suggest that understanding the underlying normative basis for tikanga will assist to properly engage with tikanga.

A tikanga framework

- 8.77 Summarising some of the essential norms which we describe in Chapter 3, whakapapa refers to the multiple layers of consciousness and connection between all things, while whanaungatanga refers to the glue that helps maintain and define that connection. Within this whakapapa and whanaungatanga matrix, the status of all natural things is defined — their mana, their tapu and when they are noa. Mana refers to their power and responsibilities, tapu to their inherent worth or their potential for harm and noa to their potential to operate without restriction. Mauri refers to life essence or force of the thing that defines it. Mana and tapu are directed to the protection of mauri.

- 8.78 It is important to note that all natural things may present with mana, tapu or noa at any given time, which will in turn define their relationship to other natural things at that time.¹⁴⁵ Mana, tapu and noa may crystallise or assume prominence depending on the entity and the context. Utu and ea will look to maintain balance or order between all things according to their mana, tapu and noa. Kawa then provides the processes and methods for managing these complex relationships.
- 8.79 It follows that relationships are ordered by reference to these norms, with whakapapa and whanaungatanga providing the source and framework for the designation of status (mana, tapu or noa) at any given time. The interaction between all things is managed according to these designations and associated responsibilities and by reference to any applicable kawa process. We suggest that commencing with these norms and returning to them throughout any engagement will assist with identifying the contexts in which tikanga should be considered, the appropriate tikanga to consider and the weight to be given to particular tikanga values — both against each other and when interacting with common law values.
- 8.80 We identified the concepts above based on expert advice and research as core or fundamental norms that are broadly shared by hāpori Māori (Māori communities). Within te ao Māori they are the basis for tikanga as an integrated system. In Chapter 3 we further consider how they may be grouped into the following categories:
- (a) Concepts of connection — whakapapa and whanaungatanga. These we term structural norms. The entirety of te ao Māori is structured by reference to these concepts, and they establish an underlying normative frame.
 - (b) Concepts of equilibrium and balance — mauri, utu and ea. These concepts function prescriptively in the sense that they make demands for the maintenance of equilibrium and balance.
 - (c) Concepts of status of an entity — mana, tapu and noa. These order Māori society and provide the jural basis for relationships in te ao Māori.
 - (d) Concepts of responsibility or obligations associated with the tikanga mentioned above.
 - (e) Processes and procedures that provide the methods for regulating relationships, which many iwi and hapū call kawa.
- 8.81 In assembling fundamental tikanga concepts in this way, we are not suggesting tikanga works as a fixed system. Tikanga is both inherently pragmatic and capable of evolution. It has localised variation. The tikanga system may also be explained in different ways, with different arrangements of core tikanga concepts. Our objective is simply to provide an account of tikanga consistent with that given by the Awanuiārangi pūkenga while also providing a means of understanding the interconnections of core tikanga concepts.

¹⁴⁵ As explained in Chapter 3, there are many types of mana and forms of tapu. Understanding those types will be key to understanding the significance of the particular status and any violation or derogation of mana or tapu.

A guide and case study illustrations

8.82 Based upon the Chapter 3 framework, in Chapter 4 we develop matters further by setting out case studies to provide further illustration and a step-by-step guide for tikanga analysis. Although the illustrations that Chapter 4 provides reflect only one approach to engaging with tikanga, we think they can be a useful tool for those considering how tikanga may be engaged in a legal situation. Importantly, as we emphasise in that chapter, expert input is likely to be essential in almost all cases — and to those tikanga experts, deconstructing tikanga in this way may seem at odds with how tikanga is practised in the real world. However, the objective of such an approach is to ensure that people who are unfamiliar with tikanga both are able to look through a tikanga lens and approach tikanga in a systematic way in order to maintain its integrity and coherence. We accordingly encourage reference to Chapter 4 and the entirety of Part One, before returning to the consideration of case law examples and other processes that we now set out.

Examples from case law

8.83 Considering what is already happening in the courts is another way to understand how tikanga may operate in a legal context. We have identified a diverse range of cases that we think helpfully illustrate the application of a tikanga lens. The following cases are a sample only and Chapters 5 and 7 discuss several further examples. In selecting the cases, we have excluded cases that are still subject to appeal or rights of appeal.

Trustee duties — grounded in a tikanga lens

8.84 The Māori Land Court’s decision in *Pokere v Bodger* illustrates how a tikanga lens can be applied to an analysis of trustee duties. In that case, the applicants challenged the decision of the trustees of an ahu whenua trust to destroy a whare (house) on trust land on the basis that the whare was akin to a marae.¹⁴⁶ The applicants argued the trustees had breached their duties both in tikanga and in “orthodox” trust law under the Trusts Act 2019.¹⁴⁷ The Court first outlined a “tikanga frame of reference”, which was akin to applying a tikanga lens in substance.¹⁴⁸ Applying this frame of reference, it saw mana as central to the obligations that were owed by the trustees.¹⁴⁹ It said mana was based in the whakapapa of the whānau that had built and lived in the whare, which was significant.¹⁵⁰ The Court saw the tikanga framework as central to determining the status of the whare, saying:¹⁵¹

To respond to the question of ‘nō wai te Whare’ [to whom does the house belong] within a perception of tikanga, we need to return to the concept of ‘mana’ in the tikanga-framework.

¹⁴⁶ *Pokere v Bodger* — Ōuri 1A3 (2022) 459 Aotea MB 210 (459 AOT 210). The decision was the first fully bilingual decision of the Māori Land Court.

¹⁴⁷ *Pokere v Bodger* — Ōuri 1A3 (2022) 459 Aotea MB 210 (459 AOT 210) at [126].

¹⁴⁸ *Pokere v Bodger* — Ōuri 1A3 (2022) 459 Aotea MB 210 (459 AOT 210) at [11].

¹⁴⁹ *Pokere v Bodger* — Ōuri 1A3 (2022) 459 Aotea MB 210 (459 AOT 210) at [42] and [87].

¹⁵⁰ *Pokere v Bodger* — Ōuri 1A3 (2022) 459 Aotea MB 210 (459 AOT 210) at [45].

¹⁵¹ *Pokere v Bodger* — Ōuri 1A3 (2022) 459 Aotea MB 210 (459 AOT 210) at [76].

- 8.85 The Court considered the tikanga of kaitiaki (guardianship) had not been met because the whare had not been maintained, which it said made the answer to the “nō wai te whare” question difficult.¹⁵² However, regardless of the status of the whare, it said that the trustees owed duties in tikanga alongside their orthodox fiduciary duties:¹⁵³

Similar to fiduciary law, where the duties and remedies arise based on the nature of trustee/beneficiary relationship, as opposed to prescription, tikanga is also relational and context specific.

- 8.86 The Court said the trustees were obligated to consider the role and views of any acknowledged kaitiaki and appoint pou tikanga (experts) when making decisions that may impact on the roles or mana of the kaitiaki and pou tikanga.¹⁵⁴ Applying its tikanga framework, the Court considered the most significant mana lay with those associated with the whare and the whenua — in this case, Ms Warren who occupied the whare. The Court considered the trustees’ actions with respect to Ms Warren were tika (correct) as they had sought to consider and look after her interests throughout, despite her refusal to co-operate with them.¹⁵⁵ This same evidence was relevant when considering the allegation that the trustees had acted in their own interests in breach of fiduciary law, which was similarly dismissed.¹⁵⁶

Wellbeing — mana and mauri

- 8.87 The High Court’s judgment in *Te Pou Matakana Ltd v Attorney-General (No 2)* is a helpful illustration of how a court can apply whakapapa, whanaungatanga and mauri as framing principles for its analysis.¹⁵⁷ The case considered the Ministry of Health’s decision to refuse a request to release information about the vaccination status of Māori individuals to Māori health providers. The Crown argued that obligations under the Treaty, including the duty to consult and connected respect for rangatiratanga (chiefly mana), were reasons not to release private information. The Court referred to evidence of a pūkenga, Dr Carwyn Jones, who linked rangatiratanga to the underlying principles of whakapapa, whanaungatanga and the wellbeing of the people. He noted that it is not inconsistent with rangatiratanga to maintain those values and that where the highly prized taonga of health is at risk, “not all tikanga principles, values or practices will be able to be fulfilled”.¹⁵⁸ The Court relied on Jones’ evidence that tikanga did not require the Ministry to obtain iwi by iwi consent to the disclosure.¹⁵⁹ Importantly, the Court examined the concept of rangatiratanga within the broader tikanga framework and having done so identified the nature of the Crown’s obligations in this context.

¹⁵² *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [79].

¹⁵³ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [103].

¹⁵⁴ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [107].

¹⁵⁵ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [110].

¹⁵⁶ *Pokere v Bodger* — *Ōuri 1A3* (2022) 459 Aotea MB 210 (459 AOT 210) at [136]–[137].

¹⁵⁷ *Te Pou Matakana Ltd v Attorney-General (No 2)* [2021] NZHC 3319, [2022] 2 NZLR 178 at [99]–[100].

¹⁵⁸ *Te Pou Matakana Ltd v Attorney-General (No 2)* [2021] NZHC 3319, [2022] 2 NZLR 178 at [108]–[109].

¹⁵⁹ *Te Pou Matakana Ltd v Attorney-General (No 2)* [2021] NZHC 3319, [2022] 2 NZLR 178 at [107]–[113].

Lakes — mana and tapu

- 8.88 The Māori Land Court decision of *Taueki v McMillan*, which involved a claim that an entire lake was wāhi tapu (a sacred area), illustrates how a court can apply the concept of tapu within the broader tikanga framework when determining an issue.¹⁶⁰ First, the Court identified the importance of connection between claims of tapu and mana:¹⁶¹

From the outset I express an instinctive discomfort, despite the legislative provisions, in any court determining the existence or otherwise of a wahi tapu, without the endorsement of the hapu or iwi who maintain mana whenua over the area in question. This is because the exercise of rangatiratanga by the tangata whenua tribes in the context of the customary practices within their own rohe [region] is and should only be a matter for them.

- 8.89 The Court also discussed evidence to the effect that wāhi tapu refers to a place being sacred therefore subject to restriction,¹⁶² but that there can be “tapu for certain periods: rivers until fishing was ended; cultivations until the planting or reaping was completed; and districts until hunting was done”.¹⁶³ This usefully shows that the effect of tapu can be context-specific.¹⁶⁴ The Court noted the effect of water on tapu, namely that it “dissipates the effects of tapu” and is used “to control tapu”.¹⁶⁵ The Court said it was important that a majority of affected whānau had not been consulted and could not be said to support a finding that the lake in its entirety was wāhi tapu. In so doing, the Court emphasised a critically important aspect of tikanga — that it is premised on the support of the affected people. It also emphasised the importance of whakapapa and whanaungatanga and the related concept of mana and that mana and tapu go hand in hand. In the result, the Court found on the facts before it that, while parts of the lake may be wāhi tapu, the whole lake was not.¹⁶⁶

Welfare and property protection — whakapapa and connection

- 8.90 Te Kōti Whānau | Family Court applied tikanga principles when considering whether to grant welfare and property orders in the case of *In the matter of [S]*.¹⁶⁷ The Court had been asked to make orders under the Protection of Personal and Property Rights Act 1988 in respect of S, who was at the end stages of mate wareware (Alzheimer’s disease). While S’s parents were immersed in te ao Māori and tikanga, S had been prevented from engaging with her Ringatū faith, te reo Māori and her extended whānau for much of her

¹⁶⁰ *Taueki v McMillan — Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144).

¹⁶¹ *Taueki v McMillan — Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144) at [83].

¹⁶² *Taueki v McMillan — Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144) at [85], referring to the evidence of Hirini Moko Mead.

¹⁶³ *Taueki v McMillan — Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144) at [87], referring to the evidence of Hirini Moko Mead.

¹⁶⁴ *Taueki v McMillan — Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144) at [83].

¹⁶⁵ *Taueki v McMillan — Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144) at [88] and [93], referring to the evidence of Hirini Moko Mead.

¹⁶⁶ *Taueki v McMillan — Horowhenua 11 (Lake)* (2014) 324 Aotea MB 144 (324 AOT 144) at [93], referring to the evidence of Hirini Moko Mead.

¹⁶⁷ *In the matter of [S]* [2021] NZFC 5911. We have elected to anonymise the name of the defendant for the present purpose and refer to the subject person only as “S”.

life. Judge Coyle described her life as being one “in which she has been crushed emotionally, culturally and spiritually, and assaulted physically”.¹⁶⁸

- 8.91 The Judge was prepared to give tikanga principles “significant weight” in his decision because:¹⁶⁹

[S] had a clear sense of where she was from, of her whakapapa links to [her iwi] and that she had a connection to the whenua there. While she attended to her taha wairua (spiritual side) surreptitiously, so as to not anger her husband, it was nevertheless a clear part of her identity.

- 8.92 The Court referred to evidence that S saw her tamariki and her mokopuna (children and grandchildren) as her main focus and commented that maintaining those relationships was a central aspect of both taha whānau (S’s family side) and managing mate wareware.¹⁷⁰

- 8.93 Tikanga and supporting taha whānau were decisive in the Judge’s decisions about where S should live and who should be appointed welfare guardian and property manager.¹⁷¹ The Court said that, while there were risks with S moving from the house she shared with her husband, those “risks are outweighed by the benefit of giving effect to taha whānau, and ... tikanga principles”.¹⁷²

- 8.94 The decision illustrates the importance of considering why and how tikanga values may be relevant to a person — the tikanga lens. In this case, the principle of connection to whānau was demonstrated as being a core part of S’s identity. It was therefore appropriate to give tikanga significant and even decisive weight in considering which orders were appropriate under the Protection of Personal and Property Rights Act.

Debt — tikanga, utu and ea

- 8.95 The High Court’s decision in *Doney v Adlam* is an example of applying tikanga as an integrated framework of principles. It involved consideration of tikanga concepts such as hara, muru and utu in the context of debt recovery. In that case, a trustee of a hapū trust had misused funds and the hapū sought to recoup those funds by sale of the trustee’s land.¹⁷³ The trustee sought relief from anticipated forfeiture of her land based on the tikanga of whakapapa and whanaungatanga and sought a further opportunity to undertake tikanga processes for resolution.¹⁷⁴ In rejecting the trustee’s claim for relief from forfeiture, Harvey J explained:¹⁷⁵

Ultimately, in the context of this long running proceeding dating back almost 15 years, tikanga cannot provide a haven for such misconduct without the appropriate degree of muru and utu for the hara that has been caused to the satisfaction of the aggrieved party. In short, in terms of tikanga, it is evident that traditional concepts including hara, muru, utu are as relevant as whakapapa, whanaungatanga, tino rangatiratanga and manaakitanga in

¹⁶⁸ *In the matter of [S]* [2021] NZFC 5911 at [2].

¹⁶⁹ *In the matter of [S]* [2021] NZFC 5911 at [30] and [36].

¹⁷⁰ *In the matter of [S]* [2021] NZFC 5911 at [26]–[27] and [36].

¹⁷¹ *In the matter of [S]* [2021] NZFC 5911 at [64]–[68].

¹⁷² *In the matter of [S]* [2021] NZFC 5911 at [64].

¹⁷³ *Doney v Adlam* [2023] NZHC 363, [2023] 2 NZLR 521 at [1].

¹⁷⁴ *Doney v Adlam* [2023] NZHC 363, [2023] 2 NZLR 521 at [3] and [81]–[85].

¹⁷⁵ *Doney v Adlam* [2023] NZHC 363, [2023] 2 NZLR 521 at [106].

this proceeding. To even contemplate the restoration of a state of ea between the trustees, the trust beneficiaries on the one hand, and Mrs Adlam and her whānau on the other, it is essential that there continues to be recompense to the trust and its beneficiaries to the fullest extent practicable. The alternative would be to allow Mrs Adlam to effectively avoid responsibility to the trust for in excess of \$10 million in circumstances where she continues to fail to provide a proper accounting for the loss or use of those funds. That can hardly be a just outcome, either in ture Pākehā or tikanga terms.

Environment – kaitiakitanga and maintaining mauri

- 8.96 The *Ngāi Te Hapū v Bay of Plenty Regional Council* case concerned consents required in relation to the abandoned vessel MV Rena that ran aground on Ōtāiti reef in 2011.¹⁷⁶ The Court was required to, among other things, resolve competing claims to kaitiaki status. The Court resolved this difficult issue based on evidence of customary association, including evidence of ancestral connection, continuous occupation, proximity, nature of customary association and the manner in which kaitiaki responsibilities were discharged.
- 8.97 The Court also identified the demand to maintain mauri (life force connection between the gods and earthly matter) and the connection of all parties to the reef, and the continuing role of all parties who have whakapapa to Motiti (an adjacent island) and have ahi kā (continuous occupation) of Ōtāiti reef. The Court concluded that granting consent better provided for the mauri of the reef, because it provided an opportunity to explicitly give recognition to the concerns and needs of the various affected iwi and hapū, particularly those on Motiti.

Process – kawa

- 8.98 Tikanga can also provide processes for resolving disputes, as the High Court acknowledged in *Ngāti Whātua Ōrākei*:¹⁷⁷
- Tikanga governs matters of process as well as substance. There are ways of resolving disputes about tikanga which are consistent with tikanga and ways which are not. Full discussion by kaumātua on a marae, abiding by the kawa of the marae and resulting in consensus, can be consistent with tikanga.
- 8.99 While the High Court made declarations about the tikanga of particular iwi, the Court preferred to leave the resolution of disputes between them to tikanga processes.¹⁷⁸ The case is also notable for its extensive consideration of the concept of mana whenua.
- 8.100 Another example is *Takamore v Clarke* where the parties were able to resolve the issues between them following further kōrero (discussion). This is an example of a tikanga-consistent process providing an answer where there was a dispute over the application of tikanga itself as between Māori and non-Māori.

¹⁷⁶ *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73.

¹⁷⁷ For general discussion on the significance of tikanga process or kawa, see *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [362]–[364].

¹⁷⁸ The Court reserved leave for parties to apply jointly to the Court to facilitate tikanga-consistent processes: *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [649(d)].

Sentencing — *mana and whakamā*

8.101 Another tikanga concept, whakamā, is particularly relevant when mana responsibilities are not discharged. Commonly referred to as shame, as explained in Chapter 3, it is “the outward expression of inward disintegration”.¹⁷⁹ The concept of whakamā can be one factor to be taken into account in the sentencing process, as illustrated in a 2019 Te Kōti ā Rohe | District Court (the District Court) sentencing decision.¹⁸⁰ In all sentencing decisions a judge is entitled to take into account the personal circumstances and background of an offender. The defendant (W) had crashed her car while intoxicated with alcohol and cannabis, resulting in her young child dying from injuries suffered in the accident. In granting a discharge without conviction, the District Court judge referred to the following evidence:¹⁸¹

It is difficult to peel away the many layers of what whakamā is ... the regret, the shame, the embarrassment, the depression, the feeling of dishonouring others, the judgment, the absolute feeling of self-doubt and worthlessness, those are all naked to the human eye. Just because we can't see them does not mean they aren't a struggle that greets [W] on a daily basis.

