

Special Section:  
Tikanga as the First Law of New Zealand: The Need  
for a System-Wide Cognitive Shift

Ko te tikanga Māori te mana tuatahi o Aotearoa: me  
tōrua marire te au whakaaro te pūnaha ture nui  
tonu, pages 523-668

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## INTRODUCTION

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### [A] CONTRIBUTORS

- ◇ Mai Chen, Barrister and President of New Zealand Asian Lawyers
- ◇ Justice Joe Williams, Supreme Court of New Zealand
- ◇ Justice Christian Whata, High Court of New Zealand
- ◇ Justice Grant Powell, High Court of New Zealand
- ◇ Chief Judge Heemi Taumaunu, Chief Judge of the District Court of New Zealand
- ◇ Acting Chief Judge Fox, Māori Land Court of New Zealand
- ◇ Judge Michael Doogan, Māori Land Court and alternate Judge of the Environment Court of New Zealand
- ◇ Justice Emiliios Kyrou, Victorian Court of Appeal, Australia

### [B] OVERVIEW

The Wānanga on Tikanga and the Law held on 3 May 2023 at Buddle Findlay's Auckland office, with the support of the New Zealand Bar Association and its President Maria Dew KC, aimed to fill the gap for lawyers practising law in Aotearoa New Zealand on how to, as Justice Joe Williams said, develop an intuition about tikanga—which is the first law of New Zealand—just as they have an intuition about contract, crime, intellectual property and property law. Justice Williams is the first Māori

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\* Huge thanks to Marie Selwood who undertook the difficult task of editing this Special Section at speed so we could get its content out quickly to the many judges and lawyers who will benefit from reading about the Wānanga on Tikanga and the Law.

Judge on the highest Court in New Zealand, the Supreme Court, and stated in his presentation that:

I readily acknowledge that tikanga is a very different form of law to that in which you have been trained, but it is law nonetheless. You will not need to become instant tikanga experts any more than you must be expert in other subcategories of law with which you are unfamiliar. You just need to know enough to develop good instincts. These will help you to judge when tikanga might be relevant to your case, when you need help and, if you do, where to go to get it. You will then be able to explain to us poor judges why tikanga is relevant, how it is relevant, and, where needed, how other non-tikanga principles or considerations in the case are to be weighed, measured or reflected as the case may be. That is the cognitive shift: the development of an ability to step into the shoes of someone from the partner system of law, even if imperfectly, in order to view the conflict from their perspective. A profession with that kind of intuition will make all the difference.

There are lawyers who already have these instincts, but most (mainly non-Māori) lawyers have only just started on the journey to develop this intuition as the Treaty of Waitangi was not even taught when they studied law, let alone tikanga. The gap includes playing catch-up on New Zealand's legal history which has recognized the application of tikanga for non-Māori as well as Māori New Zealanders for some time.

The Supreme Court's relatively recent statement in *Ellis* (2022: para 19) about the broad application of tikanga as the first law of New Zealand applying to non-Māori as well as Māori has clearly signposted for all lawyers the direction of travel, which makes the need to embark on this journey inexorable even if those lawyers do not specialize in indigenous legal issues:

The Court is unanimous 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. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies.

Few cases may be unaffected given this unanimous statement by the Supreme Court.

A further fundamental change is that Tikanga Māori/Māori Laws and Philosophy will be required to be taught as a new compulsory subject as well as being interwoven into the other compulsory subjects and legal ethics in the law degree from 1 January 2025. Judges in New Zealand are in the process of developing a postgraduate diploma course for

judges about tikanga and the law, which is hoped to also be available to practitioners in future, so that both judges and counsel can upskill.

Having written my Master of Laws thesis at Harvard Law School many years ago on the use of law to create Māori into an underclass and determining whether law can also be used to restore Māori, I now realise that restoration will be achieved through Tikanga as the first law of New Zealand.

