Tikanga and the Law Wānanga: Tikanga in Environmental Jurisdiction

Judge Michael Doogan
Māori Land Court

Abstract

Tikanga Māori is increasingly influencing the law of New Zealand, in every jurisdiction. The Environment Court is becoming more concerned with issues which necessitate knowledge of different tikanga Māori, matauranga Māori and Te Reo Māori. The following is a discussion on how tikanga affects the incorporation of Treaty of Waitangi and Māori concepts in the Resource Management Act 1991. It then moves to how and to what extent the Environment Court can consider relational and mana whenua issues. And lastly, Judge Doogan gives insights from a Māori Land Court, Waitangi Tribunal and Environment Court judge for practitioners on understanding tikanga issues and working with Māori collectives.

Keywords: Environment Court; Māori Land Court; Waitangi Tribunal; Resource Management Act 1991; *Lex Aotearoa*; Te Reo; tikanga; mātauranga; mana whenua; procedure; advocacy.

Tuatahi, e tautoko ana ahau i te mihi kua mihia mai i te timata o tēnei hui, tēnā koe Coral. Aku tuakana o te ture tēnā koutou, ka mihi hoki ki a koutou kua huihui mai nei, e tae atu hoki ki ngā karangatanga maha o te ture ki te huitopa tēnā tatou katoa.

Kia ora koutou for all your kaha to still be here. I support the mihi to Mai Chen and the New Zealand Asian Lawyers for this opportunity. Thank you, Takeshi Ito, Vice President Legal and Company Secretary of Millennium and Copthorne Hotels NZ Ltd and Secretary of NZ Asian Lawyers, for that introduction. I do have a slide presentation.

I am not speaking on behalf of the Māori Land Court, the Waitangi Tribunal or the Environment Court.

[A] INTRODUCTION

As the earlier speakers made clear, there is turbulence going on in the way tikanga is being integrated into all the jurisdictions that you have heard from today.

Mai Chen gave me three helpful questions.[1] The first was how tikanga, as the first law of Aotearoa New Zealand, affects the express incorporation of Treaty and Māori concepts in the Resource Management Act 1991 (the Act), with a particular focus on the Part 2 provisions. The second question was regarding the extent of the Environment Court jurisdiction regarding relational or mana whenua issues, and Acting Chief Judge Fox has just discussed this. Last was suggestions that may assist counsel to advocate well in relation to tikanga issues in the Environment Court. I am going to focus on the last two questions.

[B] "LEX AOTEROA"

Justice Williams has today already touched upon the "Lex Aotearoa" concept of the first law, an idea that I think came originally from Ani Mikaere.[2]

Justice Williams' lecture *Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law* is well worth a read in its entirety (Williams 2013). It provides an understanding of the first and second laws of Aotearoa New Zealand. I am going to skip through the first and second layers and focus on the third law.[3]

The third law is predicated on perpetuating tikanga in a way intended to be permanent and, within the broad confines of the *status quo*, transformative. At the end of that lecture Justice Williams makes the very important point, that: "In fact all three layers are still alive and interacting organically" (Williams 2013: 32). It is the interaction of these layers that gives rise to the dynamics that the courts deal with and you, as practitioners, will encounter. If you can understand it in big-picture terms I think you will get some insight, at least, into why parties may take the position they do at certain points. I am going to develop that a bit more when I come to this third question.

I would recommend the forthcoming paper that Whata J and the Law Commission are developing. We have had the benefit of some discussions

1 Slide 1 "Three topics".

2 Slide 2 "Tikanga as the first law in Aotearoa".

3 Slides 3-7 "Tikanga as the first law in Aotearoa".

as a bench with Whata J and his team, and you have had a brief snapshot today. The work that the team are doing to bring together a conceptual framework will be of immense value to practitioners and to judges. I also want to acknowledge my colleague, Judge Sheena Tepania, who is with me today to tautoko.[4]

Tikanga comes to the court through statutory doors and windows. The *Ngāti Maru Trust v Ngāti Whātua Ōrākei* (2020) provides a very clear and helpful articulation of the boundaries of the court's jurisdiction when it comes to the section 61 relational or mana whenua issues.