8.102 Feelings of helplessness and “searching for her baby in a sea of faces” were also described as whakamā. The Court then observed:¹⁸²

... when one adds the loss of [W's] baby to the fact that she, in her particular instance, is carrying or will be required to carry a burden of cultural enquiry, cultural analysis, cultural judgment ... I am satisfied that ... for [W] the consequences of conviction would be out of all proportion to the gravity of the offending.

8.103 While not referring expressly to the principle of *ea* or balance or to tikanga relating to the need to help bring someone out of a state of whakamā,¹⁸³ the judgment concludes with the following whakataukī:

Kia patu tērā taniwha te whakamā, kia mate
Banish that taniwha whakamā for ever.

8.104 This judicial approach can be seen as consistent with tikanga, insofar as the Court discharged a mana-based responsibility of bringing the offender out of her state of whakamā.

TOOLS FOR JUDICIAL ENGAGEMENT

8.105 In this section, we discuss tools that can assist judges to engage with tikanga. Deciding what tikanga matters should be resolved by courts and how they should go about resolving disputes involving tikanga presents a significant challenge.

8.106 Given that tikanga is integral to cultural identity, its use and application outside of its natural environment (including within state law) must be handled with care. Until the legal

¹⁷⁹ Joan Metge *In and out of Touch: Whakamaa in Cross-Cultural Context* (Victoria University Press, Wellington, 1986) at 77.

¹⁸⁰ We have elected to anonymise the name of the defendant. The case citation is [2019] NZDC 17641, a decision of Judge Greg Davis of the Matariki Court.

¹⁸¹ [2019] NZDC 17641 at [77].

¹⁸² [2019] NZDC 17641 at [77].

¹⁸³ See further Chapter 3.

profession as a whole has developed a sufficient level of understanding to apply tikanga appropriately, we consider that courts must be prepared to allow tikanga experts to have a significant role in judicial engagement with tikanga.

- 8.107 We propose that the promotion of manaakitanga — an obligation to take care of and uphold the mana of tikanga — should be a guiding principle for judicial engagement with tikanga. We see this principle as encouraging the judiciary to enable Māori to maintain the integrity of tikanga and patrol the boundaries of its application as well as ensure that the common law develops correctly when applying or engaging with tikanga.
- 8.108 We suggest, for example, that judges should be guided by manaakitanga when deciding whether to appoint pūkenga, when to refer issues to a specialist court or when to defer to tikanga processes entirely. Manaakitanga has heightened importance because of the intergenerational (past, present and future) implications of decisions about tikanga — especially tikanga relational interests, which are taonga tuku iho (inherited taonga). We consider the principle of manaakitanga should operate whenever tikanga is raised in court or whenever the court is engaging with tikanga more broadly.¹⁸⁴
- 8.109 When the court must engage with tikanga, the principle of manaakitanga should prompt judges to consider which processes will best uphold the mana of tikanga. In particular, we suggest that it would be desirable for courts to consider in each dispute:
- (a) The use of pūkenga to assist with disputes about the meaning and effect of tikanga within te ao Māori.
 - (b) Whether the ability under section 61 of Te Ture Whenua Maori Act 1993 to refer questions of tikanga that need to be resolved to Te Kooti Pira Māori | Māori Appellate Court would assist the court.
 - (c) Adopting a focused case management approach, including potentially either a pre-action protocol or mandatory agenda items at the first case management conference.
- 8.110 Below, we address considerations relating to each of these potential tools. We also suggest categories of disputes in which each tool might be most appropriate. Ultimately, the question of whether a tool is appropriate can only be answered in the context of the particular dispute and by allowing tikanga itself and the principle of manaakitanga to provide guidance.

Pūkenga

- 8.111 There are several ways in which pūkenga can bring tikanga expertise to the court, including:
- (a) pūkenga sitting on the bench as co-decision makers;¹⁸⁵

¹⁸⁴ An example is Te Ao Mārama in the District Court, where tikanga guardianship is promoted by recognising the role of local hapū in holding the mana in respect of tikanga, even as the initiative seeks to infuse court processes with te reo and tikanga Māori.

¹⁸⁵ For example, as provided for in Te Ture Whenua Maori Act 1993, s 62 which allows for “additional members with knowledge and experience in tikanga Maori” to sit on the Appellate Court for particular hearings. At present, there is limited scope for the participation of pūkenga as additional members in this manner in hearings convened in the courts of general jurisdiction.

- (b) pūkenga being appointed by the court as counsel assisting the court,¹⁸⁶ or as court experts;¹⁸⁷
 - (c) pūkenga providing an agreed statement of tikanga that is admitted with the consent of all the parties under section 9 of the Evidence Act 2006, as was done in *Ellis v R*; and
 - (d) parties calling expert evidence from pūkenga within the typical adversarial framework as independent experts, as was done in *Ngāti Whātua Ōrākei*.
- 8.112 This decision about when and how to bring pūkenga before the court involves consideration of two issues:
- (a) Admissibility — how should tikanga be brought into the court? As law via submission, fact, expert evidence or something unique?
 - (b) Decision-making capacities — once tikanga is before any court, would that court benefit from pūkenga assistance in determining the dispute as it relates to tikanga?

Admissibility of tikanga evidence

8.113 The current common law position on admissibility is developing, as we canvassed in Part Two of this Study Paper. The orthodox approach to proving the content of tikanga in court is to treat it as a matter of fact to be established by evidence,¹⁸⁸ often given by pūkenga.¹⁸⁹ The courts’ treatment of tikanga is necessarily evolving. In some cases, it will be appropriate for courts to treat tikanga as settled, meaning that counsel can make submissions on this without additional evidence.¹⁹⁰ In other cases, expert evidence will assist the court due to the nature of the dispute and the tikanga involved, particularly where the tikanga issue is novel or complex (from the common law’s perspective). In our

¹⁸⁶ Previously “amicus curiae”. The Solicitor-General must appoint counsel to appear and be heard as counsel assisting where requested by the High Court or District Court: High Court Rules 2016, r 10.22; District Court Rules 2014, r 10.27. As to the role and status of counsel assisting, see generally *Beneficial Owners of Whangaruru Whakatuira No 4 v Warin* [2009] NZCA 60, [2009] NZAR 523 at [21]. It is inherent in the use of this procedure that the person appointed must be “counsel” — that is to say, a lawyer. Though that may enable the appointment of any number of appropriate pūkenga, that will not always be the case. More broadly, there is the option to appoint counsel to assist the Court or amicus curiae with submissions and guiding discussion about those clashes between tikanga and British common law. For example, the courts have engaged Te Hunga Roia Māori (the Māori Law Society) to undertake this role in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239; *Smith v Fonterra Co-operative Group Ltd* [2022] NZSC 35 (judgment pending at time of publication).

¹⁸⁷ High Court Rules 2016, r 9.36. Pursuant to existing practice, where the parties are unable to agree on an expert the Court decides the question of who is to be appointed from a list of suitable persons named by the parties, emphasising the independence and accountability of the court expert to the court. For the procedure in a situation of disagreement, see further *Kilgour v Cotterill* (1994) 7 PRNZ 423 (HC). Independent pūkenga tikanga were appointed in *Re Edwards (Te Whakatōhea No 2)* [2021] NZHC 1025, [2022] 2 NZLR 772.

¹⁸⁸ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95]; *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 at [36]; *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [47].

¹⁸⁹ See for example *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [2]; *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [48]; *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 at fn 78; *Ulrich v Attorney-General* [2022] NZCA 38, [2022] 2 NZLR 599 at [37] and [39].

¹⁹⁰ This is subject to the qualification that, during the transitional phase while the treatment of tikanga is evolving, it may assist the court and save time and cost to the parties to permit pūkenga involvement even though ordinarily an expert (including a court expert) is unable to report on questions of law: compare *Theatrelight Electronic Control & Audio Systems Ltd v Angliss* (1997) 10 PRNZ 422 (HC). See for example *Te Rūnanga o Ngāti Whātua v Kingi* [2023] NZHC 1348.

view, it should not be inferred from the fact that expert evidence will assist the court that either fact or foreign law are proper categorisations of tikanga.

When should pūkenga be appointed to assist the court?

8.114 In *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)*,¹⁹¹ the High Court considered whether to appoint a pūkenga under rule 9.36 of the High Court Rules 2016, which provides for the appointment of a “court expert”.¹⁹² The Court suggested the following test should apply:¹⁹³

The relevant considerations are similar to those in allowing an interested party to intervene in proceedings. In deciding whether to appoint pūkenga, the Court will weigh the likelihood the appointment will assist the Court against the risk of prejudice or unfairness to the litigants, guided by the overall interests of justice. The power is more likely to be exercised:

- (a) the more important are the questions of tikanga in a case;
- (b) the less expert tikanga evidence is provided by the parties; and
- (c) the less procedural prejudice or unfairness an appointment would cause to the parties.

8.115 In that case, the Court declined to appoint independent pūkenga because, while the issues were “complex, nuanced and novel”,¹⁹⁴ the parties’ own pūkenga had already separately provided a significant amount of expert evidence.¹⁹⁵ However, in the subsequent substantive decision on this matter, the Court acknowledged that it may have been preferable to appoint a pūkenga tikanga given the complexities of the case.¹⁹⁶

8.116 We consider that pūkenga may be of considerable assistance where courts are required to make decisions in the context of complex, nuanced and novel issues of tikanga. In such cases, the need for caution is paramount. The *Ngāti Whātua Ōrākei* case is an example of a case directly addressing tikanga where the court is called upon to act in an essentially declaratory manner. As we discuss below, it may also be that such cases are best suited to an alternative forum.

8.117 Pūkenga are less likely to be required where the tikanga at issue is a settled aspect of tikanga-related law or where the application of tikanga on the facts is relatively straightforward.¹⁹⁷ In such cases, the issue is not so much about the meaning or relevance of tikanga but its application to a particular set of facts. Parties might instead rely on cases where the relevant tikanga is discussed or on authoritative reports. There is an important qualifier to this observation. In matters involving the application of local tikanga, referring to cases resolved by reference to general tikanga Māori or to the tikanga of a different iwi or hapū is unlikely to provide authoritative guidance. Judges will need to be alive to

¹⁹¹ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120.

¹⁹² The Court considered that even if rule 9.36 did not apply appointment of pūkenga would be possible under the High Court’s inherent jurisdiction: *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 at [36].

¹⁹³ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 at [37].

¹⁹⁴ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 at [38].

¹⁹⁵ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 1)* [2020] NZHC 3120 at [39].

¹⁹⁶ *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [93]: “In retrospect, I consider it would have been beneficial to appoint an independent pūkenga to conduct the conference of tikanga experts, and an independent chair of the historian experts.”

¹⁹⁷ See *Te Rūnanga o Ngāti Whātua v Kingi* [2023] NZHC 1348 at [97]–[103].

the potential for variation and therefore the need for expert assistance. As a matter of course, we suggest the court should always consider whether pūkenga would assist in a particular case.

Te Ture Whenua Maori Act 1993, section 61

8.118 Section 61 of Te Ture Whenua Maori Act 1993 provides that the High Court may state a case on “any question of tikanga Māori” and refer it to the Māori Appellate Court. Notably, the answer of the Māori Appellate Court is then binding on the High Court.¹⁹⁸

8.119 We repeat the Commission’s previous comments about the appropriateness of these specialist courts making determinations about tikanga:¹⁹⁹

The Māori Land Court and the Māori Appellate Court are markedly more appropriate than any other forum in our court structure to make determinations about tikanga. It ignores the very substance of what requires determination to suggest that decisions can simply be made after hearing competing experts give evidence. The adjudicator needs an understanding of the context, beyond fact and precedent. It involves sets of beliefs and values which are subjected to careful and sensitive assessment.

While the judges of the Māori Appellate Court do not describe themselves as expert in tikanga, that court has, among its membership, greater experience and knowledge than any other. Added to this it can seek advice from those with expertise and so is the appropriate forum for determinations in this area both at first instance and on appeal.

8.120 The High Court’s power to state a case for the Māori Appellate Court is much broader than the current, narrow statutory jurisdiction of the Māori Land Court itself. It allows “any question of tikanga Māori” to be referred. There are several advantages of using this approach to questions of tikanga that arise in the High Court:

- (a) It brings the issue before judges with considerable experience in tikanga. Māori Appellate Court judges are required to have suitable knowledge and experience in tikanga.²⁰⁰
- (b) It means the question of tikanga will be referred to a forum that allows a pūkenga to be appointed as co-decision maker, where required.²⁰¹
- (c) The decision of the Māori Appellate Court is final.²⁰² This enables the High Court to proceed with determining the dispute following the case stated with minimal procedural delay.

¹⁹⁸ The issue of whether that opinion would, on appeal from the decision of the High Court to the Court of Appeal (and Supreme Court), bind the appellate courts does not appear to have arisen for determination. The scheme of Te Ture Whenua Maori Act 1993, under which appeals from the Māori Appellate Court are to the Court of Appeal (and Supreme Court in exceptional circumstances), could be taken to suggest that the Court of Appeal and Supreme Court would not be bound by the opinion of the Māori Appellate Court: see ss 58A–58B.

¹⁹⁹ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 242.

²⁰⁰ Te Ture Whenua Maori Act 1993, s 7(2A).

²⁰¹ Te Ture Whenua Maori Act 1993, s 62. This jurisdiction is confined to cases referred under s 61.

²⁰² Te Ture Whenua Maori Act 1993, s 61(4).

- 8.121 We see the option of referring a case stated to the Māori Appellate Court as a powerful resource that is currently underused. Given the increase in the number of High Court cases in which tikanga issues arise and the range of complex and novel issues involved, we anticipate that the case-stated power may be more frequently used in the future.
- 8.122 Situations where use of the case stated procedure would be most appropriate are likely to include cases where:
- (a) expert evidence is filed on tikanga and there is a conflict on the evidence that must be resolved;
 - (b) there is a novel tikanga issue or a lack of guidance available for the court such as other relevant case law, authoritative writing or relevant reports; or
 - (c) the tikanga issues have the potential to affect future litigants, and counsel for one or both parties lacks experience in tikanga or there is otherwise concern about incomplete submissions on the tikanga issues.
- 8.123 In our view, there would be value in the generalist courts being required to consider stating a case for the Māori Appellate Court in any case in which tikanga as law is at issue, particularly where the court is asked to determine what the applicable tikanga is. There is no statutory basis for this at present. However, the High Court could require the parties to consider the use of this procedure, relying on the High Court Rules and its inherent powers.²⁰³ Following due consideration being given to the use of the procedure, if the Court decides not to refer the matter the reasons should be recorded.

Case management tools

- 8.124 High Court and District Court rules do not require parties to identify appropriate tools for judicial engagement with tikanga ahead of case management conferences.²⁰⁴ However, the court rules would not prevent the court from directing the parties to consider the use of any appropriate tools and for tikanga-related issues in general to be included on the agenda for case management conferences. For example, the parties might be directed to identify as a matter for discussion at the first case management conference:²⁰⁵
- (a) their categorisation of the tikanga dispute (a tikanga-based customary law claim, relating to tikanga values, or addressing tikanga as law); and
 - (b) which tools for engagement they consider might assist the parties and the court.
- 8.125 At a more general level, the relevant heads of bench may consider it appropriate to issue a practice note directing judges to consider the appropriate tools for engagement where issues of tikanga are likely to arise in a case.²⁰⁶ The heads of bench may benefit from engagement with pūkenga should this path be pursued. This could include requiring the court to identify clearly the tikanga at issue at an early stage, to categorise the type of

²⁰³ In such a case, use of the section 61 pathway may achieve the procedural objective of the High Court Rules 2016, r 1.2: the just, speedy, and inexpensive determination of proceedings. For the source of that jurisdiction see High Court Rules 2016, rr 1.4(4), 1.6 and 7.1; see further *Quality Pizzas Ltd v Canterbury Hotel Employees Industrial Union* [1983] NZLR 612 (CA) as an instance of the Court's inherent powers.

²⁰⁴ High Court Rules 2016, rr 7.3, 7.4 and sch 5; District Court Rules 2014, rr 7.2, 7.4 and sch 3.

²⁰⁵ In practice, tikanga disputes may not be confined to only one of these categories. In any such cases, a combination of approaches appropriate to each category may be needed to facilitate protection and engagement.

²⁰⁶ The making of a practice note appears to be the exercise of the court's inherent power to regulate its procedure: J C Corry *Laws of New Zealand Civil procedure*: High Court (online ed) at [5].

claim (for example, a customary law or values case) and to indicate any associated evidential and procedural requirements.

ENHANCING PROCESSES FOR TIKANGA DISPUTE RESOLUTION

8.126 Enhancing processes for tikanga dispute resolution is the final element we consider may help to promote coherent common law engagement with tikanga. These processes may occur in the courts, or by way of alternative dispute resolution. Developing spaces for resolving tikanga disputes is an important part of courts patrolling the boundaries of their role. The four options we explore below are:

- (a) creating a specialist tikanga panel in the High Court;
- (b) providing for the appointment of pūkenga as commissioners of the High Court;
- (c) expanding the jurisdiction of the Māori Land Court; and
- (d) using arbitration as a binding dispute resolution process that can be customised to use tikanga as the governing law and facilitate a more tikanga-consistent procedure.

A specialist tikanga panel in the High Court

8.127 An option available within existing law is to establish a specialist panel of appropriately qualified judges of the High Court who could be allocated cases involving tikanga-related disputes for both case management and hearing.

8.128 The commercial panel provided for in the Senior Courts Act 2016 offers an example of such specialisation.²⁰⁷ The commercial panel is governed by Part 29 of the High Court Rules and by an Order in Council that sets out the types of proceedings to which panel judges may be assigned.²⁰⁸ Judges who are nominated to the panel continue to sit on a full range of other High Court matters while, as a general rule, case managing any panel cases they are assigned to in order to ensure consistency for parties.²⁰⁹

8.129 An existing provision in the Senior Courts Act allows the Chief High Court Judge, in consultation with the Attorney-General and the Chief Justice, to establish other panels of High Court Judges.²¹⁰ A panel designed to hear tikanga cases could be established under this section. It could operate in a similar way to the commercial panel: the Chief High Court Judge could determine how many judges are necessary based on the workload of the Court and assign judges to the panel. A list of the types of cases suitable for a tikanga panel could be developed. Although litigants could nominate their cases to be heard by a panel judge, the Chief High Court Judge would determine whether a case should be allocated to the panel.²¹¹

²⁰⁷ Senior Courts Act 2016, s 19. The commercial panel was originally established as the “commercial list” in 1986 by the Judicature Act 1908, ss 24A–24G.

