

“You cant own trees, we have an absolute right to protect them”

Dr Moana Jackson in relation to kōrero with the original claimants in the WAI 262 claim



1. **Claims based on tikanga custom (e.g. Trans-Tasman Resources)**

- ▶ Tikanga-based custom giving rise to legally enforceable rights and interests in the common law
- ▶ They generally concern the recognition of property rights.

2. **Claims based on tikanga values (e.g. Takamore v Clarke, Ellis)**

- ▶ Tikanga values are weighed alongside other values that may be relevant to the dispute.
- ▶ These claims arise in a variety of contexts, including environmental law, employment law, sentencing and family law.

3. **Claims based on tikanga as law (e.g. Ngāti Whātua Ōrākei)**

- ▶ Courts are asked to decide what the tikanga is in a specific situation.

HOW DOES TIKANGA APPLY?

ELLIS V R [2022] NZSC 114

- The majority of the Supreme Court said:
- ▶ The colonial tests for incorporation of tikanga in the common law should no longer apply.
 - ▶ Rather, the relationship between tikanga and the common law will evolve contextually and as required on a case-by-case basis.
 - ▶ Tikanga was the first law of Aotearoa/New Zealand and that it continues to shape and regulate the lives of Māori.
 - ▶ The courts must not exceed their function when engaging with tikanga.
- ▶ Care must be taken not to impair the operation of tikanga as a system of law and custom in its own right.
 - ▶ The appropriate method of ascertaining tikanga (where it is relevant) will depend on the circumstances of the particular case.

Other observations

- ▶ Greater reference to the text of Te Tiriti
- ▶ Legislation to be read consistently with tikanga.
- ▶ Legislation Design Advisory Committee guidelines provides that legislation should be consistent with tikanga to the extent possible.
- ▶ Wānanga process and production of an agreed statement protected the mana of the experts (compared with Takamore).

ELLIS V R [2022] NZSC 114

In relation to the Ellis case, the agreed statement was:

- ▶ **Mana tangata**, and by implication, **whakapapa** and **whanaungatanga**, is impacted by the allegations of **hara**. Consequently, this continues after the death of the person.
- ▶ Tikanga requires further probing in these circumstances.

STATEMENT OF TIKANGA

- ▶ Tikanga is a complete system of principles for the right or correct way of doing things. These principles order Māori affairs and so regularly influence behaviour that they have been referred to as Māori custom.
- ▶ Tikanga needs to be understood from a Te Ao Māori perspective.
 - ▶ Commission uses the tukutuku metaphor for interweaving state law and tikanga together.
 - ▶ Also uses the wharehenui model to understand a Te Ao Māori perspective.
 - ▶ Mātauranga Māori – Māori knowledge systems
 - ▶ Mātauranga ā-iwi – iwi knowledge systems

HE POUTAMA – LAW COMMISSION

Law Commission's suggested guide for engagement:

- ▶ Identify the relevant tikanga as it relates to the factual situation.
- ▶ Identify relevant kōrero tuku iho and related mātauranga.
- ▶ Identify other similar situations (or precedents).

HE POUTAMA – LAW COMMISSION



Te Pou Matakana Ltd v Attorney-General [2021] NZHC 2942:

- ▶ The High Court upheld a judicial review claim by a Māori health provider about 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".
- ▶ Tikanga such as taonga, whakapapa, whanaungatanga and mauri

TIKANGA AND JUDICIAL REVIEW

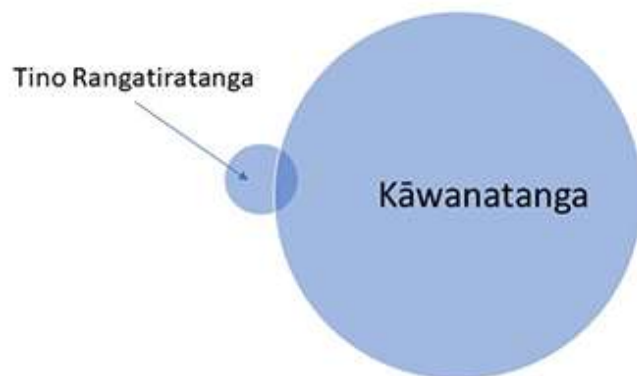
▶ *Ngāti Whātua* litigation

- ▶ Iwi are increasingly sophisticated and well-resourced litigants
- ▶ Tikanga is a freestanding legal framework
- ▶ That system does not bind the Crown
- ▶ Deference where possible to a tikanga-based resolution process

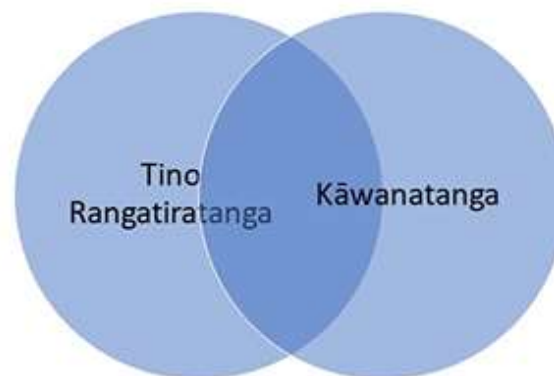
TIKANGA AS LAW

Matike Mai Aotearoa and *He Puapua*

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CONSTITUTIONAL TRANSFORMATION

- ▶ Adopt a te Ao Māori lens or ask someone with skills in this area.
- ▶ How am I engaging with tikanga? A customary right, a value that informs the development of the common law or as a source of law?
- ▶ Do I need to brief expert evidence, or can I rely on other sources such as Waitangi Tribunal Reports?
- ▶ Respect the mana and tapu of tikanga Māori
- ▶ Don't assume the Court or indeed other Māori will understand tikanga Māori
- ▶ Invite the Court to consider:
 - ▶ Appointing Pūkenga
 - ▶ Refer question of tikanga to the Māori Appellate Court
- ▶ ADR: entire process governed by tikanga Māori

TOOLS FOR PROFESSIONALS