The slides set out the statutory scheme of the Resource Management Act 1991 and the relevant provisions concerning tikanga and Te Tiriti ō Waitangi.[5] There is a hierarchy of obligation. At the high end, there is the requirement to "recognise and provide for" (section 6), then to have "particular regard to" (section 7) and finally to "take into account" the principles of the Treaty (section 8). Kaitiakitanga in the Act is defined as "the exercise of guardianship by tangata whenua of an area, in accordance with tikanga Māori". There are intersecting definitions between tangata whenua and mana whenua, which locate the emphasis on collective customary interests and authority, held at the iwi and hapū level.

First this tension between the second and third law, I know other speakers have already touched on today. As Natalie Coates said: "Should Māori attempt to carve out a small space within the whare of the state legal system if the whenua and foundations upon which it is built are defective?" (Coates 2017: 54)[6] The ongoing question Whata J touched on was concerning the space for rangatiratanga to operate. I have included a little whakataukī here: "*Kei whawhati noa mai te rau o te rātā*—Do not pluck the blossoms off the rāta tree, some things are perfect just the way they are." That is there as a note of caution. Our legal training leads us to become rather impatient for answers, and you develop ways of thinking and skills designed to try and assist you to quickly isolate, prioritize and advocate on a fairly selective use of information.

In this space, particularly at this time of transformation, there is a real question for practitioners and judges which we need to keep at the forefront: how far do we need to go in terms of the engagement with tikanga? I will try and highlight where I think the guardrails might be.

4 "Tautoko" can mean to support, assist, or to give encouragement.

5 Slide 8 "Statutory Scheme–Resource Management Act 1991 relevant provisions" and Slide 12 "Statutory scheme".

6 Slide 13 "Some ongoing tensions between second and third law to be aware of" and Slide 14 "Nature of the Treaty relationship".

I have highlighted three extracts from various Waitangi Tribunal reports which touch on this tension. First, from *He Whakaputanga me te Tiriti*:

> Rangatira did not cede authority to make or enforce law over their people and within their territories. They agreed to share power and authority with the Governor, with whom they were to be equal though with different roles and different spheres of influence (2014, 526-527).

Second, from the *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*:

> The Treaty guaranteed to Māori their Tino Rangatiratanga was at a minimum the right to self-determination and autonomy … that included the right to work through their own institutions of governance and apply their own tikanga and system of customary laws (2018, 158-169).

Thirdly, from He Pāharakeke He Rito Whakakikinga Whāruarua Oranga Tamariki Inquiry, noting the contemporary facts that, from a Treaty of Waitangi or Te Tiriti ō Waitangi analysis, concern the statistics in the care and protection space, and Chief District Court Judge Taumaunu's address about other statistics in the criminal justice sphere, the Tribunal's conclusion was that:

> The Crown has intruded in harmful ways into the areas the Treaty guaranteed to Māori. "… Māori must be given the right to chart their own path towards realisation in contemporary times of the Treaty promise of rangatiratanga over kainga." (2021, 183-184).

I highlight these passages to shine a light on ongoing issues which are in part legal, and part political. The resolution of some of these matters, and what a truly contemporary Treaty-consistent Aotearoa New Zealand might look like, is the big issue of the day. For lawyers and judges there is a need to at least have an understanding of that wider context in order to navigate the appropriate space for whatever our legal role may be.

[C] THE ENVIRONMENT COURT AND MANA WHENUA ISSUES

Coming to the second question Mai Chen posed around the extent of the Environment Court jurisdiction in relation to mana whenua issues. Whata J's decision in the *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* (2020: para 133) case is a really helpful and clear statement of the boundaries. This particular decision came from an appeal on a case that I was sitting on with his Honour Environment Judge Newhook and Environment Commissioner Paine, and has been referred back to our

court. I am still sitting, and the matter is adjourned while the other *Ngāti Whātua* litigation goes through the higher courts.