²⁰⁸ Senior Courts (High Court Commercial Panel) Order 2017.

²⁰⁹ Te Kaiwhakawā Matua | Chief High Court Judge “Commencement and operation of the Commercial Panel of the High Court” (press release, 10 August 2017).

²¹⁰ Senior Courts Act 2016, ss 19(3)–19(4).

²¹¹ Compare High Court Rules 2016, r 29.2.

- 8.130 A “tikanga panel” has several advantages. It could assist in the more efficient disposition of cases.²¹² It does not require a new court to be established or the jurisdiction of an existing specialist court to be reconsidered. Litigants could self-identify a case as being suitable for the panel. There may also be disadvantages of a tikanga panel. These might include:²¹³
- (a) the panel being small due to lack of judicial capacity, risking conflicts of interest or allegations of panel stacking;²¹⁴
 - (b) the stultification of the development of familiarity and expertise with tikanga across the High Court more generally, including for judges who may ultimately sit on appeal courts;
 - (c) appeal rights would be to non-specialist appellate courts; and
 - (d) in likelihood, panel members would have general expertise in tikanga but not the specialist expertise that a pūkenga could provide, for example, relating to the tikanga of an iwi or hapū.
- 8.131 Overall, we consider the option of a tikanga panel is worthy of consideration. The potential disadvantages may mean it is preferable to explore the alternative options discussed below such as referrals to the Māori Land Court. However, at this time the need to enable the High Court to engage with tikanga appropriately and effectively on matters of intergenerational impact is a matter of considerable importance and urgency. As the perceived need for a commercial list or panel has changed over time, the need for a specialist tikanga panel may diminish over time. The establishment of a tikanga panel could be regarded as a pilot scheme, as the commercial panel was originally envisaged to be.²¹⁵

Pūkenga as commissioners of the High Court

- 8.132 In particularly complex cases (for example cases involving conflicting tikanga positions or that also engage the powers, rights and/or obligations of non-Māori) another option would be to enable the High Court to appoint pūkenga on a case-by-case basis to sit with a judge as a commissioner on tikanga.

²¹² See for example *Te Rūnanga o Ngāti Whātua v Kingi* [2023] NZHC 1348 at [103].

²¹³ We note also the more general discussion of jurisprudential and constitutional aspects of judicial specialisation in Aotearoa New Zealand (including comparatively) provided previously by the Commission: *Te Aka Matua o te Ture | Law Commission Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 262–269; *Te Aka Matua o te Ture | Law Commission Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at ch 10.

²¹⁴ *Te Aka Matua o te Ture | Law Commission Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 266 and 267; Petra Butler “The assignment of cases to judges” (2003) 1 *New Zealand Journal of Public and International Law* 83 at 84.

²¹⁵ The Commission considered in 2004 that the commercial panel had served its purpose and was no longer necessary given the relatively low number of cases that were being allocated to it: *Te Aka Matua o te Ture | Law Commission Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 266–267. Subsequently, in 2012, the Commission recommended the re-establishment of a commercial panel in the High Court as a pilot project. Since then, there has been an increase in the number of panel judges and the work of the commercial panel. In 2019, six additional judges were appointed by the Hon Justice Venning, the then Chief High Court Judge. As of March 2023, there are 15 judges allocated as panel judges: *Te Kōti Matua o Aotearoa | The High Court of New Zealand “Notification of changes to the commercial panel”* (press release, 22 March 2023).

- 8.133 This would require legislative amendment. While the High Court Rules provide for court-appointed experts,²¹⁶ there is presently no general provision to appoint pūkenga in the role of a commissioner assisting the High Court. In contrast, there is capacity to appoint lay commissioners in the Environment Court.²¹⁷ The High Court also has the power to appoint lay members to sit in certain Commerce Act matters.²¹⁸ In such cases, the additional lay members are not co-equal decision makers. The majority of the court must include the judge (or, where more than one judge sits, a majority of the judges).²¹⁹ These provisions could provide a model for appointing pūkenga to sit as additional members of the High Court (and equally other courts of general jurisdiction) in respect of tikanga disputes.
- 8.134 Experience under the Marine and Coastal Area (Takutai Moana) Act suggests parties may not necessarily support the appointment of pūkenga as commissioners. In a provision similar to section 61 of Te Ture Whenua Maori Act that was earlier discussed, the Takutai Moana Act enables the High Court to refer to the Māori Appellate Court or pūkenga for opinion or advice on tikanga.²²⁰ In some cases, parties have objected to these processes being instigated and the extent to which the expertise of pūkenga is relied upon.²²¹ While these issues will need to be considered, we do not think they rule out further consideration of the appointment of pūkenga as commissioners.

An expanded Māori Land Court jurisdiction

- 8.135 In this section we explore whether the Māori Land Court might play a greater role in considering tikanga issues. Much has been written about this Court's jurisdiction and potential for it to take on a broader role,²²² including its "Maori character",²²³ and whether the Court should be involved in matters relating to Māori other than land, including family

²¹⁶ Commerce Act 1986, s 77. See also Human Rights Act 1993, s 126: on appeal from the Human Rights Review Tribunal, two HRRT members who are not judges sit with a High Court Judge in the High Court to determine the appeal.

²¹⁷ Resource Management Act 1991, s 253 provides in this regard that, when considering whether a person is suitable to be appointed as an Environment Commissioner or Deputy Environment Commissioner of the Environment Court, regard shall be had to ensuring that the court possesses a mix of knowledge and experience including knowledge and experience in "matters relating to the Treaty of Waitangi and kaupapa Maori".

²¹⁸ Senior Courts Act 2016, s 9(2) anticipates that enactments may provide for the appointment of persons other than judges to sit with judges or as members of the court in specific proceedings.

²¹⁹ Commerce Act 1986, ss 77(10)–77(12).

²²⁰ Marine and Coastal Area (Takutai Moana) Act 2011, s 99. The Māori Appellate Court's opinion is binding while the advice of a pūkenga is not (as under Te Ture Whenua Maori Act 1993, s 61).

²²¹ For example, *Collier v Ngāti Rehua-Ngāti Wai ki Aotea* [2020] NZCA 536 at [7].

²²² See for example Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 99–100; The Royal Commission on the Maori Land Courts "The Maori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3; Joseph Williams "The Māori Land Court: a separate legal system?" (New Zealand Centre for Public Law, Wellington, 2001); Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004); Te Aka Matua o te Ture | Law Commission *Striking the Balance: Your Opportunity to Have Your Say on the New Zealand Court System* (NZLC PP51, 2002); Te Aka Matua o te Ture | Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, 2002); Te Aka Matua o te Ture | Law Commission *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase* (NZLC SP13, 2002).

²²³ The Royal Commission on the Maori Land Courts "The Maori Land Courts: Report of the Royal Commission of Inquiry" [1980] IV AJHR H3 at 61.

matters.²²⁴ The Māori Land Court was first established as a court of record in 1865 as the Native Land Court,²²⁵ a role which continued under Te Ture Whenua Maori Act 1993.²²⁶ The Court is, uniquely compared with other jurisdictions, a court of record primarily concerned with indigenous matters and has been in continuous operation for over 150 years.²²⁷ Commenting on the role of the Court in 2001, Chief Judge Williams (as he then was) said:²²⁸

The picture I painted of the Court supplemented by strong community representation and applying a mix of equity, public and Maori custom law to the extent that each of them remains relevant to the circumstances of Maori kin groups in the 21st century, is the vision which must be worked to ... it is a logical extension of the Maori Land Court's role to adapt to meet that perceived need. That is because the Court already deals with a number of these sorts of dispute in relation to land in its current workload.

- 8.136 As his Honour has subsequently also said, “I’ve always thought the Court has a key role to play in unlocking the power of the Māori community if only it could be given that job”.²²⁹
- 8.137 The Māori Land Court has traditionally been a land title court,²³⁰ focused on resolving issues connected to land claims.²³¹ It consists of up to 14 judges including a Chief Judge and Deputy Chief Judge who are all appointed because of their knowledge and experience of te reo Māori, tikanga and the Treaty of Waitangi.²³² The Court operates within seven districts across Aotearoa New Zealand.
- 8.138 Similar to other courts established by statute, the Māori Land Court’s jurisdiction is limited to that conferred by legislation.²³³ However, the Court has jurisdiction over a wide range of matters concerning Māori land,²³⁴ the status of any land,²³⁵ and whether any specified person is Māori.²³⁶ In relation to any trust over Māori land, it has the same powers as the High Court. In addition, the Court has jurisdiction under the Fencing Act 1978, Protected

²²⁴ Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 134; and see too Te Aka Matua o Te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of succession law: rights to a person’s property on death* (NZLC R145, 2021) at 296: “there continues to be a desire for the Court’s jurisdiction to be expanded to deal with Māori issues generally”.

²²⁵ Native Lands Act 1865, s 5.

²²⁶ Te Ture Whenua Maori Act 1993, s 6(1).

²²⁷ Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 78.

²²⁸ Joseph Williams “The Māori Land Court: a separate legal system?” (New Zealand Centre for Public Law, Wellington, 2001) at 10–11.

²²⁹ Te Kooti Whenua Māori | Māori Land Court and Te Tāhū o te Ture | Ministry of Justice *He Pou Herenga Tangata, He Pou Herenga Whenua, He Pou Whare Kōrero — 150 Years of the Māori Land Court* (October 2015) at 88.

²³⁰ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 233.

²³¹ Te Ture Whenua Maori Act 1993, s 6(2).

²³² Te Ture Whenua Maori Act 1993, s 7.

²³³ Te Ture Whenua Maori Act 1993, s 6(2).

²³⁴ Te Ture Whenua Maori Act 1993, ss 17 and 18(1).

²³⁵ Te Ture Whenua Maori Act 1993, s 18(1)(h).

²³⁶ Te Ture Whenua Maori Act 1993, s 18(1)(e).

Objects Act 1975,²³⁷ Maori Fisheries Act 2004 and Maori Commercial Aquaculture Claims Settlement Act 2004.²³⁸ Relating to its jurisdiction:

- (a) The jurisdiction is concurrent with any other court of competent jurisdiction except where exclusive jurisdiction is provided for in Te Ture Whenua Maori Act.²³⁹
- (b) The Court also exercises a jurisdiction to advise other courts, commissions or tribunals on matters of representation or to determine who are the most appropriate representatives of a class or group of Māori.²⁴⁰
- (c) In exercising its jurisdiction and powers relating to land, the Court must seek to give effect to wishes of land owners, provide a forum for discussion, facilitate the resolution of disputes, ensure fairness in dealings between multiple owners and promote practical solutions to problems.²⁴¹

8.139 We suggest that the potential of the Māori Land Court for considering issues of tikanga more broadly should be considered. In 2004, the Commission made a series of recommendations in relation to the Māori Land Court that were not adopted by the government.²⁴² Many of those recommendations could be revisited, including those relating to the Court's jurisdiction. The Commission recommended expanding the jurisdiction of the Māori Land Court to include all disputes involving communal Māori assets.²⁴³ The Commission recorded that key Māori organisations and opinion leaders had expressed strong support for expanding the role of the Māori Land Court in this way.²⁴⁴ This reflected a preference by Māori to manage internally their own dispute resolution processes, with the Māori Land Court as a back-up where adjudication is required. However, the Commission noted there was limited support for further expanding the jurisdiction beyond the area of communal assets.²⁴⁵

8.140 The Commission also discussed appeal rights on questions of law and tikanga and the scope of judicial review of the Court's decisions as a statutory body.²⁴⁶ The majority of Commissioners concluded that appeals on issues of tikanga should only be capable of challenge from the Māori Appellate Court to the Supreme Court, although two Commissioners considered that decisions on matters of tikanga by the Māori Appellate

²³⁷ Protected Objects Act 1975, pt 2.

²³⁸ Te Ture Whenua Maori Act 1993, ss 26, 26B–26C and 26P–26Q.

²³⁹ The main areas over which the Māori Land Court has exclusive jurisdiction are alienation, succession and jurisdiction of trusts established under Te Ture Whenua Maori Act 1993. See Caren Fox, Stephanie Milroy and Matiu Dickson *Laws of New Zealand The Māori Land Court* (online ed) at [38].

²⁴⁰ Te Ture Whenua Maori Act 1993, s 30.

²⁴¹ Te Ture Whenua Maori Act 1993, s 17.

²⁴² Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004). The Law Commission's recommendations regarding the Māori Land Court were rejected by the government.

²⁴³ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 239.

²⁴⁴ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 238–239.

²⁴⁵ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 239.

²⁴⁶ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 234.

Court should be final.²⁴⁷ All Commissioners considered that standard appeal rights on other questions of law and judicial review should remain available.²⁴⁸

- 8.141 An option is to extend the jurisdiction of the Māori Land Court to include all claims involving tikanga as custom and tikanga as law. Any expanded jurisdiction would not automatically capture the non-tikanga elements of any claim. Rather, the extent of the jurisdiction on such matters would need to be context dependent, as it currently is. We do not consider that the further category of tikanga values claims should be within the presumptive jurisdiction of the Māori Land Court given the potentially diverse subject matter that might engage such values.
- 8.142 In line with promoting the Māori Land Court as the specialist forum when dealing only with tikanga, appeal rights could be limited to the Māori Appellate Court on questions of tikanga only. Appeals on questions of law could follow the existing track, which allows for appeals to the Court of Appeal and then the Supreme Court.²⁴⁹

The use of arbitration to resolve tikanga disputes

- 8.143 Arbitration under the Arbitration Act 1996 already has the potential to assist in resolving tikanga disputes where the parties agree on an appropriate process. However, the parties do not always agree on a tikanga-appropriate process up front. In that situation, the default rules in the Act apply and may not be well suited to tikanga disputes. The current default rules generally work very well for commercial disputes but were not drafted with tikanga disputes in mind. Accordingly, there may be benefit in developing new tailored default rules in the Arbitration Act to better enable tikanga-consistent arbitration.
- 8.144 Arbitration can be a highly effective means for Māori to secure the expression of cultural values in dispute resolution, including the application of tikanga Māori.²⁵⁰ The Arbitration Act is underpinned by the principle of party autonomy and the idea that parties should be willing to accept outcomes determined through a process they have chosen and designed. Arbitration provides the flexibility for parties to agree, for example, to conduct their proceedings entirely in te reo Māori and on a marae,²⁵¹ and to adapt the rules of evidence and the procedure of the arbitration as the parties wish subject to overriding considerations of natural justice.²⁵² The governing law can be tikanga,²⁵³ and the arbitrators can be appointed by the parties specifically for their tikanga expertise or mana.

²⁴⁷ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 234.

²⁴⁸ Te Aka Matua o te Ture | Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 234.

²⁴⁹ Te Ture Whenua Maori Act 1993, s 58A.

²⁵⁰ Amokura Kawharu “Arbitration of Treaty of Waitangi settlement cross claim disputes” (2018) 29 Public Law Review 295 at 296.

²⁵¹ Arbitration Act 1996, sch 1 cl 20(2) and 22.

²⁵² Arbitration Act 1996, sch 1 cl 19(1).

²⁵³ Arbitration Act 1996, sch 1 cl 28(1).

- 8.145 The High Court decision in *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* illustrates the importance of the parties to arbitration agreeing on a tikanga-consistent process from the outset.²⁵⁴ In this case, there was a dispute between two groups of beneficiaries of the Ngāti Rehua-Ngātiwai ki Aotea Trust as to the whakapapa of two individuals. The High Court held that an agreement to arbitrate the dispute was an abuse of court process (due to earlier orders) and that the issue of disputed whakapapa was not in any event “capable of determination by an independent arbitrator without a strong connection to Ngāti Rehua-Ngātiwai ki Aotea”.²⁵⁵ The parties contested whether there was consent to arbitrate the issues relating to whakapapa by using an independent arbitrator appointed under the default rules of the Arbitration Act. The plaintiffs submitted they had intended that any arbitration would proceed within the context of the tikanga of the hapū. They argued that meant it had to be undertaken by the kaumātua validation process, involving elders of the hapū, consistent with the Court’s previous orders.²⁵⁶ The Court agreed and held that arbitration by an external barrister would be inconsistent with the applicable tikanga in this case.²⁵⁷
- 8.146 It would have been available to the parties to customise the procedure, including specifying criteria for appointment of an arbitrator such as particular experience in tikanga or relevant whakapapa.²⁵⁸ Further, parties have the freedom to agree to withdraw their mandate from an arbitrator and to appoint another arbitrator by consent or through a previously agreed process.²⁵⁹
- 8.147 In some cases, when parties have attempted to use arbitration as a process tailored to tikanga-based dispute resolution, their dispute has ended up in extensive post-award litigation.²⁶⁰ This is far from ideal. Extensive post-award litigation is costly and if the award is set aside, the parties then may be bound by their arbitration agreement to re-arbitrate the dispute and incur further costs. By this stage, one or more of the parties may have lost faith in the process or lost confidence in the tribunal, either of which will negatively impact the effectiveness of the process. Parties may also wait a long time for an answer to their dispute. Delay in dispute resolution can further compound existing injustice.²⁶¹
- 8.148 The Arbitration Act is primarily tailored for commercial disputes. Our review of the cases suggests some of the Act’s default provisions are, in general, inappropriate for tikanga-based settings. For instance, the default rules favour confidentiality of proceedings and

²⁵⁴ *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1.

²⁵⁵ *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [65].

²⁵⁶ *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [55].

²⁵⁷ *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [62].

²⁵⁸ If those preconditions are not met, a party can challenge the arbitrator appointment and any award rendered will not be enforceable: Arbitration Act 1996, sch 1 cl 34(2)(a)(iv).

²⁵⁹ Arbitration Act 1996, sch 1 cl 15.

²⁶⁰ For example *Leef v Bidois* [2013] NZHC 1349; *Bidois v Leef* [2015] NZCA 176, [2015] 3 NZLR 474; *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770 (both cases led to multiple post-award litigation proceedings). In *Bidois v Leef*, the Court of Appeal overturned the High Court, finding that the issues of mana whenua were arbitrable and upholding the award in the face of procedural irregularities. In *Ngāti Hurungaterangi*, core reasoning on the central factual issues comprising five paragraphs was held by the Court of Appeal to amount to a failure to give reasons, resulting in the award being set aside.

²⁶¹ For example *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [54].

provide for ex parte preliminary orders.²⁶² The default rules also provide for appeals on points of law to the High Court,²⁶³ which now arguably captures appeals on questions of tikanga.²⁶⁴ This may be inappropriate for tikanga arbitrations.²⁶⁵ If the parties wish to have the safeguard of an appeal, an appeal right to a specialist tribunal or to the Māori Land Court or Māori Appellate Court could be a more appropriate default option to preserve access to specialist tikanga expertise in any further adjudication.

- 8.149 Ideally, the parties will agree at the outset on procedural steps that promote a dispute resolution process consistent with tikanga. However, because that may not always occur, there could be benefit in developing new default rules to better enable tikanga-consistent processes and thereby reduce collateral recourse to the courts.