This Wānanga puts a tikanga lens on the law for lawyers, who are then better placed to provide assistance to judges. The presentations that follow from six judges of the New Zealand Supreme Court, High Court, District Court, Māori Land Court and the Environment Court expound upon:

- ◇ What tikanga principles and values are, and what tikanga-enabled processes like Te Ao Marama are.
- ◇ A methodology to determine if there is a tikanga issue. How do you put a tikanga lens on cases/advice? How do you frame the issues?
- ◇ How to derive tikanga evidence, including by respecting the tikanga and building trust, so those with the expertise and knowledge will allow you to depose it.
- ◇ The best cases and most reputable secondary sources which can be used in place of, or in addition to, expert tikanga evidence. This also includes understanding the legal history of tikanga cases applying to non-Māori as well as Māori and interpreting tikanga/ Te Tiriti o Waitangi incorporated in statute, including the Resource Management Act 1991, which is written about below.
- ◇ How tikanga is best applied to substantive law and how to resolve conflicts in tikanga evidence. This includes the relevance of regional variations in tikanga throughout New Zealand and the conflict of law issues that the variations may create.
- ◇ The need for legal imagination where legislation has incorporated tikanga, and also other matters, but have not properly protected tikanga through the Act, nor in how that Act overlaps or intersects with other Acts incorporating tikanga and Te Tiriti O Waitangi references and obligations/requirements. The Marine and Coastal Area (Takutai Moana) Act 2011 is an example written about below.
- ◇ How tikanga is adaptive and flexible in accommodating new situations and developing the common law.

- ◇ A potential for friction between the cultural values that underpin the tikanga system and the western values that underpin the common law.
- ◇ How tikanga can be certain, based on shared principles and no more inherently uncertain than any other part of the law, as Justice Whata says. All law is inherently imprecise or it would be unjust, as Justice Williams states.
- ◇ And understanding the Te Reo Māori which underpins tikanga.

The need for the Wānanga became clear when I wrote the paper for the Euro-Expert Conference on Cultural Expertise in the Courts in Europe and Beyond: Special Focus on France and International Perspectives, held at the Université Paris Panthéon Sorbonne on 6-7 April 2023. That paper on “The Increasing Need for Cultural Experts in New Zealand” provides a contextual introduction to the Wānanga for those less familiar with the tikanga developments in New Zealand, followed by the presentations of the following judges:

- ◇ Justice Joe Williams, Supreme Court of New Zealand
- ◇ Justice Whata of the High Court of New Zealand
- ◇ Justice Powell of the High Court of New Zealand
- ◇ Chief Judge Taumaunu, Chief Judge of the District Court of New Zealand
- ◇ Acting Chief Judge Fox of the Māori Land Court of New Zealand
- ◇ Judge Doogan of the Māori Land Court and alternate Judge of the Environment Court of New Zealand.

All of the presentations have been edited and embellished by the judges after the Wānanga. Some judges wanted to emphasize that this is a light-handed introduction to a very complex subject matter and, importantly, only expresses one view of tikanga.

Finally, this special section rightly comes full circle in concluding with an important paper by Justice Emilios Kyrou, a Judge of the Australian Federal Court and President of the Administrative Appeals Tribunal,<sup>1</sup> on “Cultural Experts and Evidence in Australian Courts”. Justice Kyrou also presented at the Euro-Expert Conference on Cultural Expertise in the Courts at the Université Paris Panthéon Sorbonne at my suggestion to the conference organizers, as I cited his helpful article “Judging in a Multicultural Society” (2015: 226) on a mental red flag cultural alert system in the legal submissions on behalf of the New Zealand Law Society as intervener in *Deng v Zheng* (2022). (I appeared alongside Jane

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<sup>1</sup> Formerly, on the Victorian Court of Appeal, Australia.

Anderson KC, who is now a New Zealand High Court judge, and Yvonne Mortimer-Wang.) The New Zealand Supreme Court quoted him in the *Deng* judgment as follows at paragraph 78(b):

Judges should approach such cases with caution. This has been well explained by Emilius Kyrou, writing extra-judicially, in his advice to judges to develop: ... a mental red-flag cultural alert system which gives them a sense of when a cultural dimension may be present so that they may actively consider what, if anything, is to be done about it (Kyrou 2015: 226).

## References

Kyrou, Emilius. “Judging in a Multicultural Society” (2015) 24 *Journal of Judicial Administration* 223-226.

## Legislation, Regulations and Rules

Marine and Coastal Area (Takutai Moana) Act 2011

Resource Management Act 1991

Te Tiriti o Waitangi 1840

## Cases

*Deng v Zheng* [2022] NZSC 76

*Ellis v R* [2022] 1 NZLR 239; [2022] NZSC 114; BC202064542