I want to note the clarity of guidance that the High Court has given. I highlight in the slides that: "The Environment Court is necessarily engaged in a process of ascertainment of tikanga Māori where necessary and relevant to the discharge of express statutory duties" (*Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* 2020: para 68).[7] Where iwi claim that a particular outcome is required to meet those directions according to tikanga Māori, the resource management decision-makers must meaningfully respond to that claim, including when different iwi make divergent tikanga-based claims.

This may involve evidential findings in respect of the applicable tikanga, and to hold otherwise would be to deprive the provisions of their meaning and effect.[8]

Whata J also noted the need for caution and cited the Tribunal's decision on the *Tamaki Makaurau Settlement Process Report* from 2007 (*Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* 2020: [72]). The central point there being that in tikanga terms, "Where there are layers of interests in a site, all are valid" (*Tamaki Makaurau Settlement Process Report* 2007, 97). It is not appropriate for the Te Arawhitito try to recognize the interest of just one iwi in an iconic site such as a Maunga.[9]

I also highlighted *Ngāi Te Hāpu Inc v Bay of Plenty Regional Council* (2017) and the *Motiti* report (Waitangi Tribunal 2023) as examples of forensic examination of competing mana whenua claims and how the Environmental Court and the Waitangi Tribunal went about weighing, considering and coming to a decision where they were required to decide on a contested mana whenua issue. From *Ngāti Hokopū Ki Hokowhitu v Whakatane District Council* (2002) which, quite some time ago, set out a very helpful set of metrics for approaching these relational claims, I simply summarize the points in the slide.[10]

In *Director General of Conservation v Te Runanga o Ngāti Tama Trust & Ors* (2019), or the *Mt Messenger* case, a Public Authority, Waka Kotahi, with compulsory acquisition powers wished to acquire land returned to Māori under Treaty settlement. Secondly, non-Māori asserted tangata whenua status. Thirdly, Māori with whakapapa to a different area asserted

7 Slide 15 "Environment Court jurisdiction regarding relational or mana whenua issues".

8 Slide 16 "And further".

9 Slide 17 "But note need for caution in these types of assessments".

10 Slide 18 "Some metrics for the exercise of the jurisdiction to consider relational claims".

tangata whenua status. There was an internal conflict within the iwi that does unquestionably hold mana whenua status. Then a couple of things arise from the evidence and the role of counsel in the case.[11]

I want to start with a submission of counsel for Ngāti Tama that the court approved. The case was appealed. The High Court has upheld the decision of the Environment Court and leave to appeal has been declined:

> Tangata whenua and mana whenua are accorded special recognition and rights under the RMA. As the Privy Council noted, these rights are "strong directions to be borne in mind at every stage of the decision-making". These rights are hard won and reflect the culmination of over 150 years of protest and advocacy on behalf of Māori. It is therefore extremely important that such rights are reserved to tangata whenua/ mana whenua alone. Extending such rights to non tangata whenua/ mana whenua interests is inconsistent with the RMA and diminishes both the value and meaning of such rights, and the mana of the iwi or hāpu that holds mana whenua (*Mt Messenger* case 2019: para 338).

That was a submission and a finding that the court made based on the particular facts of the case. Context is everything. In terms of the observation that Williams J made at the start of this wānanga, in relation to the application of tikanga to non-Māori, notwithstanding the jurisprudence in *Ellis v R* (2022) and in other cases, there are still circumstances where it is quite critical to understand and apply the use of statutory terms, such as "tangata whenua" and "mana whenua", in a way that keeps fidelity to the origin of the term or principle. There is a lot of discussion in this case and other cases related to it about the centrality of whakapapa to the land. The case that Acting Chief Judge Fox cited from his Honour Justice Harvey in *Gibbs v Te Runanga o Ngāti Tama* (2011) is a precursor to some of the very same facts in this case. It is the whānau, the Gibbs whānau, who were claiming tangata whenua status. The Environment Court relied on, in part, Judge Harvey's decision in *Gibbs v Te Runanga o Ngāti Tama* (2011).[12]

Some observations about the *Mt Messenger* case.[13] First, the early recognition by Waka Kotahi that it would not be right, in principle, to try to acquire land returned to an iwi in its Treaty settlement by using the compulsory acquisition powers. Not so long ago that probably would not have even been a question. But to their credit and to the credit of the advisors of Waka Kotahi, and I acknowledge again Buddle Findlay,

[11] Slide 19 "An example: *Mt Messenger* case" and
Slide 20 "The Court cited with approval the following submission of Ngāti Tama".