CONCLUSION

- 8.150 The common law is in a state of transition in relation to tikanga. There is a developing body of law addressing engagement between tikanga and state law. The courts must approach tikanga-related state law with care.
- 8.151 We have identified three major categories of tikanga-related claims with which the common law has engaged, namely those based on tikanga custom, tikanga values and tikanga as law. We hope that these categories provide a foundation for the incremental, case-by-case development of the common law as it engages with tikanga in a coherent and certain manner.
- 8.152 We suggest three broad strategies for engagement. The first aims to ensure that tikanga is interpreted and applied through a tikanga lens. This requires an understanding of tikanga from the inside and as an integrated normative framework.
- 8.153 The second strategy focuses on tools for judicial engagement and promoting manaakitanga of tikanga. There are already tools available that can and should be called upon as context requires, including:
- (a) The use of pūkenga as court experts.
 - (b) Referring tikanga issues to the Māori Appellate Court through the case-stated procedure.
 - (c) Case management tools for early identification of tikanga cases, appropriate remedies and evidential approaches.

²⁶² Arbitration Act 1996, ss 14A and 14B and sch 1 cls 17C–17K.

²⁶³ Arbitration Act 1996, sch 2 cl 5(1).

²⁶⁴ In *Ngāti Hurungaterangi v Ngāti Wahiao* [2016] NZHC 3156, the High Court's view was that tikanga-based awards cannot be appealed (unless the custom is notorious) as they only raise questions of fact. The Court of Appeal did not address that view. However, subsequent Supreme Court authorities on tikanga's status as law (irrespective of any threshold test for custom) would indicate that a contrary result should follow: *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801; *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239.

²⁶⁵ Amokura Kawharu "Arbitration of Treaty of Waitangi settlement cross claim disputes" (2018) 29 Public Law Review 295 at 306.

8.154 The third strategy requires consideration of how court and alternative dispute resolution processes could be enhanced. We consider that the following options should be explored further:

- (a) Establishing a specialist tikanga panel in the High Court.
 - (b) Providing for the appointment of pūkenga as commissioners of the High Court.
 - (c) Extending the jurisdiction of the Māori Land Court to include aspects of claims about tikanga as custom and tikanga as law. Consideration could also be given to limiting appeal rights on questions of tikanga to the Māori Appellate Court.
 - (d) Developing new tailored default rules in the Arbitration Act to better enable tikanga-consistent arbitration as an alternative forum.
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CHAPTER 9

Tikanga proficiency in the public sector

INTRODUCTION

9.1 Public officials developing and implementing policies and laws are increasingly expected to be proficient in tikanga. However, they face systemic challenges. Guidance is needed on ways to facilitate public sector engagement with and understanding of tikanga, at the same time as assuring adequate safeguards for tikanga are set in place. In this chapter, we consider four ways of working towards these objectives:

- (a) Public sector capability and capacity building are needed to enable meaningful engagement with tikanga by policy makers in public agencies. We consider work towards capability and capacity building that is under way.
- (b) More procedural and policy guidance should be given on how public agencies can properly address tikanga during the policy and legislative process. This could build on existing te Tiriti o Waitangi | Treaty of Waitangi (Treaty) guidance models and should encourage tikanga consideration at an early stage.
- (c) This in turn may require greater institutional support. While we do not presently recommend a specific institutional change, we discuss the importance of convening a body with tikanga expertise to support public sector tikanga engagement and consider some options.
- (d) Processes could be improved for considering kupu Māori (Māori words) in legislative drafts and interpreting them consistently with tikanga. We discuss legislation establishing a public holiday marking the rising of the star cluster Te Kāhui o Matariki as a helpful example of how to engage positively with tikanga in a legislative context.

Reasons for public sector engagement with tikanga: impetus and opportunities

9.2 Awareness of the positive ways in which tikanga might contribute to policy is not new for public agencies. At times, government agencies have produced significant tikanga-focused work of enduring value, exemplified in reports such as *Puao-te-ata-tu*, *He*

Whaipaanga Hou and *He Hinātore ki te Ao Māori*.¹ Additionally, public agencies are becoming aware that it is not good practice for the government to proceed without taking sufficient account of tikanga. In *Ellis v R*, Te Kōti Mana Nui | Supreme Court (the Supreme Court) unanimously held that tikanga will be recognised in the development of the common law in cases where it is relevant.² We understand that public agencies are keenly interested in the implications of *Ellis* for their daily work and recognise the need to change practices and build their tikanga competency. Agencies are also actively reflecting on how their statutory obligations may be affected as courts interpret legislation referring to tikanga.

- 9.3 Public service guidance for those writing new policy and legislation already invites policy makers to demonstrate how their proposals have approached an issue from the perspective of tikanga values.³ Guidelines further state that legislation “should, as far as practicable, be consistent with fundamental common law principles and tikanga”, requiring Māori customs and beliefs to be considered.⁴ With *Ellis*, the Supreme Court has reinforced both the connection of tikanga with fundamental common law principles and these policy and legislative expectations. There have also been several decades of Crown acknowledgements that it must act consistently with the Treaty, which is a foundational document in Aotearoa New Zealand’s unwritten constitution.⁵ As Cabinet documents reflect, the Treaty involves tikanga.⁶ Tikanga may also have independent relevance, as the Cabinet Office circular issuing Treaty guidance for agencies rightly observes.⁷
- 9.4 In the past, public service initiatives exploring tikanga have tended to be occasional and reliant on external experts rather than a standard part of public sector practice. Typically, the purpose of previous studies of tikanga was to bring Māori perspectives to the fore to better understand and respond to policy problems in ways that would make a positive difference in Māori lives. However, as we developed this chapter, we also found examples of tikanga influencing policy design and research frameworks in ways that are applicable to all, and of agencies embedding tikanga into their daily policy life.
- 9.5 One example of this approach is Ngā Tikanga Paihere, a research principles framework guiding data collection and data management practices that is underpinned by tikanga

¹ The Maori Perspective Advisory Committee *Puao-te-Ata-tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988); Moana Jackson *The Maori and the Criminal Justice System: A New Perspective | He Whaipaanga Hou* (Department of Justice, Study Series 18, 1987–1988, part 2); Te Tāhū o te Ture | Ministry of Justice *He Hinātore ki te Ao Māori: A glimpse into the Māori world* (March 2001).

² *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [19] and [21].

³ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi guidance” (22 October 2019) CO (19) 5 at 12.

⁴ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 19.

⁵ Kenneth Keith “On the constitution of New Zealand: an introduction to the foundations of the current form of government” in Cabinet Office *Cabinet Manual 2023* at 1–2; see too for example *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [582] and [586]–[587]. Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal continues to underline the linkage between the Treaty and tikanga. See for example Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023) at 156 and 159 (noting adverse effects for Māori flowing from the fact that “tikanga and mātauranga Māori, while centrally important to many Māori, are not recognised as ‘ordinary’ in the nation as a whole”); reviewing the Tribunal’s earliest reports see also Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 69.

⁶ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi guidance” (22 October 2019) CO (19) 5 at [74]–[76].

⁷ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi guidance” (22 October 2019) CO (19) 5 at [76].

concepts. It was developed by Associate Professor Māui Hudson in partnership with Tauranga Aotearoa | Stats NZ.⁸ Another example, He Ara Waiora, is a tikanga-based wellbeing measures framework supporting Te Tai Ōhanga | The Treasury policy work.⁹ He Ara Waiora was initially focused on lifting Māori living standards and Māori wellbeing. Increasingly, however, the Treasury is using He Ara Waiora alongside the conventional OECD-focused Living Standards Framework to advise Ministers and develop policy, enabling officials to “interweave and embed Te Ao Māori perspectives in [their] policy advice”.¹⁰ The underlying philosophy of He Ara Waiora is that Māori perspectives and mātauranga-based principles can contribute to lifting all New Zealanders’ intergenerational wellbeing.¹¹ Both of these examples show that tikanga can contribute to policy making for all and support both Māori advancement and the development of the law.

- 9.6 Public officials with whom we spoke were alive to both the need and the opportunity to improve their practice. However, tools and strategies are needed to assist them. Those with whom we consulted felt that public agencies would benefit from much more guidance. There was a lot of uncertainty about how public agencies should proceed and concern about obstacles to overcome in engaging with tikanga, even while there is willingness to do so. We found agreement on the need for the public sector to upskill itself in relation to tikanga and for consideration of how this process can be systemically supported.

Relevance to local authorities

- 9.7 This chapter primarily addresses how central government can properly consider tikanga when making policy and laws.¹² However, the public sector also includes local government. Local authorities (regional, district and city councils and unitary authorities) also have rule-

⁸ Tauranga Aotearoa | Stats NZ “Ngā Tikanga Paihere” (23 November 2020) <www.data.govt.nz>. Grouped in five pairs, the principles are: pūkenga and whakapapa, pono and tika, wānanga and kaitiaki, wairua and mauri, tapu and noa.

⁹ Te Tai Ōhanga | The Treasury “He Ara Waiora” (28 October 2021) <www.treasury.govt.nz>. See too Emily O’Connell, Tia Greenaway and Tax Working Group Secretariat *He Ara Waiora: A Pathway Towards Wellbeing* (Te Tai Ōhanga | The Treasury, DP 18/11, September 2018) for a thorough explanation of how the framework was developed, involving Ngā Pūkenga (a Māori expert working group that continues to advise on and support the implementation of the framework), Te Puni Kōkiri and Te Arawhiti. He Ara Waiora articulates ends (outcomes that are important for waiora) and means (approaches, processes, or tikanga principles that need to be followed to achieve the ends). The ends are: wairua (defined as “spirit”), te taiao (the natural world) and he ira tangata (the human domain, which in turn prioritises four mana principles underpinning collective and individual wellbeing). The means are: kotahitanga, tikanga, whanaungatanga, manaakitanga and tiakitanga.

¹⁰ Te Tai Ōhanga | The Treasury “He Ara Waiora” (28 October 2021) <www.treasury.govt.nz>. Beyond the Treasury, He Ara Waiora is contributing to others’ work: see Diana Cook and others *He Kāhui Waiora: Living Standards Framework and He Ara Waiora COVID-19: Impacts on Wellbeing* (Te Tai Ōhanga | The Treasury, DP 20/02, July 2020) at 33 (noting commercial iwi organisations have adapted the framework); Te Kōmihana Whai Hua o Aotearoa | New Zealand Productivity Commission *A Fair Chance for All* (Interim Report, September 2022). The Productivity Commission supports “the idea that He Ara Waiora should be used as an overarching framework for public policy in Aotearoa New Zealand” and utilised it in shaping their own “mauri ora” (thriving) approach.

¹¹ Te Tai Ōhanga | The Treasury “He Ara Waiora” (28 October 2021) <www.treasury.govt.nz>.

¹² Public Service Act 2020, s 10; and see Te Kawa Mataaho | Public Service Commission “Te hanga o te rāngai tūmatanui | How the public sector is organised” <www.publicservice.govt.nz>. As defined by the Public Service Act, the public service includes Crown agents such as the Accident Compensation Corporation, Te Mana Rauhi Taiao | Environmental Protection Authority, Te Whatu Ora | Health New Zealand, Kāinga Ora — Homes and Communities, Taumata Arowai (the Water Services Regulator) and Waka Kotahi | New Zealand Transport Agency. For a useful overview of primary, secondary and tertiary law-making authorities, see John Burrows “Legislation: primary, secondary and tertiary” (lecture presented to Te Tai Ōhanga | The Treasury, 26 May 2009).

making and policy-making functions. They engage with tikanga and are an important interface for Māori interaction with the state. Although the timeframes for this Study Paper have not allowed us to engage with local authorities or examine their separate processes, we offer here some general remarks.

- 9.8 The systemic issues we review in this chapter are not confined to central government. Many will also arise in the local authority context. The Supreme Court's affirmation of the continuing applicability of tikanga in New Zealand law in *Ellis v R* also applies to local authorities. Already, some statutes directly affecting local authorities specifically refer to tikanga, such as the Resource Management Act 1991 and the Water Services Act 2021.¹³ As central government develops more laws incorporating tikanga, local authorities will need to engage with tikanga more often when putting those laws into effect. Consequently, issues such as capability and capacity, how to develop procedural guidance and access expertise, and the statutory interpretation of kupu Māori or tikanga concepts will also warrant reflection by local authorities.

BUILDING CAPABILITY AND CAPACITY TO ENGAGE WITH TIKANGA

- 9.9 A public sector that is competent and confident in engaging with tikanga is an important prerequisite to any requirement that tikanga should be considered. Policy and legal staff within agencies need sufficient skill to recognise when tikanga has a bearing on their work and to respond adequately. Even where Crown-Māori engagement on tikanga has been facilitated, we heard that disappointing outcomes and problems can arise where government officials lack appreciation of what has been shared with them in consultation. In some larger agencies, full-time roles dedicated to leading relationship building and engagement with Māori have been created. However, too often a disproportionate burden in covering capability shortfalls falls on Māori staff in generalist roles within agencies.
- 9.10 As a purely practical matter, agencies' capability and capacity to engage with tikanga is affected by resourcing decisions. Agencies must be properly resourced to prioritise staff upskilling in tikanga and to enable ongoing tikanga engagement. This will need to be built into agencies' baseline funding — a decision requiring support at the level of senior officials and, in likelihood, their ministers. Leadership was therefore identified to us as a key to initiating positive change.
- 9.11 Recently, initiatives have been put in place that recognise the responsibility of public service chief executives to take steps to address issues relating to organisational capability. We discuss below provisions introduced in the Public Service Act 2020 and an initiative relating to these provisions called Whāinga Amorangi (established in 2022 by Te Arawhiti | The Office for Māori Crown Relations). Both of these may promote and assist agencies' engagement with tikanga. However, as both are relatively new and have some limitations, we also discuss other opportunities.

Capability-building initiatives: the Public Service Act and Whāinga Amorangi

- 9.12 The Public Service Act recognises that the public service has a role in supporting relationships between Māori and the Crown consistent with the Treaty.¹⁴ The Act requires

¹³ Resource Management Act 1991, ss 2 and 7(a); Water Services Act 2021, s 14.

¹⁴ Public Service Act 2020, s 14(1).

chief executives to develop and maintain the capability of the public service to engage with Māori and to understand Māori perspectives.¹⁵ This requirement, while not referring explicitly to tikanga capability, sets an objective that is unlikely to be achieved without some public service grounding in tikanga. Additionally, provisions in the Act outlining what it means to be a good employer include recognition of:¹⁶

- (i) the aims and aspirations of Māori; and
- (ii) the employment requirements of Māori; and
- (iii) the need for greater involvement of Māori in the public service.

9.13 Supplementing these statutory requirements, Te Arawhiti has established the cross-agency work programme Whāinga Amorangi. The programme aims to help chief executives meet their Public Service Act responsibility, position the public service to support the Māori-Crown relationship and work across the public service towards a culture change.¹⁷ Agencies must develop organisational and individual capability-building plans to be submitted by their chief executives to Te Arawhiti for review and advice. Progress on the organisational plans will be publicly reported in agencies' annual reports. Chief executives are expected to commit to developing their own capabilities.¹⁸ A Māori-Crown relations capability framework finalised in 2022 identifies relevant priorities, including to:¹⁹

- make the public service more accessible and responsive to Māori;
- enable the public service to take new approaches to complex issues;
- enable public servants to meaningfully engage with Māori and improve the quality of government decision-making;
- enable the public service to recognise the skills and knowledge Māori public servants bring, and the importance of better supporting Māori public servants;
- support the growth of Māori public servants in leadership positions.

9.14 Whāinga Amorangi specifies “tikanga/kawa” as one of six important areas for initial focus.²⁰

Supporting capability and capacity development and putting it in systemic context

9.15 By signalling the importance of raising public sector comfort, confidence and capability when encountering tikanga,²¹ both the Public Service Act requirements and Whāinga Amorangi set valuable expectations. Specifying tikanga and kawa as a focus area builds on the Public Service Act direction in important ways. Without this, while on its face section 14(2) of the Public Service Act is broad enough to support a priority of tikanga

¹⁵ Public Service Act 2020, s 14(2).

¹⁶ Public Service Act 2020, s 73(3)(d).

¹⁷ Te Arawhiti | The Office for Māori Crown Relations “Whāinga Amorangi resource hub” <tearawhiti.govt.nz>.

¹⁸ Te Arawhiti | The Office for Māori Crown Relations *Whāinga Amorangi: Transformational Leadership* (undated) at 15.

¹⁹ Te Arawhiti | The Office for Māori Crown Relations *Māori Crown relations capability framework for the public service* (September 2022).

²⁰ Te Arawhiti | The Office for Māori Crown Relations *Māori Crown relations capability framework for the public service* (September 2022) at 2.

²¹ For “comfortable”, “confident” and “capable” as relevant measures, see Te Arawhiti | The Office for Māori Crown Relations *Māori Crown relations capability framework for the public service — individual capability component* (undated).

upskilling within agencies, the Act does not itself prioritise tikanga. That said, from the perspective of strengthening agencies' capability to engage with tikanga, both initiatives also have some weaknesses.

- 9.16 First, these initiatives will not necessarily lead to tikanga capability being prioritised in the short term. Whāinga Amorangi plan making is commencing for the first three-year cycle of the programme. In those first three years, te reo Māori and New Zealand history/Treaty of Waitangi literacy take priority as essential capability areas. Tikanga/kawa is an optional competency that chief executives may elect to include.²² Given this, it cannot be assumed that tikanga will be a priority focus.
- 9.17 Further, while the Public Service Act envisages that a good employer will employ and support Māori staff, this is unlikely to answer the issue. Māori staff may well have greater capability than other staff to engage with Māori and understand Māori perspectives. However, even for those who are Māori, the ability to advise on tikanga will vary and may require recourse to others with greater knowledge. The nature of tikanga expertise is such that it will never be widely shared. Agencies will need to know when and how to reach out and to whom, rather than expecting staff to hold that expertise.
- 9.18 We commend tikanga capability to those continuing to develop Whāinga Amorangi as an integral, high-priority aspect of this programme. However, we do so mindful of ongoing challenges. Tikanga expertise is a limited commodity. The reality is that expanding agencies' specialist expertise in tikanga through recruitment into the public sector depletes the externally available supply of expertise, which iwi also rely on. This suggests that a balance is needed between sharing and teaching basic tikanga building blocks while introducing external expertise where appropriate. However, even this approach will place demands upon Māori individuals and organisations to support the public service in upskilling.
- 9.19 We see advantages in moving promptly to improve tikanga knowledge gaps and offer guidance. Given this, rather than leaving capability-building matters to individual agencies, there may be short-term merit in providing some tikanga-focused cross-government training modules and support. Te Arawhiti, in consultation with tikanga experts, would be well positioned to design and facilitate such an approach. We think agencies would welcome this based on the interest in the topic and many questions we encountered.
- 9.20 As an aside, there is also room to significantly expand the Whāinga Amorangi resource list relating to tikanga.²³ For example, agencies will find already-published guides such as *Te Mātāpunenga* and the online Legal Māori Resource Hub (which incorporates a Māori legal dictionary) invaluable in helping to explain tikanga concepts.²⁴ We hope that this Study Paper and our Study Paper of 2001 will also prove helpful.²⁵

²² Te Arawhiti | The Office for Māori Crown Relations *Whāinga Amorangi: Transformational Leadership* (undated) at 9.