[12] And see also *Poutama Kaitiaki Charitable Trust v Heritage* (2021).

[13] Slide 21 "Some observations".

who very early on Waka Kotahi took that principled position. They also appointed an external consultant who had expertise in Treaty negotiations to guide their process of engagement with Ngāti Tama. By the time it came to the court, they had a very sophisticated amount of evidence to demonstrate how they had engaged with not only Ngāti Tama, but the neighbouring iwi Ngāti Maniapoto, Ngāti Mutunga, and the Poutama group that was claiming status. They also made it quite clear to the court that unless they could get the agreement of the iwi, they would have to go to an alternative route. The route chosen was the best on all the scientific and technical evidence according to Waka Kotahi, but if they could not get agreement from Ngāti Tama they would go back to one or other of the less preferred alternative options. That was a very important step.

Secondly in terms of the findings, Ngāti Tama has mana whenua over the project and importantly that was recognized by both Ngāti Maniapoto and Ngāti Mutunga. There was evidence to that effect. The only challenge came from the Poutama Collective.

Neighbouring landowners also affected by the proposal (the Pascoes) were not kaitiaki in the sense that the word "kaitiakitanga" is used in the Act. The relationship there was one of stewardship. In that case, Mrs Pascoe had lived on the land for about 30 years and had some whakapapa that she had only just become aware of to a hapū to the south, but outside the project area. But on the facts, the Pascoes were not able to demonstrate the kind of link that would displace the mana whenua of Ngāti Tama. And then the finding was that the collective Poutama are not exercising mana whenua over the project area.

[D] ADVOCACY AND TIKANGA

So the last area, and a really big topic, is how to advocate well on tikanga and the law.[14] The phrase Williams J uses in *Lex Aotearoa* to describe the third phase is essentially a process of integrating tikanga in order to perpetuate it (2013, 32-3). He distinguishes that concept from "separate to survive", which is the Canadian or American reservation type model.

Respectfully, while I think that it is accurate to say there is a process of integration, in order to perpetuate and accord tikanga its rightful place in our legal framework and in everything we do, I still see the issues evolving in a way that will require some form of reconciliation about how the Treaty guarantee of tino rangatiratanga is appropriately recognized and provided for within that overall framework.

[14] Slide 22 "How to advocate well on tikanga and the law".

When tikanga comes to the Environment Court, the court must hear evidence grounded and defined in terms of tikanga Māori and mātauranga Māori, in order to make the best decisions. The best evidence of tikanga Māori and mātauranga Māori will of course be in Te Reo Māori. That is in response to the earlier question on whether you need to have Te Reo Māori to understand tikanga Māori. The immediate answer is yes, because that is how it is expressed and how it is held.[15]

The task of the courts and the task of practitioners, if we are not fluent in Te Reo or if we are not tikanga experts, and I put myself in both of those categories, is to ensure that, as a matter of procedure and as a matter of evidence, you have access to the relevant information and the relevant tikanga. That in itself is actually trickier than it sounds because there are a lot of reasons why holders of tikanga, holders of knowledge, are very careful and selective about when they want or choose to release that information to any kind of public forum, let alone a legal process.

My observation from my time as an advocate, and from my time sitting in both the Waitangi Tribunal, the Māori Land Court and the Environment Court, is that the quality of the information we receive from a pou tikanga depends a good deal on the confidence that they have that the information they choose to share is treated with respect, appropriately understood and not misapplied or misappropriated. These are all factors at work in this area that practitioners and judges need to be, at the very least, aware of.[16]

In the Waitangi Tribunal, as Acting Chief Judge Fox said, we sit with some of the leading pou tikanga in Aotearoa. When we are hearing from pou tikanga for claimants in the Waitangi Tribunal, most speakers are speaking to the kaumatua sitting alongside me. In the Māori Land Court or in the Environment Court, sitting with someone with that kind of expertise greatly assists the way the evidence comes to the court and assists the panel or the judge in properly respecting and understanding the evidence.

Finally, for practitioners, if you are acting for a collective, an iwi or a hāpu, it takes time to build a relationship of trust. You must recognize that it is not like gathering evidence for the collapse of the bridge or a car crash. You are not going to get a decent understanding of the important and fundamental issues from a hāpu or iwi unless you have got to a point where they feel confident enough not only that you can do your legal job,

15 Slide 23 "Cultural competency: what does it mean?".

16 Slide 24 "No matter how good you are as an advocate".

but that you are trustworthy with this information. You are unlikely to be trusted with tikanga and mātauranga unless you show genuine respect for it.

Turning to this idea of cultural competency or capability, first, building and maintaining capability in Te Reo is fundamental. Secondly, understanding the Treaty jurisprudence is also fundamental. I note that the work that Chief District Court Judge Taumaunu and his clerks have developed will be a great resource.

Court procedure or the Tribunal procedure needs to show respect for tikanga, or you are not going to get much engagement, nor will you get the information you need in order to make proper and balanced decisions. So, for counsel, if it is unclear, just ask the registrar and do some inquiries prehearing. If you are acting for Māori clients, or if you are acting in circumstances where you are advising others who are responding to tikanga-related issues, be respectful of the need for the processes to accommodate ways of delivering and receiving tikanga evidence. That includes sitting on marae or other similar venue to receive the tikanga evidence.

Be sensitive to the ongoing effects of the second law.[17] I note the observation in the statement of the Mātanga Tikanga in the *Ellis v R* case (2022: 38) about the effects of colonization on Maoridom.[18] Many Māori have been alienated from lands, culture and are unfamiliar with tikanga. By being sensitive, if I could give an example from the Māori Land Court, in cases of succession where there are whāngai we are required to deal with those matters in accordance with the tikanga of the relevant hāpu.[19] We often must ask the applicant for succession, depending on the location of the land, what is the tikanga of the hāpu in the lands here? It is not uncommon for someone to say look, "I don't know", "I'm not sure, I can ask my auntie, my whānau", "I know who can check this out."

We must slow our procedures down. Where necessary we get court staff to assist applicants, making sure that the right information about the lands is taken out and given to the them so that they can make the right inquiries and slow everything down until the information comes back. The dimensions this can lead to are all sorts of very human feelings

[17] Slide 25 "Be sensitive to the ongoing effects of the second law".

[18] Mātanga Tikanga—tikanga experts. Used in *Ellis v R* to give insight and guidance on the relevant tikanga concepts being advanced by the court.

[19] Whāngai—Māori customary adoptions which are not legal adoption, but adoption within the wider whanaunga group.

of shame or whakamā. There can be tensions within the wider groups between those who hold some tikanga and Te Reo, and those that do not. Tension between hau kāinga and these who live away. At the very least counsel, and those interacting with these kind of issues, need to be sensitive and aware of these issues and how they may present. Cross examination. Again, try to narrow issues prior to hearing.

Our new judge, Alana Thomas, and Corrin Merrick, wrote in 2019 *Kia Kākano Ru ate Ture: Te Reo Māori Handbook for the Law*. The start of the book has good practical guidance.

I found a quote from an anthropologist called Mary Catherine Bateson to guide us in this time of transition:

> Ambiguity is the warp of life, not something to be eliminated. Learning to savour the vertigo of doing without answers, and making do with fragmentary ones, opens the pleasures of recognising and playing with pattern, finding coherence within complexity, sharing within multiplicity.

Kia ora tātau.

About the author

Judge Michael Doogan was appointed to the Māori Land Court on 25 January 2013. Based in Wellington, he provides support for hearings in the Aotea District of the Māori Land Court and hears cases in Taumarunui, Tūrangi and Palmerston North. Judge Doogan also sits as a Presiding Officer in the Waitangi Tribunal, and as an Alternate Environment Court Judge.