²³ Te Arawhiti | The Office for Māori Crown Relations *Māori Crown relations capability framework for the public service* (September 2022) at 4.

²⁴ Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Te Mātāhauariki Research Institute, Victoria University Press, Wellington, 2013); The Legal Māori Resource Hub <www.legalmaori.net>; and see The Legal Māori Resource Hub "A dictionary of Māori legal terms" <www.legalmaori.net/dictionary>.

²⁵ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

9.21 Ultimately, although building public agencies' in-house capability is important, it must be seen as one piece of a larger whole. The value of lifting general capability to engage with tikanga is unquestioned. However, other supporting initiatives will be needed. The importance of building complementary external processes into the system that allow agencies to connect with the right expertise and be supported with guidance cannot be overemphasised.

DEVELOPING PROCEDURAL GUIDANCE: PROMPTS TO CONSIDER TIKANGA

9.22 Another challenge for those working on public policy and law reform can be a lack of clear direction about how and when to consider tikanga. Risks that arise include agencies developing processes or policies that are superficial or lack clarity in respect of tikanga, or missing opportunities through inadvertent neglect of tikanga approaches. Procedural guidance has an important role to play in ensuring that agencies developing policy are reflecting on the relevance of tikanga and integrating tikanga consideration where appropriate from the earliest stages of their policy development. Good policy processes will improve the resulting law.

9.23 At least two important pieces of Cabinet-endorsed guidance mention tikanga.²⁶ There are also general guides for engaging with Māori.²⁷ However, overall, comparatively little guidance exists. By contrast, the Crown has over several decades successfully embedded a norm for policy makers and public officials to consider the Treaty and engage with Māori in their work. This has been supported by extensive legal and policy guidance. As the importance of giving specific attention to tikanga is increasingly recognised, a similar process of embedding fuller guidance and earlier consideration is desirable.

9.24 Some agency-led guidance could be developed on each agency's own initiative. As tikanga capability and capacity grow within the public sector, agencies will be increasingly able to develop good internal protocols for identifying and engaging appropriately with tikanga in ways suited to their work. But external guidance will still play an essential part in setting expectations. Guidance should draw attention to the need to reflect on tikanga issues and set expectations that tikanga will be meaningfully considered throughout the policy-making process from an early stage.

9.25 In this section, therefore, we discuss opportunities for improving guidance on when and how public agencies should consider tikanga when developing policy and legislation. As a minimum, there is room to strengthen existing Cabinet-endorsed guides, issued respectively by the Legislation Design and Advisory Committee (LDAC) and the Cabinet Office. We understand that the LDAC *Legislation Guidelines* (LDAC Guidelines) chapter relating to the Treaty of Waitangi, Treaty settlements and "Māori interests", including tikanga, is under review. We therefore consider the LDAC Guidelines only briefly, before focusing more closely on processes supporting the development of Cabinet papers.

²⁶ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021); Cabinet Office Circular "Te Tiriti o Waitangi / Treaty of Waitangi guidance" (22 October 2019) CO (19) 5.

²⁷ See for example Te Arawhiti | The Office for Māori Crown Relations *Guidelines for engagement with Māori* (1 October 2018).

The LDAC Guidelines

- 9.26 The LDAC Guidelines advise public officials on developing good legislation.²⁸ Adopted by Cabinet, they are a key reference for assessing whether draft legislation adheres to accepted legal and constitutional principles and maintaining the overall integrity and coherence of legislation in Aotearoa New Zealand.²⁹ Tikanga is referenced in the LDAC Guidelines in two places: when considering how new legislation relates to the existing law and Māori interests including Treaty interests.³⁰
- 9.27 First, when agencies are considering “how new legislation relates to the existing law”, the LDAC Guidelines recommend that they should identify “[r]elevant common law rules and principles and tikanga”.³¹ This language aligns with Supreme Court dicta by locating tikanga with the common law and identifying the need to consider tikanga where relevant. The language further indicates that tikanga is properly equated with common law rules and principles. As this section goes on to say, the expectation that new legislation “should, as far as practicable, be consistent with fundamental common law principles and tikanga” may require Māori language, customs and beliefs and the importance of community, whānau, hapū and iwi to be considered.³² However, these points are not further explained in the LDAC Guidelines.
- 9.28 Second, in a chapter dedicated to “The Treaty of Waitangi, Treaty settlements, and Māori interests”, agencies are asked whether proposed legislation potentially affects rights and interests recognised at common law or practices governed by tikanga. The text focuses on customary title or rights that might be affected and “potentially affected practices that are governed by tikanga”.³³ In so doing, the LDAC Guidelines tend to position tikanga in a passive way, acted upon by state law. This contrasts with a policy and legislative approach in which tikanga might actively contribute to laws and legal principles that incorporate tikanga strands and apply to all.
- 9.29 Overall, while the Treaty and “Māori interests” are given attention in the LDAC Guidelines, the comparatively brief nature of explanation about tikanga contrasts with fuller treatment of other topics, such as fundamental constitutional principles and values of Aotearoa New Zealand law and separate chapters dedicated to the New Zealand Bill of Rights Act 1990, discrimination, privacy and international obligations.³⁴ There is merit in a more developed tikanga section. Reframing tikanga discussion in the LDAC Guidelines and giving policy makers more actionable guidance would be beneficial. Indeed, tikanga might stand among the issues relevant to all legislation.

Guidance supporting the development of Cabinet papers

- 9.30 The second piece of existing policy and legislative guidance that refers to tikanga is a Cabinet Office circular: “Te Tiriti o Waitangi | Treaty of Waitangi guidance” (the Treaty

²⁸ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021).

²⁹ See generally Legislation Design and Advisory Committee <ldac.org.nz>.

³⁰ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 3.4 and 5.3.

³¹ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 3.4.

³² Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 3.4.

³³ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 5.3.

³⁴ Compare Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021), chs 4 and 6–9.

circular).³⁵ The guidance on tikanga considerations in the Treaty circular is brief and could be expanded. Alternatively, tikanga may warrant its own guidance in a separate circular. We discuss these options below. We also suggest that requirements or recommendations for policy makers to address tikanga could be built into the following documents:

- (a) The Cabinet paper template, which might include a requirement for a tikanga analysis section or impact statement.
- (b) Regulatory Impact Statements, which are an opportunity to reflect on how tikanga has been weighed when deciding on policy options.

Cabinet Office circular: Treaty of Waitangi guidance

9.31 The Cabinet Office Treaty circular sets out Treaty-related questions for policy makers to consider as they develop policy proposals, as a way of assuring decision makers that relevant factors have been addressed.³⁶ Among the questions, policy makers are invited to assess how policy issues have been considered from a tikanga values-based perspective.³⁷ This recognises that “courts have, in recent years, considered tikanga values to be important to the consideration of matters relating to Māori and should be given appropriate weighting in decision-making”.³⁸ However, as with the LDAC Guidelines, the Treaty circular has a detailed discussion on the Treaty but only a brief section on tikanga. A bullet point list names some tikanga values, identifying mana, whakapapa, whanaungatanga and manaakitanga as “values that could offer perspective on an issue”.³⁹

9.32 While the brevity of the tikanga discussion is not unexpected given the circular’s focus on Treaty issues, it does highlight the relative absence of significant guidance on tikanga. As a minimum, we think that the Treaty circular would benefit from expansion. Beyond this, as we discuss below, tikanga may warrant its own guidance with a much fuller analysis consistent with the Treaty circular’s recognition that tikanga has independent legal relevance.⁴⁰ Guidance given to policy makers on the Treaty and tikanga should be complementary and will sometimes need to work alongside each other, particularly where Treaty obligations require legislation that provides for tikanga in some way.⁴¹ However, we see benefit in providing guidance on tikanga in a separate Cabinet Office circular rather than conflating it with Treaty issues. In practical terms, a companion tikanga-focused circular would reinforce the importance of giving attention to tikanga in its own right.

³⁵ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi guidance” (22 October 2019) CO (19) 5.

³⁶ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi guidance” (22 October 2019) CO (19) 5 at [19.3] and [45].

³⁷ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi guidance” (22 October 2019) CO (19) 5 at 12.

³⁸ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi guidance” (22 October 2019) CO (19) 5 at [74].

³⁹ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi guidance” (22 October 2019) CO (19) 5 at [75].

⁴⁰ Cabinet Office Circular “Te Tiriti o Waitangi / Treaty of Waitangi guidance” (22 October 2019) CO (19) 5 at [76].

⁴¹ The Plant Varieties Act 2022 is an example of this. The legislation provides for kaitiaki relationships, following the report *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity — Te Taumata Tuatahi* (Wai 262, 2011): see Te Ratonga Whare Pāremata | Parliamentary Service “Plant Variety Rights Bill 2021: Bills Digest 2646” (18 May 2021) Pāremata Aotearoa | New Zealand Parliament <www.parliament.nz>.

A tikanga-focused Cabinet Office circular

- 9.33 The Treaty circular was developed with advisory input from external experts. Similarly, appropriate input from Māori with tikanga expertise would also be necessary for the development of any new tikanga-focused circular. Convening a Māori steering group of experts to develop a draft would be desirable.
- 9.34 Accordingly, we by no means fully address here what future guidance ought to contain. As a starting point, however, questions similar to those in the Treaty circular could be posed, for example:
- (a) Are there tikanga perspectives relating to this issue that might inform your policy considerations and preferred approach? In addressing this question, explain:
 - (i) What processes have been undertaken to identify relevant tikanga?
 - (ii) Where tikanga has not been considered relevant, why not?
 - (b) To what extent have policy makers anticipated tikanga positions or legal arguments that their work is inconsistent with tikanga or has unforeseen tikanga-connected meanings? How does the proposal respond to these positions or arguments?
 - (c) Does the proposal allow for Māori to exercise tikanga?
 - (d) Is this a context where tikanga-based solutions might apply to all and be of general benefit? Is this recommendation made with Māori support?
 - (e) In what ways have Māori been involved in tikanga aspects of your policy design?
 - (f) Where tikanga concepts or tikanga-based approaches are part of the design, what role will Māori have in policy implementation?
 - (g) How will incorporating tikanga in this policy proposal build Māori capability and capacity and enhance Māori wellbeing?
- 9.35 As we discuss later in the chapter, further issues and policy questions may arise in drafting legislation. These include whether tikanga concepts are intended to be Māori-specific or have general application and approaches to defining tikanga concepts. It may be helpful for a tikanga circular to address such issues.
- 9.36 Robust analysis of tikanga aspects of policy proposals will be beneficial in developing Cabinet papers and their accompanying Regulatory Impact Statements. It would fulfil a similar function to Treaty analysis, encouraging structured engagement with tikanga considerations during policy development.

Cabinet policy paper requirements

- 9.37 Ministers take papers to Cabinet to provide updates or seek agreement to significant policy proposals, introduce new regulations or a Bill, or release a discussion or consultation document. The template for writing Cabinet policy papers prompts officials to address the Treaty, and Cabinet papers regularly include a Treaty section summarising how policy development has taken account of relevant matters.⁴² Other mandatory considerations are addressed in specific sections — requiring, for example, summaries of climate implications, population implications or human rights implications of policies.

⁴² Cabinet Office “Cabinet policy paper template” (7 May 2021) at 2 <dpmc.govt.nz>.

- 9.38 Policy makers are used to thinking about the Treaty because the mandatory requirement in Cabinet papers sets a structural incentive. There are prompts to consider the Treaty and guidance on what questions officials should consider when developing policies and advice. Although this is not necessarily proof against policies being rationalised after the fact or perfunctory approaches to addressing the Treaty, these standard requirements work to establish norms. If an issue has in another agency's view been inadequately considered or differences of opinion remain about options, this can be put before ministers — serving as a practical incentive to ensure that outstanding issues are resolved before Cabinet considers policy proposals. The Cabinet paper template could be amended to prompt officials to include a tikanga analysis.
- 9.39 The Cabinet requirement to address climate implications has led to the development of supporting processes, including a Climate Implications of Policy Assessment (CIPA) early engagement form.⁴³ The CIPA form is sent to Manatū mō te Taiao | Ministry for the Environment to determine whether an assessment of the climate implications of the policy proposal is required. If analysis is required, the draft analysis goes through a quality assurance process before being reported on in the climate implications section of the Cabinet paper.⁴⁴ While a tikanga analysis would differ in key respects from a CIPA (which is triggered by an objectively measurable accounting threshold), a similar model could be considered for seeking early advice on the need for an assessment of the tikanga implications of a policy.

Regulatory Impact Statements

- 9.40 The 10-page maximum length of Cabinet papers does not always permit detailed analysis of an issue. In most cases, policy makers present a fuller supporting document called a Regulatory Impact Statement (RIS) attached to the relevant Cabinet paper.⁴⁵ A RIS is required for all government proposals that create, amend or repeal primary or secondary legislation.⁴⁶ Every RIS is publicly available, providing a high-level summary in which options are identified and weighed and justifying the recommended option.⁴⁷ Officials are directed in the RIS to “[o]utline the criteria you will use to evaluate options”.⁴⁸ Examples of generic criteria suggested in the template include difficulty of implementation, time required for implementation, compatibility with pre-existing regulation or regulatory systems, fiscal or administrative or compliance costs, equity and value for money. Usefully, officials drafting a RIS are further directed to:⁴⁹

⁴³ A Climate Implications of Policy Assessment (CIPA) is required for proposals that include decreasing greenhouse gas emissions as a key policy objective or that are likely to have a direct emissions impact at or above 0.5 million tonnes CO₂-e within the first 10 years of the proposal period: Cabinet Office, Department of the Prime Minister and Cabinet “Cabinet policy paper template” (7 May 2021) at 5.

⁴⁴ Manatū mō te Taiao | Ministry for the Environment *Climate Implications of Policy Assessment: Guide to estimating the greenhouse gas emission impacts of policies* (November 2019) at 8.

⁴⁵ Cabinet Office Circular “Impact analysis requirements” (26 June 2020) CO (20) 2; Te Tai Ōhanga | The Treasury *Guide to Cabinet’s Impact Analysis Requirements* (June 2020).

⁴⁶ Cabinet Office Circular “Impact analysis requirements” (26 June 2020) CO (20) 2 at [13].

⁴⁷ See Cabinet Office Circular “Impact analysis requirements” (26 June 2020) CO (20) 2 at [9.4]; Te Tai Ōhanga | The Treasury “Regulatory Impact Statement template” (July 2021) <treasury.govt.nz> at 9.

⁴⁸ Te Tai Ōhanga | The Treasury “Regulatory Impact Statement template” (July 2021) <treasury.govt.nz> at 7: deciding upon an option to address the policy problem.

⁴⁹ Te Tai Ōhanga | The Treasury “Regulatory Impact Statement template” (July 2021) <treasury.govt.nz> at 7.

Comment on relationships between the criteria eg, where meeting one criterion can only be achieved at the expense of another (trade-offs), or where certain criteria are prioritised or weighted more than others.

- 9.41 Consistency with tikanga could be a valuable criterion for evaluating policy options. As officials can already take tikanga implications into account if they choose, this would not necessarily require any changes to the RIS template. However, revised Cabinet guidance could help to make this a more common practice by setting an expectation that, where relevant, tikanga considerations will be incorporated into RIS analyses.
- 9.42 In summary, we suggest tikanga considerations in policy could be drawn to Cabinet attention in a more systematic and rigorous way. We see merit in making the importance of tikanga visible by not simply including it within a Treaty analysis. One option would be to follow the approach of existing policy and legislative protocols for considering the Treaty or climate matters. These can provide models for a tikanga-focused equivalent.
- 9.43 However, while we think this will improve the depth of consideration of tikanga in Cabinet papers, one practical problem remains. That is, how any new guidance that may be issued in the LDAC Guidelines or through Cabinet Office circulars can be effectively overseen and support given to agencies who are still building their capacity and expertise. That requires an institution with both an overview of the requirements and sufficient expertise to advise agencies about the best way to meet them. An analogy can be drawn with how the Ministry for the Environment facilitates the CIPA process and provides quality assurance. In the next section of this chapter, we explore avenues for expert advisory input and oversight of how agencies consider tikanga in their work.

EXTERNAL EXPERT ADVISORY PROCESSES

- 9.44 It is essential that agencies are able to seek external tikanga expertise. This ranks high on the list of systemic needs we have identified. Generic guidance about tikanga, while informative and important, cannot replace context-specific engagement with those with expert knowledge of tikanga in practice. Tikanga is not something that can be sufficiently understood by a textual analysis, or even a broad public consultation exercise. However, agencies with whom we spoke identified practical challenges in finding appropriate expertise. Deep knowledge of tikanga is not widely held. Following the *Ellis v R* decision, some officials we spoke with wondered whether for each policy or drafting exercise a process of wānanga (deliberation) involving pūkenga (experts) would need to occur. There are also procedural hurdles relating to Cabinet confidentiality, requiring Cabinet permission to brief anyone outside the public service on confidential proposals. This can be a barrier to tikanga consultation and may suggest advantages in formally establishing a standing group of some kind rather than consulting different experts on a case-by-case basis.
- 9.45 An agency such as the Parliamentary Counsel Office (PCO) might be in a position to appoint its own advisory panel to engage with tikanga issues that arise in drafting. Because of the nature of the PCO's work as "guardians of the statute book",⁵⁰ such a body would achieve an overview of tikanga concepts and kupu Māori wherever they arise in legislation. This would help to ensure that tikanga concepts are appropriately and

⁵⁰ John Burrows "Legislation: primary, secondary and tertiary" (lecture presented to Te Tai Ōhanga | The Treasury, 26 May 2009) at 6.

consistently incorporated into legislation. However, while such advice at the legislative stage is desirable, advice and input would also be beneficial much earlier in the policy development process. Some agencies (for example, the Treasury) have established their own tikanga advisory committees.⁵¹ However, it is doubtful whether such an approach would be feasible for all agencies, or efficient and effective from a whole-of-government perspective. A proliferation of individual advisory committees seems likely to overburden experts, have significant agency costs and risk agencies receiving inconsistent or incomplete advice.

- 9.46 We therefore consider below options for providing centralised support to public agencies to engage with tikanga in an appropriate way. We begin by considering the roles of already-established bodies, including the LDAC, agencies focused on outcomes for Māori and the Māori-Crown relationship (Te Puni Kōkiri | Ministry of Māori Development and Te Arawhiti), and an officials' group established for Treaty provisions oversight hosted by Te Arawhiti. In light of this, we then discuss whether a new public body is needed and what form it might take.