Judge Doogan graduated from Massey University with a Bachelor of Arts in 1983 going onto graduate with a Bachelor of Law from the University of Otago in 1986. He commenced work as a Judges' clerk in Hamilton in 1986 and worked in private practice and in local government in Wellington before moving to England in 1990. Between 1990 and 1995 he worked in private practice in England before returning to New Zealand to take up a position in the Public Law team with Simpson Grierson in Wellington. In 1998 he joined the Crown Law Office's Treaty Issues and International Law Team. In 2005 Judge Doogan commenced practice as a barrister sole in Wellington. As a barrister, Judge Doogan represented a range of Māori clients before the Courts and the Waitangi Tribunal.

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Legislation, Regulations and Rules

Resource Management Act 1991

Te Tiriti o Waitangi | The Treaty of Waitangi 1840

Cases

Director General of Conservation v Te Runanga o Ngāti Tama Trust & Ors [2019] NZENvc 203 (the *Mt Messenger* case)

Ellis v R [2022] NZSC 114

Gibbs v Te Runanga o Ngāti Tama (2011) 274 Aotea MB 47 (274 AOT 47)

Ngāi Te Hāpu Inc v Bay of Plenty Regional Council [2017] NZEnvC 73

Ngāti Hokopū Ki Hokowhitu v Whakatane District Council (2002) 9 ELRNZ 111

Ngāti Maru Trust v Ngāti Whātua Ōrākei [2020] NZHC 2768

Poutama Kaitiaki Charitable Trust v Heritage NZ [2021] NZEnvC 165

Tikanga and the law wānanga – Tikanga in Environmental Jurisdiction

Judge Michael Doogan

Judge of the Māori Land Court and alternate Judge of the Environment Court

3 May 2023

Three topics:

How tikanga as the first law of NZ affects the express incorporation of Treaty and Māori concepts in the Resource Management Act 1991, particularly the Part 2 provisions.

The extent of the Environment Court's jurisdiction with regard to "relational" or mana whenua issues (s 6(e)).

Suggestions that may assist counsel to advocate well in relation to tikanga issues in the Environment Court.

Tikanga as the first law of Aotearoa

Lex Aotearoa, Williams J describes the law in NZ as having been laid down in three layers and that we are now operating in the third layer

- The first layer was a system of law that emerged from what Kupe, Toi and other voyagers brought here and has come to be known as tikanga Māori.

Tikanga as the first law of Aotearoa

The second layer arrived with the British and collided with Māori customary law. Tikanga was explicitly rejected and viewed as “a temporary expedient in the wider project of extinction and cultural assimilation.”

Tikanga as the first law of Aotearoa

The third layer begins in the 1970s with increasing political and legal recognition of custom law. The third law is predicted on perpetuating the first law. The recognition of customs (tikanga) in the modern era is different – and:

"It is intended to be permanent, and admittedly within the broad confines of the status quo, transformative."

Tikanga as the first law of Aotearoa

But “in fact all three layers are still alive and interacting organically.”

Tikanga – an overview

Sir Hirini Moko Mead: "Tikanga Māori focuses on the correct way of doing something."

Justice Joe Williams: "... Tikanga Māori: 'tika' meaning correct, right or just; and the suffix 'nga' transforms 'tika' into a noun, thus denoting the system by which correctness, rightness or justice is maintained. **And:** "tikanga and law are not co-extensive ideas. Tikanga includes customs or behaviours that might not be called law but rather culturally sponsored __"

Durie J: "conceptual regulators."

Ani Mikaere: "enabled change while maintaining cultural integrity."

See also pending study paper "Tikanga Māori" for Te Aka Matua o Te Ture Law Commission – Whata, J and Statement of Tikanga of Sir Hirini Moko Mead and Professor (Sir) Pou Temara 31 January 2020 – appendix to Judgment of Supreme Court in Ellis (2022) NZSC 114.