Legislation Design and Advisory Committee — role in policy and legislative design

- 9.47 The LDAC, a committee established by the Attorney-General, exists to improve the quality of legislation.⁵² In addition to publishing its *Legislation Guidelines* (discussed above), the LDAC advises agencies early in the development of policy and legislation on how to translate policy into well-designed legislation and identify potential public law issues.⁵³ The LDAC may also scrutinise Bills introduced to Parliament.⁵⁴ It is not, however, concerned with the policy objectives of legislation. Its focus is on good legislative practice.⁵⁵
- 9.48 Most standing LDAC members are senior government legal advisors and officials. Other external legal practitioners, academics and regulators may be appointed at the Attorney-General's discretion.⁵⁶ The PCO provides secretarial assistance, and the Chief Parliamentary Counsel is among ex-officio members of the group. While the LDAC's composition may include members with tikanga expertise from time to time, overall, its capacity to address tikanga is limited, reflecting the lack of Māori at senior levels in the relevant agencies.
- 9.49 LDAC subcommittees engaging with officials on the development of Bills will usually be drawn from among this standing membership.⁵⁷ However, processes do allow for non-

⁵¹ Some agencies have established such committees, such as Ngā Pūkenga, an expert advisory group that continues to work alongside the Treasury supporting the tikanga-based wellbeing framework He Ara Waiora. See too Te Aka Matua o te Ture | Law Commission "Māori Liaison Committee: terms of reference" (undated) <www.lawcom.govt.nz>.

⁵² Legislation Design and Advisory Committee <ldac.org.nz>; Cabinet Office *Cabinet Manual 2023* at [7.40]–[7.44]; Legislation Design and Advisory Committee "Briefing to the incoming Attorney-General" (10 November 2017).

⁵³ Legislation Design and Advisory Committee "The role of the LDAC" (8 October 2021) <ldac.org.nz>; Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 4.

⁵⁴ Legislation Design and Advisory Committee "The role of the LDAC" (8 October 2021) <ldac.org.nz>.

⁵⁵ Legislation Design and Advisory Committee "The role of the LDAC" (8 October 2021) <ldac.org.nz>.

⁵⁶ Legislation Design and Advisory Committee "Membership" <ldac.org.nz>; and see too Office of the Attorney-General "Adjustment of Legislation Design and Advisory Committee" (Cabinet Legislation Committee paper, 1 October 2018).

⁵⁷ Legislation Design and Advisory Committee "Engaging with LDAC" (8 October 2021) <ldac.org.nz>.

public service members to sit on LDAC subcommittees considering a Bill.⁵⁸ This is one way in which tikanga expert input might be obtained on individual Bills where it is needed. The LDAC has a standing dispensation from Cabinet to share otherwise confidential material with outside contributors.⁵⁹ These protocols could enable consultation with pūkenga on matters not in the public domain and would work around some of the procedural barriers to external consultation.

- 9.50 The LDAC has recently established a Māori-Crown relations subcommittee to consider ways forward. In future, if the LDAC were to address itself more systematically to tikanga issues, any such decision might prompt changes to LDAC’s composition or procedures such as a focus on Māori membership and appointing members with tikanga expertise. However, while at first glance it might seem that the LDAC’s established role puts it in a good position to scrutinise legislation in its formative stages and point out tikanga-connected issues or opportunities, this would be a substantial role change. Tikanga may have significant policy as well as legislative dimensions, raising issues beyond the normal scope of LDAC consideration. There are also some limitations in the process of bringing Bills to the LDAC. Although the LDAC can use its initiative to suggest that the responsible agency should seek advice on a particular piece of legislation, generally agencies self-select which legislative matters are prioritised for LDAC attention.⁶⁰ It would require major reconfiguration for that committee to oversee tikanga input itself, address tikanga in its important policy dimensions (which are not purely matters of “legislative design”) and obtain the confidence of Māori in administering such a role.

The roles of Te Arawhiti and Te Puni Kōkiri

- 9.51 Two public agencies focused on outcomes for Māori may be able to assist other agencies to engage with tikanga: Te Puni Kōkiri and Te Arawhiti. Te Puni Kōkiri is the government’s principal policy advisor on Māori wellbeing and development.⁶¹ Te Arawhiti supports Crown engagement with Māori and works in multiple ways towards strengthening Treaty partnership foundations.⁶² Te Arawhiti also administers a Treaty provisions oversight group, which could be better placed than the LDAC to identify tikanga issues and which we discuss below.
- 9.52 While both Te Puni Kōkiri and Te Arawhiti have important roles, their ability to assist agencies is also limited. Given that each agency has its own strategic direction, supporting other agencies’ development of policy and legislative proposals is not their primary focus.⁶³ The ability of Te Arawhiti and Te Puni Kōkiri to contribute to policy proposals will also be affected by how early in the process their input is sought or queries are raised.

⁵⁸ Legislation Design and Advisory Committee “LDAC operating model” (24 April 2020) <ldac.org.nz>.

⁵⁹ Providing this dispensation to the LDAC (which now includes a mix of public service and external members), see Office of the Attorney-General “Adjustment of Legislation Design and Advisory Committee” (Cabinet Legislation Committee paper, 1 October 2018) at [6.2]–[6.3]; Cabinet Legislation Committee Minute “Adjustment of Legislation Design and Advisory Committee” (1 October 2018) LEG-18-MIN-0127 at [7]–[8]. See too Office of the Attorney-General “Remodelling the Legislation Advisory Committee” (Cabinet Legislation Committee paper, 5 March 2015) LEG (15) 7 at [29].

⁶⁰ Legislation Design and Advisory Committee “Engaging with LDAC” (8 October 2021) <ldac.org.nz>; Legislation Design and Advisory Committee “LDAC operating model” (24 April 2020) <ldac.org.nz>.

⁶¹ Te Puni Kōkiri | Ministry of Māori Development <www.tpk.govt.nz>.

⁶² Te Arawhiti | The Office for Māori Crown Relations <www.tearawhiti.govt.nz>.

⁶³ See generally: Te Puni Kōkiri | Ministry of Māori Development “Our vision, purpose, role and values” (6 July 2022) <www.tpk.govt.nz>; Te Arawhiti | The Office for Māori Crown Relations “Tēnā koutou katoa” <www.tearawhiti.govt.nz>.

We understand that, not uncommonly, Te Arawhiti and Te Puni Kōkiri are asked during interagency consultation on proposals for their “tikanga input” on policy that has already been developed.

- 9.53 Process issues such as this could be corrected and we go on to suggest important ways in which Te Puni Kōkiri and Te Arawhiti each may continue to contribute to facilitating tikanga engagement. However, we also consider that the burden of supporting public sector engagement with tikanga issues should not rest solely upon the shoulders of the “Māori” agencies. Process aside, there remains a larger issue of principle — that is, the proper fora for tikanga advisory input to avoid any perception of Crown capture and to maintain a level of independence and accountability outside of the Crown. Government officials need external pathways to receive community-grounded tikanga guidance directly from holders of the relevant expertise who remain accountable to their communities.

The Treaty provisions oversight group

- 9.54 As noted, Te Arawhiti administers a Treaty provisions oversight (TPO) group made up of officials from different agencies. The TPO group has similarities with the LDAC but is more newly established and has a narrower focus. It is focused on Treaty compliance, with a role in reviewing draft Bills and advising on relevant provisions.⁶⁴ The group marks a step in the direction of past recommendations made by Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal that Bills should receive Treaty scrutiny.⁶⁵
- 9.55 Although the TPO group is not presently tikanga-focused, the hosting of this group within Te Arawhiti perhaps advantageously positions the group to seek tikanga guidance, make the right connections and identify relevant issues. Already, this group has been trialling an approach in which it works alongside the LDAC. External relationships with iwi and hapū continually being built by Te Arawhiti may enable the TPO group to facilitate consideration of tikanga issues that arise as legislation is developed. Alongside Treaty issues, it might be a forum for identifying tikanga matters of concern and guiding agencies on how to address them, even if the group did not itself house all the necessary expertise.
- 9.56 Countering this, in likelihood, the TPO group’s expertise and composition will also differ from that which might be expected of a specialist tikanga group. Combining functions runs the risk that neither is done well. The TPO group is also subject to the reservations already identified in relation to government agencies. It comprises selected officials, and there remains a fundamental issue of whether making a tikanga advisory role a matter for Crown officials is the best approach.

Establishing a tikanga expert advisory group

- 9.57 In this section, we consider whether a new expert advisory group on tikanga should be established and what its purpose and functions might be. We also discuss options for how the group could be established.

⁶⁴ Cabinet Office *Cabinet Manual 2023* at 128.

⁶⁵ Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2019) at 35.

Is a new tikanga-focused group needed?

- 9.58 According to the LDAC Guidelines, a new public body should only be created if no existing body “possesses the appropriate governance arrangements or is capable of properly performing the necessary functions”.⁶⁶ As we explored in the previous section, existing agencies and cross-agency groups could play a greater role in facilitating tikanga engagement during policy and legislative development. Of these, the Te Arawhiti-administered TPO group may be the most suitable and able to adapt. However, no existing body appears ideally suited to the task of providing agencies developing policies and legislation with tikanga-focused guidance and support and steering their engagement on tikanga issues. Revising an existing body’s governance arrangements or capability may also disrupt or be incompatible with its existing purposes.
- 9.59 For these reasons, it may soon be necessary to have a group made up of Māori who are knowledgeable in tikanga that is able to advise agencies. However, before establishing any new tikanga-focused group, it will also be essential to gauge the support of Māori and closely involve Māori in developing and considering a range of options. Before selecting any option, Māori should be involved in discussing the appropriate form, purpose and functions of any future group. We suggest this should include consulting widely with iwi and hapū.
- 9.60 Much more work would be needed to explore a range of possible options. We therefore confine ourselves to preliminary observations on possible options for what we call a tikanga expert advisory group. As we discuss these options, we have left open a number of matters that will benefit from Māori involvement in deciding on the right way to move forward. We first consider some potential purposes and functions, and criteria essential to the success of a tikanga expert advisory group. For the purpose of stimulating discussion, we then review two options for convening a group. They are:
- (a) A further cross-agency group, to be serviced and funded by an existing agency or agencies. Group members could include tikanga experts from outside government alongside senior officials knowledgeable in tikanga. The group would have a specialised tikanga focus.
 - (b) A tikanga expert group informed by the model of Te Mātāwai, which is a Crown-affiliated but independent Māori entity established to support Māori language use.
- 9.61 Each of these options would have greater independent expert standing than existing options and would provide a more specialised focus on tikanga issues. Since any such body’s primary purpose would be to advise officials, it would need to have the trust and confidence of officials as well as Māori. Accordingly, both of the mooted options seek to balance the need to retain an element of Crown connection (so that agencies have comfort and confidence in being able to engage at an advisory level and share information) with the need to access external expertise and maintain accountability to Māori communities.

⁶⁶ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 104; and see further questions and considerations for those proposing to establish a new government-funded body at 104–109. These include whether or why it is needed (could an existing body, modified if needed, take on the function?) and what type of body by reference to a list of types.

Tikanga expert advisory group purpose and functions

- 9.62 If a new tikanga expert advisory group is established, we see the following criteria being essential to its success:
- (a) The group would be established to enable tikanga experts to communicate about tikanga with public agencies.
 - (b) It is essential that the group is Crown-funded. However the group is established, success would depend on receiving adequate funding for service and support.
 - (c) At the same time, it must retain some degree of separation from the Crown and have an appropriate mandate from Māori. This can be achieved through its membership and appointment processes.
 - (d) It should have the ability to consider regional variations in tikanga.
 - (e) Its purpose would be to provide advice on tikanga-related issues that may arise during policy development and legislative drafting.
 - (f) While the group may be a forum to which the already-established officials' groups could refer tikanga-related matters, it ideally would be involved as early as possible in policy development.
 - (g) The group should be able to provide guidance to agencies on who else they should consult.
- 9.63 Terms of reference could provide for tikanga expert advisory group members to draw on their personal expertise and knowledge of tikanga Māori, Māori governance entities and Māori communities to:⁶⁷
- (a) advise agencies on:
 - (i) the consistency of any legislative or policy proposal with tikanga concepts;
 - (ii) the relevance of tikanga-based approaches to their policy design; and
 - (iii) how to include appropriate references to tikanga in policy or legislation;
 - (b) advise agencies on how to engage and consult with Māori on tikanga-focused aspects of their legislative or policy proposals;
 - (c) develop generic guidance on engaging with tikanga, consulting with other tikanga experts as appropriate; and
 - (d) provide advice and opinions on topics or matters relating to tikanga referred to it from time to time, either generally or in relation to specific projects.
- 9.64 At a minimum, the group would have a role in reviewing developing legislation (including in its policy phase). There may be a case for a wider focus — for example, to include major policy or operational initiatives that do not involve legislation. However, including non-legislative matters would enlarge the scope of the group's work and may be better managed within individual agencies.

⁶⁷ Compare Legislation Design and Advisory Committee <www.ldac.org.nz>; Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 4; Te Aka Matua o te Ture | Law Commission "Māori Liaison Committee: terms of reference" (undated) <www.lawcom.govt.nz>.

9.65 There may be benefits in the tikanga expert advisory group developing an affiliation with the LDAC or TPO officials' groups, given its similar focus. This could be achieved through a memorandum of understanding. It would help to avoid duplication of efforts and ensure that the new body has links with established processes for reviewing policy and drafting proposals. The LDAC and/or TPO group could also potentially function as a filter, referring matters for tikanga expert advisory group consideration where appropriate. While this might help to manage the workload of the tikanga expert advisory group, it might also have the disadvantage of preventing policy proposals from being considered at an early stage.

Option One: a third cross-agency officials' group that is tikanga-focused

9.66 To establish a new tikanga expert advisory forum, one option is to convene another cross-agency group. To ensure that a proportion of the group's membership is familiar with internal policy and government processes, in part its membership could include senior Māori officials drawn from across government. A further quota of members expert in tikanga and the law might then be appointed from outside the public service to make up the group's remainder. The LDAC provides a model for convening such a group and also shows the potential for processes to be put in place enabling input from other external experts beyond the group's standing members.

9.67 In some ways, establishing a third officials' group alongside the LDAC and the TPO group seems duplicative. However, it would have the benefit of being tikanga-focused and bringing together senior officials and others with tikanga expertise. One argument weighing against this approach is that it may suffer from the same perception of being officially captured, compared to a group retaining a mandate directly from Māori with ongoing accountability by its members to Māori communities. However, a composite membership — with some members from within government and others drawn from outside — may work in part to counter this perception.

9.68 Such a group would need to be serviced and supported by a government agency. There are options for hosting the group, which include Te Puni Kōkiri and/or Te Arawhiti. A group could be co-convened and jointly funded by both of these agencies, reporting to the Minister for Māori Development and/or the Minister for Māori Crown Relations.

9.69 We have also reflected on the potential for Te Aka Matua o te Ture | Law Commission to make either interim or ongoing contributions as a host or supporting agency. Reasons include the Commission's status as an independent Crown entity, enabling a degree of separation from government. The Commission's statutory remit to take and keep the law of New Zealand under review in a systematic way is also relevant and includes the statutory obligation to take te ao Māori (the Māori dimension) into account.⁶⁸ However, a role which the Commission undertook previously in reviewing introduced legislation for the then Legislation Advisory Committee (now the LDAC) was disestablished for reasons including the resource-intensive nature of the work.⁶⁹ These experiences make us cautious. If a tikanga expert advisory group with a role reviewing tikanga-focused

⁶⁸ Law Commission Act 1985, ss 5(1)(a), 5(1)(b) and 5(2)(a).

⁶⁹ See Office of the Attorney-General "Remodelling the Legislation Advisory Committee" (Cabinet Legislation Committee paper, LEG (15) 7, 5 March 2015) at [12].

legislative provisions and policies were to be established, it must be durable. It must also have well-established te ao Māori connections.

Option Two: a statutory board informed by Te Mātāwai

- 9.70 A second option, placing more emphasis on the importance of directly involving Māori communities, could be to model the tikanga expert advisory group on the approach of Te Mātāwai: a Māori language revitalisation initiative.⁷⁰ Established in 2016 by Te Ture mō Te Reo Māori | Māori Language Act 2016, Te Mātāwai is an independent Board of Māori expert members.⁷¹ Its functions include providing strategic leadership for the public sector and greater Aotearoa to promote Māori language use in homes and in the community.⁷²
- 9.71 Te Mātāwai Board members are each appointed for a three-year term. Numbering in total 13 members, the Board has seven members chosen by iwi, four te reo tukutuku representatives representing the interests of four clusters of Māori language organisations and two members (including a co-chair) appointed by the Minister for Māori Development.⁷³ With most of the membership chosen by iwi and Māori language stakeholder organisations,⁷⁴ Te Mātāwai is constituted in a way that is Māori-led and iwi-based, which helps to establish its legitimacy. A similar approach could be taken to a tikanga expert advisory group.
- 9.72 A majority of iwi-appointed members providing an iwi-based mandate and accountability would be a main feature of a tikanga expert advisory group established on such a model. Other expert representatives might contribute more generic tikanga, mātauranga, te reo Māori and legal expertise.
- 9.73 Similarly to Te Mātāwai, the group could be associated with Te Puni Kōkiri or Te Arawhiti for administrative purposes, following the model of a statutory board.⁷⁵ Like all public bodies, there would be standard, compulsory accountabilities such as those provided for by the Public Audit Act 2001, the Public Records Act 2005 and the Official Information Act 1982.⁷⁶ As Te Mātāwai illustrates, such a board may still be an independent entity.

KUPU MĀORI IN LEGISLATION

- 9.74 The final matter we address in this chapter is the way in which legislative drafting engages tikanga. The first reference to a tikanga concept was made in general legislation in the Resource Management Act 1991, referring to kaitiakitanga.⁷⁷ Since then, other tikanga concepts such as “whāngai”, “whānau” and “wāhi tapu” have been written into

⁷⁰ Te Mātāwai <tematawai.maori.nz>.

⁷¹ Te Mātāwai “The Board” <tematawai.maori.nz>.

⁷² Te Mātāwai “Māori language revitalisation” <tematawai.maori.nz>.

⁷³ Te Mātāwai “The Board” <tematawai.maori.nz>.

⁷⁴ Te Kāwanatanga o Aotearoa | New Zealand Government “Te Mātāwai” (1 November 2021) <www.govt.nz>.

⁷⁵ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 107: a statutory board means a body corporate established by or under written law to perform or discharge any public function under the supervisory charge of a Ministry or organ of state.

⁷⁶ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 Edition* (September 2021) at 108.

⁷⁷ “It was the first genuine attempt to import tikanga in a holistic way into any category of the general law”: Joseph Williams “Lex Aotearoa: an heroic attempt to map the Māori dimension in modern New Zealand law” (2013) 21 Taumauri | Waikato Law Review 1 at 18.

legislation.⁷⁸ These kupu Māori are, as Tai Ahu identifies, one step towards “the use of Māori as a language of substantive law” — that is, “the language used in any kind of legal instrument to produce a legal outcome or create a legal relationship”.⁷⁹ The importance for policy makers and drafters of choosing kupu Māori carefully and realising that tikanga will influence the statutory interpretation of kupu Māori cannot be overemphasised.

- 9.75 Some of the drafting issues that arise link back to matters canvassed earlier in the chapter. Many of our remarks and suggestions made earlier will have a bearing on some of the issues confronting drafters. Addressing them will contribute to certainty and clarity at the drafting stage. For example, the fact that kupu Māori can have many meanings may raise fears of uncertainty about how they will be interpreted. Different hapū and iwi may also interpret words or concepts in varying ways based on their own tikanga. As envisaged above, a tikanga expert advisory group might assist with these challenges by reviewing draft legislation incorporating kupu Māori or tikanga concepts. It may be able to address queries that arise during the drafting process and assist in finding the right approach or form of words. The procedural guidance for policy makers we discuss earlier in the chapter may also be useful in prompting early identification of the relevance of tikanga and encouraging officials to grapple with issues that arise prior to policy approval. This will increase confidence in a reflective approach having been taken and greater policy clarity.
- 9.76 While the processes we have already discussed will assist in ensuring tikanga is properly considered in legislation, challenges remain. One issue is how much legislative definition is required or proper for a tikanga concept. Whereas legislation needs to speak to everyone, tikanga concepts may mean different things to different people, and some will have no knowledge of them at all. Detailed definitions or drafting can lessen criticism that the law is unclear. However, as Ahu writes, kupu Māori definitions given in English risk losing cultural nuances and “ascribing inadequate and artificial meanings to Māori concepts”.⁸⁰ There is a strong argument against legislation setting the parameters of cultural concepts: a “definition that is too descriptive is likely to inappropriately codify the content of the concept”.⁸¹
- 9.77 Drafters therefore confront a challenge of how to strike the right balance in their use of definition sections. There has not been a consistent drafting approach to defining kupu Māori in legislation. Only some existing legislative definitions provide that kupu Māori are to be interpreted consistently with tikanga.⁸² More recently, some new approaches are being tried, such as in relation to the freshwater management regulatory mechanism Te

⁷⁸ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 13 and 50; see also Catherine J Iorns Magallanes “The use of tangata whenua and mana whenua in New Zealand legislation: attempts at cultural recognition” (2011) 42 Victoria University of Wellington Law Review 259 at 262 (whose terminology of “pepper-potting” Ahu adopts).

⁷⁹ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 50.

⁸⁰ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 94.

⁸¹ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 95.

⁸² See for example Resource Management Act 1991, ss 7(a) and 2(1) defining “kaitiakitanga”; compare the “kaitiakitanga” definition replaced on 17 December 1997 by Resource Management Amendment Act 1997, s 2(4); and compare for example “taonga”, which remains undefined in the Property (Relationships) Act 1976, s 2.

Mana o te Wai that is part of the National Policy Statement for Freshwater Management 2020.⁸³ Implementation processes have allowed iwi and hapū to develop their own statements of the meaning of Te Mana o te Wai, each describing the concept according to their own tikanga.⁸⁴ This is an example of the government trialling new ways to accommodate tikanga.

- 9.78 We make some brief observations below about incorporating kupu Māori into legislation, which could be considered for inclusion in any expanded Cabinet guidance on tikanga.
- 9.79 First, to use a Māori word or phrase in an otherwise English text can be a powerful tool and reflects a purposeful drafting choice. When kupu Māori are used in legislation, it should always be presumed that this was meant to enable their meaning to be explored and their interpretation to be developed in Māori ways. Kupu Māori in legislation should produce tikanga-connected outcomes. As Ahu contends, tikanga should play a greater role in determining the meaning of Māori words.⁸⁵
- 9.80 Accordingly, kupu Māori should be reserved for situations when a Māori meaning is intended. As a corollary, simply grafting kupu Māori onto policy otherwise written through a non-Māori lens may be problematic. It would be mistaken to think that kupu Māori can be used as a cosmetic gloss on policies without changing their substance.
- 9.81 Agencies are likely to need to ask themselves deeper policy questions about the intended meaning and application of kupu Māori and tikanga concepts. For example, clarifying policy intentions will be useful where there may be different Māori and non-Māori understandings of concepts. “Taonga” or “mana” are examples of tikanga concepts with a popular understanding that is more limited or colloquial than their tikanga meaning.⁸⁶ Agencies may also wish to consider and clarify a tikanga concept’s purposes in different contexts, such as a concept’s intended application in circumstances not involving Māori.
- 9.82 In light of the above and as a general measure, the Legislation Act 2019 could be amended to either require or establish a presumption that kupu Māori are to be interpreted consistently with tikanga. This would be one means of providing clearer guidelines for the statutory interpretation of Māori text.⁸⁷
- 9.83 There are further options for development than this short discussion of legislative issues permits. We have focused on interpreting the meaning of Māori words.
- 9.84 There remains a larger issue of the meaning that tikanga might bring to English legal language as the common law develops. At other times, legislative actions may engage tikanga in ways that are not self-evident. For example, while Crown apologies written into

⁸³ Manatū mō te Taiao | Ministry for the Environment *National Policy Statement for Freshwater Management 2020* (August 2020, amended February 2023) at [1.3].

⁸⁴ Our Land and Water *Te Mana o te Wai Guidelines for Mana Whenua: National Policy Statement for Freshwater Management 2020* (25 February 2022) at 11. See too: Our Land and Water *Te Mana o te Wai: A Factsheet for Hapū and Iwi* (February 2022, Factsheet 1).

⁸⁵ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 95.

⁸⁶ Mihiata Pirini and Anna High “Dignity and mana in the “third law” of Aotearoa New Zealand” (2021) 29 *New Zealand Universities Law Review* 623.

⁸⁷ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 69.

Treaty settlement enactments have no legal effect from a non-Māori legal standpoint,⁸⁸ an apology that restores mana can have tikanga significance. As state law meets tikanga, these matters may arise. Lastly, while instances of dual language legislation remain occasional at present, in the future te reo Māori could become a more regular language of statutory enactment.⁸⁹ To close the chapter, we discuss an example of this, showing how legislative language can be important as a nuanced way of communicating tikanga.

Te Kāhui o Matariki Public Holiday Act 2022: an Act engaging with tikanga

9.85 Te Kāhui o Matariki Public Holiday Act 2022 (Te Kāhui o Matariki) provides an example of a tikanga-centred policy and legislative process. The legislation establishes an annual public holiday to acknowledge the rising of the constellation Matariki, which marks the Māori new year. Te Kāhui o Matariki brings mātauranga Māori (Māori knowledge) and tikanga into the rhythms of Aotearoa New Zealand’s regular life. It is an example of tikanga considerations positively influencing both the drafting process and the completed legislation. It also gives an indication for the future of how mātauranga and tikanga-based legislation that addresses matters of importance to Māori might be achieved. We focus our discussion on four related features:

- (a) Te Kāhui o Matariki exemplifies a legislative process and a completed Act sustaining direct connections with Māori knowledge experts and mātauranga.
- (b) The decision to provide for this public holiday in a principal Act was consistent with a tikanga approach and allows mātauranga and tikanga relating to the holiday to be more fully understood.
- (c) Departures from orthodox drafting enabled mātauranga to be shared while acknowledging and respecting boundaries. Te Kāhui o Matariki holds space for mātauranga and tikanga, respecting their mana and the mana of the Matariki Advisory Group (who contributed to drafting the Act).
- (d) Reo Māori usage helps to communicate mātauranga.

Connection with knowledge experts

9.86 Enacted in both te reo Māori and English, Te Kāhui o Matariki was drafted with contributions from seven mātauranga experts who formed the Matariki Advisory Group.⁹⁰ The Matariki Advisory Group provided a statutory statement on the meaning and significance to Māori of Matariki, which is the first substantive section in the Act. It also set dates for a 30-year period on which Matariki should be observed, based on the Māori lunar calendar, te maramataka. Preparation of the statutory statement by the Matariki Advisory Group reflects “Māori rangatiratanga over mātauranga Māori”.⁹¹ Its direct

⁸⁸ Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 61.

⁸⁹ See for example: the Preamble to Te Ture Whenua Maori Act 1993; and for dual language enactment in entirety, Te Ture mō Te Reo Māori 2016 and Te Kāhui o Matariki Public Holiday Act 2022. See too Tai Ahu “Te reo Māori as a language of New Zealand law: the attainment of civic status” (LLM Dissertation, Te Herenga Waka | Victoria University of Wellington, 2012) at 77 and generally.

⁹⁰ Minister for Māori Crown Relations and Minister for Workplace Relations and Safety “Matariki Advisory Group: establishment, appointments and terms of reference” (Cabinet paper, 2 July 2021).

⁹¹ Minister for Māori Crown Relations and Minister for Workplace Relations and Safety “Matariki Advisory Group: establishment, appointments and terms of reference” (Cabinet paper, 2 July 2021) at [9].

incorporation into Te Kāhui o Matariki closely connects the Act with both the Matariki Advisory Group and mātauranga.

The decision to establish a separate Act

9.87 The decision to establish Te Kāhui o Matariki as a principal Act contrasts with an alternative and equally legally effective approach: establishing a Matariki holiday by consequentially amending the Holidays Act 2003. The decision regarding the Act was partly influenced by the intention that the new public holiday would, like public holidays for Anzac Day and Waitangi Day, become a shared heritage and taonga for Māori and non-Māori alike.⁹² Incidentally (yet more importantly from a tikanga perspective), the stand-alone Act also enables a broader narrative, context and perspective to be communicated. Te Kāhui o Matariki does more than the legally effective minimum. In the Act, the correct understanding about Matariki is as important as creating a public holiday to mark its observance. In this indirect way, Te Kāhui o Matariki has taken a tikanga-consistent approach. It allows the traditions and tikanga at the heart of Matariki to be shared and centred in ways that a simple consequential amendment to the Holidays Act would not have achieved.

Modifying drafting conventions

9.88 In Te Kāhui o Matariki, departures from established drafting conventions have facilitated the Matariki Advisory Group statement about mātauranga and tikanga. Section 3, which shares the meaning and significance of Matariki to Māori, takes the place of a customary purpose clause. The statement begins with a karakia. It next foregrounds the importance of understanding that Matariki traditions vary among iwi and hapū.⁹³ Following this acknowledgement of tribal variance, shared principles and intentions guiding the celebration are centred by identifying guiding principles and a list of tikanga values.⁹⁴ In these ways, the statement about how Matariki can be celebrated focuses on how tikanga Māori traditions relating to Matariki may be respected and protected at the same time as they are being shared.

9.89 The section stating the significance of Matariki also respects mātauranga in more nuanced ways. By contrast to putting this text in a Preamble, which might have been another option, the position of the statement sets it apart without risk of legal reinterpretation. It is marked by a different typeface and preceded by saying that “[t]he Matariki Advisory Group (established by the Government) has explained the meaning and significance of Matariki to Māori as follows”.⁹⁵ Drafting choices such as these are indicative of how those responsible for the legislation have endeavoured to safeguard both tikanga and the Crown by indicating boundaries around this provision and who is speaking.

⁹² Compare Anzac Day Act 1966; Waitangi Day Act 1976.

⁹³ See particularly Minister for Māori Crown Relations and Minister for Workplace Relations and Safety “Matariki Advisory Group: establishment, appointments and terms of reference” (Cabinet paper, 2 July 2021) at [19]: “in-depth, specific cultural knowledge, expertise and understanding of Te Ao Māori and the pūrākau and mātauranga Māori associated with Matariki and Maramataka (the Māori calendar)” and “the ability to consider regional variations in traditions”.

⁹⁴ Compare Wiremu Doherty, Hirini Moko Mead and Pou Temara “Tikanga” (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at [1.3]–[1.4] and [1.94]. See Appendix 1.

⁹⁵ Te Kāhui o Matariki Public Holiday Act 2022, s 3.

Being enacted in te reo Māori

- 9.90 Not least, being written in Māori adds to the sense of Te Kāhui o Matariki bringing mātauranga to life. Reo Māori became significant in conveying nuances when drafting the new law. For example, regarding the observance day, the simplest direct translation into Māori — Te Rā o Matariki | Matariki Day — would have turned focus towards the day rather than the constellation of stars and a time at which the stars are seen in the sky. Instead, the language chosen is “Te Rā Aro ki a Matariki” | “Matariki Observance Day”: a day that heeds or turns towards Matariki.⁹⁶ The Māori text contributes in these subtle ways to sharing tikanga and mātauranga.
- 9.91 Having Te Kāhui o Matariki on the statute book is significant for these ways in which both the drafting process and the legislation have expressed tikanga. It is a precedent showing how, with care, proper ways can be found to protect and acknowledge the respective needs and priorities of tikanga and state law makers. Te Kāhui o Matariki reflects the responsibility felt by those crafting and contributing to the legislation for correctly striking this balance and continuing to safeguard mātauranga and tikanga while sharing them with others.

CONCLUSION

- 9.92 This chapter has explored core aspects of public sector engagement with tikanga. As our review of the issues reinforces, further work is required to build the tikanga capability of the public sector to ensure timely and adequate consideration of tikanga issues and to improve tikanga-connected drafting practices. The issues must be seen as interconnected. Together, the matters reflected on in this chapter will work in combination to support better outcomes.
- 9.93 As public organisations engage with tikanga, missteps will be damaging. Still, public officials must not be paralysed by the challenges facing them. Recognising that there are institutional imperfections, Associate Professor Nicole Roughan writes:⁹⁷

... Val Napoleon argues that, when it comes to the practice of Indigenous laws, communities should not get stalled by institutional imperfections or gaps in capacities. Provided there is caution and careful awareness of past failures and their lessons, that may be as apt for an emerging genuine and general common law as it is for the regenerating Indigenous legal orders that Napoleon’s work supports. The institutions, tools and practices that already exist (and those yet to be developed) will be imperfect forms for realising the interlegal interactions of state law and tikanga. They will prove unwieldy and controversial, they will be contested and criticised and, at times, they may lead to outcomes that fall short on any number of measures of legitimacy or justness.

⁹⁶ Te Kāhui o Matariki Public Holiday Act 2022, s 5.

⁹⁷ Nicole Roughan “Interlegality, interdependence and independence: framing relations of tikanga and state law in Aotearoa New Zealand” (paper presented to Te Aka Matua o te Ture | Law Commission, 2023) at [5.40]; see further Appendix 3.

9.94 However, rather than a roadblock, Roughan regards this as a process of navigation. To borrow a further phrase from her, “institutionalising humility” may perhaps be the most valuable commodity as systems engage with one another.⁹⁸ Expanding on her meaning, Roughan proposes processes where both parties jointly determine their “rules of engagement”, set in place restraints that acknowledge power imbalances and police clear boundaries regarding what is separated and what is shared.⁹⁹ We suggest that it is worthwhile reflecting on how the value of humility can be embedded and practically demonstrated by agencies when engaging with tikanga.

⁹⁸ Nicole Roughan “Interlegality, interdependence and independence: framing relations of tikanga and state law in Aotearoa New Zealand” (paper presented to Te Aka Matua o te Ture | Law Commission, 2023) at [5.2], [5.12] and [5.43]; see further Appendix 3.

⁹⁹ Nicole Roughan “Interlegality, interdependence and independence: framing relations of tikanga and state law in Aotearoa New Zealand” (paper presented to Te Aka Matua o te Ture | Law Commission, 2023) at [5.2], [5.12] and [5.43]; see further Appendix 3.

CHAPTER 10

Conclusion

- 10.1 In 2001, the Study Paper *Māori Custom and Values in New Zealand Law* concluded with the imagery of new growth and change:¹

Tungia te ururoa, kia tupu whakaritorito, te tupu a te harakeke

Burn off the overgrowth, so that the new shoots of flax bush may grow.

- 10.2 Since then, we have seen greater, more genuine recognition of tikanga by state law than had occurred in the preceding 160 years. However, we are still in a process of transition, both in terms of the evolution of state law and building understanding of tikanga outside of Māori communities. In our present Study Paper — based on the advice of our experts, scholarly work of tikanga jurists, and the expressions of tikanga and application of tikanga principles found in more than 800 briefs of evidence — we have provided an account of tikanga as a system of norms. Consistent with a mātauranga-centric approach, we commenced our analysis from within the wharenuī, noting its connections with the marae ātea. We have identified that tikanga is a cogent integrated system of values, principles and norms that continues to regulate the lives of Māori and can contribute generally to the law of Aotearoa New Zealand. We demonstrated how this tikanga framework can be used to solve concrete legal problems. We then traced the evolution of state law from rejection of the existence of tikanga through to recognition of tikanga as informative of the law and a source of law.
- 10.3 We have also responded to some ongoing concerns about state law interaction with tikanga and what it should look like. We have identified the general principles governing common law treatment of tikanga and the emergent categories of tikanga-related common law. We have recommended strategies for tikanga engagement and for the development of judicial and public agency processes that will help preserve both the integrity of tikanga and assist in the principled development of state law. We have stressed the importance of adopting an informed tikanga lens approach to all law making that engages with tikanga. We have confidence that tikanga can provide the required boundaries, alongside the common law method, to enable appropriate state law and tikanga interaction.
- 10.4 Throughout this Study Paper, underlying all of its thought, we have had in mind the tukutuku process and the values imbued in that process explained in our introduction. Tukutuku is a way of picturing the interaction between tikanga and state law and describing values associated with such a process to guide future engagement. The tukutuku process involves two people positioned on either side of a lattice panel, working

¹ Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (SP 9, 2001) at 96.

to bind or lash together the panel's vertical stakes (kākaho) and horizontal rods (kaho). Metaphorically, if tikanga were viewed as the vertical stakes and state law as the horizontal rods, the interaction that is occurring is an incremental process of, one stitch at a time, lashing together these diverse legal norms. In Chapter 1, we foreshadowed this as a way of describing how state actors and Māori may work together within the state law space.

- 10.5 However, to realise this, much more work is needed. The engagement of both common law and statute with tikanga continues to evolve at a rapid pace. The principles and processes for engagement are not yet settled and are being tested every day, whether in terms of the common law, statute law or policy making. There remain significant risks that tikanga may be adversely affected by state law, particularly if and where state law continues to assume the primary responsibility for defining and developing tikanga-related law. Tikanga and tikanga institutions remain especially vulnerable to the machinery of the state, and there remain concerns that the coherence of state law may be adversely affected by the unfettered incorporation of tikanga. All of this emphasises the need for care and manaakitanga by state institutions in the interpretation and application of tikanga. In this paper overall we have therefore adopted a modest, incremental approach — a slow weave.
- 10.6 We consider that there is legitimacy in this course. It seeks to live up to the demand made in Te Aka Matua o te Ture | Law Commission's first tikanga Study Paper that any genuine commitment to te Tiriti o Waitangi | Treaty of Waitangi will involve recognising tikanga, while at the same time expressing the necessary caution when promoting changes to state law.²
- 10.7 We acknowledge that there are different pathways towards this recognition. For example, Associate Professor Nicole Roughan identifies the potential for a “genuine common law” and what she imagines as a genuine interaction between two legal systems by “operating both a domain of interdependence between state law and tikanga and fora for contesting its boundaries around a core of independent operation of tikanga”.³ Dr Carwyn Jones refers to a model in which contending normative orders encounter each other and engage in a negotiation. He argues that “the legitimacy of any normative order should not be assumed but, rather, must always be justified”.⁴
- 10.8 Others question how meaningful engaging within the state legal system can be. For example, Natalie Coates asks:⁵
- Should [Māori] attempt to carve out a small space within the whare (house) of the state legal system if the whenua (ground) and foundations upon which it is built are defective?
- 10.9 Ani Mikaere answers this question by arguing that although carving out a small space within the whare of the state legal system may be better than nothing, that project should

² Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 95–96.

³ Nicole Roughan “Interlegality, interdependence and independence: framing relations of tikanga and state law in Aotearoa New Zealand” (paper presented to Te Aka Matua o te Ture | Law Commission, 2023) at [7]. For Roughan's paper, see Appendix 3.

⁴ Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (University of British Columbia Press, Vancouver, 2016) at 47.

⁵ Natalie Coates “The recognition of tikanga in the common law of New Zealand” [2015] *New Zealand Law Review* 1 at 30.

not distract Māori from an ultimate tino rangatiratanga goal.⁶ Annette Sykes similarly argues that a hybridised system is still state law centred and that the goal should be “having a tikanga system of justice based on our values that work for our people”.⁷ Moana Jackson also took the view that those who are redefining Māori rights and sourcing them in the common law are concerned only with capturing Māori concepts in a way that is consistent with their law.⁸

10.10 While there is not scope within this paper to adequately respond to these challenging arguments, it is important to acknowledge them and to emphasise that what we say here does not preclude ongoing development and change. Other future pathways are not closed by the approach we have recommended, which seeks chiefly to preserve the coherence and independence of tikanga at a time when the legal landscape around it is actively shifting, unsettling the ground.

10.11 We close with another way of viewing matters, offered by pūkenga Tā Pou Temara from whom we sought advice. Explaining that it is not a widely known matter, Temara introduced to us the concept of “te ihonui”, identifying it as a liminal middle space:⁹

Te Ihonui is the line that runs straight down the middle of the house. It is both tapu and noa, neither one nor the other. In Mātaatua tradition, the body of the dead lies on this line, at the back of the house. Rua Hepetipa of Maungapōhatu used his knowledge of the ihonui line to lay food on. It is on this line that food can be taken.

Te Ihonui begins with the pou tāhū at the front of the house and ends with the pou tūārongo at the rear of the house. It is a space that stretches from the ground or floor to the tāhū of the house. The tāhū is the embodiment of Ranginui, and the ground or floor refers to Papatūānuku. Te Ihonui is like an invisible veil that separates the taranui which is reserved for manuhiri and the taraiti of the house, the prerogative of the tangata whenua. In the tikanga of engagement the manuhiri and tangata whenua are protected and restricted by tapu. It is when they cannot come to an agreement that both sides may invoke the ihonui and move to the centre of the house, sometimes in a literal sense, but often in [a] figurative sense, to find a solution. Te Ihonui is a liminal space and is a safe space for negotiation and the achievement of a solution.

10.12 Te ihonui therefore represents a domain of unbounded potential, an inclusive space where the sides of a whare come together to discuss issues, to negotiate unresolved tensions and seek a pathway through the challenges that confront us. Those challenges are not always small. The outcome may be elusive or uncertain. However, the challenge of weaving state law and tikanga together in a legitimate, authentic and coherent way starts by building an understanding of tikanga that is accessible to all New Zealanders.

⁶ Ani Mikaere “Tikanga as the first law of Aotearoa” (2007) 10 Yearbook of New Zealand Jurisprudence 24 at 26.

⁷ Annette Sykes “The myth of tikanga in the Pākehā law” (2021) 8 Te Tai Haruru Journal of Māori and Indigenous Issues 7 at 28.

⁸ Moana Jackson “Changing realities: unchanging truths” (1994) 10 Australian Journal of Law and Society 115 at 116.

⁹ Pou Temara, personal communication (1 June 2023).

INDEX

Tikanga concepts

In this Study Paper the following tikanga concepts are important. The index offered here is not exhaustive. However, it will direct readers to some key tikanga concepts that we have focused on. To assist readers in finding concise summaries and definitions of the concepts, these are indexed in **bold**.

aroha 3.121–124

and koha 3.133

and responsibilities 3.115, 3.140, 4.6, and see illustrative examples at

4.20–22 and 4.25 (in context of disputed burial)

4.36–38 and 4.43 (to whānau taonga)

4.55, 4.58 and 4.61–62 (in relation to contractual breach)

4.73 and 4.79 (in mana moana context)

4.92, 4.94–96 and 4.102–103 (in surrogacy context)

in pūrākau 2.24

in a system of norms 3.16

atawhai 3.121–122

and care of children 4.109

and koha 3.133

and rangatiratanga 3.122

and responsibilities 3.115, 3.123, 3.127

in a system of norms 3.16

ea 3.63–64, 8.78

and koha 4.111

and maintenance 4.81

and process to achieve 3.64, 4.44

and utu to achieve 3.49, 3.67, 3.70

in action 3.69

in pūrākau 2.23, 2.35

judicially considered 5.59, 8.95

kaitiaki and kaitiakitanga 3.116–119, 3.123–125

and mana 3.84, 3.123, 3.125, 4.58, 4.74, 4.124, 6.46

and mauri 3.52, 4.78, 8.96–97

and responsibilities 3.123–126, 4.6, and see illustrative examples at

- 4.37 and 4.42–43 (to whānau taonga)
- 4.61 and 4.70 (in relation to contractual breach)
- 4.74 (arising from different take)
- 4.79 (in mana moana context)
- 4.130 (in rāhui context)

and tapu 4.76

and whakapapa 3.149

and whanaungatanga 3.42, 3.124, 4.37, 4.56, 4.72, 4.121

in legislation 6.51, 7.3, 9.74

in NZLC SP9 3.17

in pūrākau 2.21, 2.35

in a system of norms 3.16

judicially considered 7.4, 7.17, 7.19–20, 8.85–86, 8.96–97

karakia 3.141–43

and tapu 3.130, 3.143

and wairua 3.143

and whakanoa 3.105, 4.110

and whanaungatanga 3.143

in court proceedings 7.33, 7.35, 7.45

in legislation 9.88

in pūrākau 2.33–34

kawa 3.128–131

and marae ātea 2.42–43

and pōwhiri 2.43, 3.132–135

and tapu 3.96

and whakanoa 3.107

facilitating tikanga 3.16, 3.127, 3.131, 3.144, 8.78–79

in action 3.145–147

in jural or policy context 3.144, 7.126, 8.98–100, 9.14–16

in pūrākau 2.28, 2.33, 2.35

kōrero tuku iho

mōteatea **4.6**

pepeha 7.45

pūrākau **2.6**, 2.17, 2.18–35, 4.9, 4.31

waiata **4.6**, 7.20

whakataukī and whakatauākī **4.6**, 4.68, 4.115, 7.20, 8.103

kotahitanga 2.57–58

and responsibilities 3.115, 4.6, and see illustrative examples at

4.21–23 (in context of disputed burial)

4.97, 4.99 and 4.103 (in surrogacy context)

4.120, 4.124, 4.130–131 (in rāhui context)

and wharenuī 2.55, 2.57–58

mana 3.71–86, 8.77–79

aspects or forms 3.74–76, and see

mana atua 3.74, 3.79–80, 4.39

mana moana 3.80, 4.74–4.86, 4.123

mana tamaiti 6.53, 7.50, 7.52–53, 7.58

mana tangata 3.74, 3.79–80, 4.17, 4.38, 4.57, 4.98, 4.122

mana tupuna 3.74, 3.79, 4.17, 4.38, 4.57, 4.98, 4.122

mana wāhine 3.75, 4.98

mana whenua 3.74, 3.79–80, 4.57, 5.54, 5.57–59, 7.3–4, 7.14, 7.17–20, 8.56, 8.99

and authority 3.13, 3.86

and kaitiakitanga 3.84, 3.117–118, 3.125

and kawa 3.131

and manaakitanga 3.84, 3.120

and marae 1.14

and mauri 3.52, 3.59

and muru 3.139

and pōwhiri 3.132–134

and rāhui 3.138

and rangatira or rangatiratanga 3.122, 8.87

and responsibilities 3.77–78, 3.81–83, 3.115, 3.123, 3.127, 4.17 and see illustrative examples at

4.22–23 and 4.32 (in context of disputed burial)

4.38, 4.43 and 4.45 (custodianship of whānau taonga)

4.58 and 4.61 (in relation to contractual breach)

4.79 (in mana moana context)

4.99 and 4.103 (in surrogacy context)

4.124–125, 4.130 and 4.132–133 (in rāhui context)

and take **3.67**, 3.83, 4.57, 4.74, 4.123

and taonga 4.39, 7.69

and tapu 3.87, 3.90, 3.98
 and Treaty settlements 9.84
 and tuku 1.31, 1.37
 and utu 3.62, 3.69
 and wellbeing 7.51
 and whakamā 3.85, 7.29, 8.101
 and whakapapa 3.31, 3.80–81, 3.149
 in action 3.108–109, 3.111–112
 in arbitration 8.144
 in Cabinet Circular 9.31
 in NZLC SP9 3.17
 in legislation 6.47, 6.66
 in pūrākau 2.21, 2.23, 2.35
 in a system of norms 3.16
 judicially considered 5.42, 5.59, 7.51–52, 7.157, 8.84–89
 of tikanga 8.71, 8.107–109, 9.81, 9.85

manaakitanga 3.120, 3.123–124, 3.126–127

and mana 3.84, 3.120, 3.123, 4.99, 4.124–125
 and mauri 4.102
 and muru 3.140
 and pōwhiri 3.134
 and rāhui 4.130–131
 and surrogacy
 and responsibilities 3.16, 3.42, 3.115, 3.120, 3.123–124, 3.126–127, 4.6, 6.46 and see illustrative examples at
 4.20–22 and 4.25 (in context of disputed burial)
 4.36–37 and 4.43 (custodianship of taonga)
 4.55–56 and 4.61–62 (in relation to contractual breach)
 4.73 and 4.79 (in mana moana context)
 4.92, 4.94–96, 4.99 and 4.102–103 (in surrogacy context)
 4.120 and 4.130–132 (in rāhui context)
 and state institutions 10.5
 and whānau taonga 4.37–4.38
 and whanaungatanga 3.123–124, 4.20–22, 4.25, 4.36–37, 4.43, 4.55–56, 4.61–62, 4.73, 4.79, 4.92, 4.94–96, 4.99, 4.102–103, 4.120, 4.130–132
 and wharehenui 2.45
 in Cabinet Circular 9.31
 in Māori society 1.115

in a system of norms 3.16
judicially considered 8.71–72, 8.107–110, 8.153

mauri 3.49–59, 8.77

and kaitiakitanga 3.52, 4.42
and mana 3.82
and rāhui 3.136
and responsibilities 3.52–53, 3.82, 3.86, and see illustrative examples at 4.42 (whānau taonga), 4.60 (damaged whenua), 4.78 (in mana moana context), 4.102 (in surrogacy context)
and taonga 4.42, 7.69
and tapu 3.87–88, 3.90, 3.98, 4.129
in action 3.54–59
in pūrākau 2.20, 2.35
in a system of norms 3.16
in legislation 6.66
judicially considered 5.24, 7.9, 8.87, 8.96–97

murū 3.69, 3.139–140

and responsibilities 3.140
and restorative justice 3.69, 3.139
in early laws 6.18
judicially considered 8.95

noa 3.71–72, 3.101–105, 8.77–79

and a degree of freedom 3.101, 3.104–105, 4.77
and karakia 3.105, 3.143, 4.110
and kawa 3.16, 3.96, 3.131
and pōwhiri 3.102, 3.135
and rāhui 3.138
and tangihanga 4.18
and tapu 3.97, 3.102, 3.113
and te ihonui 10.11
and whakanoa 3.99–100, 3.107, 3.138, 4.18, 4.23, 4.101, 4.110, 4.128
in action 3.113
in pūrākau 2.23, 2.35
in a system of norms 3.16

pōwhiri 3.132–135

and mana 3.132, 3.134
 and manaakitanga 3.134, 4.22
 and tapu and noa 3.102, 3.135
 and tono 4.26, 4.29
 and whanaungatanga 3.45, 3.132–133
 in court proceedings 7.34

rāhui 3.111–3.112, 3.136–138, 4.135

and kaitiakitanga 4.130
 and mauri 3.51, 3.53, 3.136
 and responsibilities 3.138, 4.121, 4.130–131
 and tapu and noa 3.96, 3.136–138, 4.126–128, 4.131, 4.137–138
 and utu 4.133
 in action 3.111–112

tapu 3.71–72, 3.87–89, 3.90–100, 8.77–79

and childbirth 4.100, 4.110
 and death 4.18, 4.22–23, 4.28, 4.31, 4.126, 4.135, 4.138
 and karakia 3.143
 and kawa 2.42, 3.130–131
 and mana 3.87, 3.98
 and mauri 3.96, 4.129
 and noa 3.97, 3.99, 3.101, 3.105–107, 3.113, 4.101
 and ōhākī 4.45–46, 4.51
 and pōwhiri 2.43, 3.102, 3.135
 and rāhui 3.111–112, 3.136–138, 4.126–129, 4.131, 4.135, 4.137
 and taonga 4.40, 4.42, 7.69
 and te ihonui 10.11
 and wāhi tapu 7.3, 7.13, 7.167–168, 8.88–89
 and whakapapa 3.31, 4.59, 4.76, 7.171
 in legislation 7.3, 7.167–168. 9.74
 in NZLC SP9 3.17
 in pūrākau 2.21, 2.23, 2.34–35
 in a system of norms 3.16
 judicially considered 7.13, 8.88–89

tukutuku 1.25, 1.27–31, 2.49, 10.4

and poutama design 1.26

utu 3.49, 3.60–63, 3.65–68, 8.78

- and muru 3.139
- and rāhui 3.136–137
- and responsibilities 3.126–127
- and tukutuku 1.31
- in hypothetical examples
 - 4.24, 4.30 and 4.33 (in context of disputed burial)
 - 4.49 (conflicting ōhākī and whānau taonga)
 - 4.63–65 (in relation to contractual breach)
 - 4.87 (mana moana responsibilities)
 - 4.105 and 4.111 (in surrogacy context)
 - 4.132–133 and 4.136 (breach of rāhui and assault)
- in NZLC SP9 3.17
- in pūrākau 2.23, 2.35
- in a system of norms 3.16, 3.49
- judicially considered 8.95

wairua 3.18–20

- and karakia 3.143
- and marae ātea 2.42
- and wharenuī 2.60, 3.18–20

whakapapa 3.22–3.35, 3.45–47, 8.77, 8.79

- and basis of relational interests or a tikanga claim 3.30–31, 3.110, 5.8
- and defining the scope of tikanga 3.148–3.150
- and first step in enquiry 4.8
- and infertility or whare ngaro 4.92, 4.94, 4.108
- and kaitiakitanga 3.149, 8.97
- and mana 3.48, 3.73, 3.80, 3.108, 4.123, 8.84
- and rangatiratanga 8.87
- and succession to whāngai 7.150–151
- and surrogacy 4.91, 4.116
- and surrogacy responsibilities 4.96, 4.117
- and tapu 4.59, 4.76
- and tikanga expertise 7.148
- and whānau taonga 4.35, 4.39
- and whanaungatanga 3.37, 4.15–16, 4.20–21, 4.36–37, 4.55–56, 4.72–73, 4.79, 4.119–121
- and wharenuī 2.55–56, 3.7, 3.21

in action 3.45–47
 in Cabinet Circular 9.31
 in legislation 6.53, 7.50
 in Māori society 1.8, 1.12, 1.15
 in pūrākau 2.10, 2.21, 2.35
 in a system of norms 3.16
 judicially considered 5.57, 7.19–20, 7.51–53, 7.171, 8.84, 8.87, 8.89–92, 8.95, 8.145–146

whanaungatanga 3.22, 3.36–43

and extended connection 3.37–38, 4.92–94, 4.120
 and kaitiakitanga 3.124
 and karakia 3.143
 and mana 3.80
 and pōwhiri 2.43, 3.45, 3.132–133
 and property interests 5.8, 5.25, 5.43
 and rāhui 3.138
 and rehabilitation 7.30
 and responsibilities 3.37, 3.41–43, 3.115, 3.123–124, and see illustrative examples at
 4.20–22 (in context of disputed burial)
 4.43–46 (custodianship of taonga)
 4.61–63 and 4.68 (in relation to contractual breach)
 4.79 (in mana moana context)
 4.92 and 4.103 (in surrogacy context)
 4.130 (in rāhui context)
 and surrogacy 4.92–97
 and trusteeship 5.43, 7.153–154, 7.157
 and whakapapa 3.37, 3.148–149, 4.16, 4.36, 4.55–56, 4.72–73, 4.120–121
 and whānau taonga 4.37
 and whāngai 7.60
 and wharenui 2.55
 in action 3.45–47
 in Cabinet Circular 9.31
 in legislation 6.53, 7.50
 in Māori society 1.15
 in NZLC SP9 3.17
 in pūrākau 2.21, 2.35
 in a system of norms 3.16
 judicially considered 5.25, 5.43, 7.12, 7.20, 7.41, 7.51–52, 7.64, 7.153–154, 7.157, 8.87, 8.89, 8.95

wharenui 2.2–8, 2.26–64, 8.75–76

and an ao Māori world view 2.2–3, 2.13, 2.36, 8.75–76

and connection 2.59–60

and kotahitanga 2.57–58

and manaakitanga 2.45

and marae ātea 2.7, 2.41–44

and mātauranga or knowledge 2.2–3, 2.13, 2.36, 2.52–53, 2.62–63, 10.2

and pūrākau 2.27–29, 2.31–32, 2.35, 2.39

and tikanga values 2.50–60, 2.64

and tukutuku 1.28, 2.49

and wairua 3.18–21

and whakapapa 2.55–56, 3.7, 3.148–150



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