Tikanga as first law in the Environment Court

- Comes to the EC through statutory doors and windows.
- The Court has no inherent jurisdiction and the task of declaring or affirming tikanga based rights in state law rests with the High Court and/or the Māori Land Court.
- *Ngāti Maru Trust v Ngāti Whātua Ōrākei* (Whata J).

Statutory Scheme – Resource Management Act 1991 relevant provisions

The Part 2 provisions include three requirements:

- First, in order to achieve the sustainable management purpose of the Act, it is deemed a matter of national importance that all persons exercising functions and powers under the Act must recognise and provide for:

  > *The relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga…*

- Second, in achieving the purpose of the Act, all persons exercising functions and powers shall have "particular regard to":

  > *a) Kaitiakitanga ...*

- Thirdly, in achieving the purpose of the Act, all persons exercising functions and powers must "take into account" the principles of the Treaty of Waitangi.

Statutory scheme continued

There is a hierarchy of obligation. At the high end, the requirement is to "recognise and provide for" (s 6) then to have "particular regard" (s 7), and finally to "take into account" (s 8).

"Tikanga Māori" is defined in the RMA as "Māori customary values and practices."

That definition is not to be read as excluding tikanga as law, still less as suggesting that tikanga is not law. Rather, tikanga is a body of Māori customs and practices, part of which is properly described as custom law.

(Supreme Court, *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board*)

Statutory scheme

"Kaitiakitanga" is defined as "the exercise of guardianship by tangata whenua of an area, in accordance with tikanga Māori; in relation to natural and physical resources; and includes the ethics of stewardship".

"Tangata whenua" means "in relation to particular area, the iwi, or hapu, that holds mana whenua over that area."

"Mana whenua" is defined as meaning "customary authority exercised by an iwi or hapū in an identified area."

Statutory scheme

The intersecting definitions of kaitiakitanga, tangata whenua and mana whenua place emphasis on collective customary interests and authority, held at the iwi or hapū level.

Numerous other provisions of significance, but note:

Local authority and consent authority shall recognise tikanga Māori where appropriate and receive evidence written or spoken in Māori (s 39(2)(b)).

The Environment Court shall recognise tikanga Māori where appropriate (s 269(3)).

Some ongoing tensions between second and third law to be aware of:

- "Should [Māori] attempt to carve out a small space within the whare of the state legal system if the whenua and foundations upon which it is built are defective?" – Natalie Coates.
- Space for rangatiratanga to operate.

"Kei whawhati noa mai te rau o te rātā" - Don't pluck the blossoms off the rata tree (some things are perfect just the way they are)

Nature of the Treaty relationship – Waitangi Tribunal

Rangatira did not cede authority to make or enforce law over their people and within their territories. They agreed to share power and authority with the Governor, with whom they were to be equal though with different roles and different spheres of influence. (Waitangi Tribunal 'He Whakaputanga me te Tiriti' pages 526-527).

The Treaty guaranteed to Māori their Tino Rangatiratanga was at a minimum the right to self determination and autonomy… That included the right to work through their own institutions of governance and apply their own tikanga or system of customary laws. (Waitangi Tribunal – Te Mana Whatuahuriri: Report on Te Rohe Potae claims 2018 pg 158-169)

The Crown has intruded in harmful ways into areas the Treaty guaranteed to Māori. "…Māori must be given the right to chart their own path towards realisation in contemporary times of the Treaty promise of rangatiratanga over kainga"

(Waitangi Tribunal – He Pāharakeke, He Rito Whakakīkinga Whāruarua Oranga Tamariki Inquiry 2021, p183, 184)

Environment Court jurisdiction regarding relational or mana whenua issues

"…when addressing the s 6(e) RMA requirement to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga, a consent authority, including the Environment Court, does have jurisdiction to determine the relative strengths of the hapū/iwi relationships in an area affected by a proposal, where relevant to claimed cultural effects of the application and wording of the resource consent conditions." (Whata J, *Ngāti Maru trust v Ngāti Whātua Ōrākei*).

And further:

- "But 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."

So:

- "The Environment Court is necessarily engaged in a process ascertainment of tikanga Māori where necessary and relevant to the discharge of express statutory duties."
- Where iwi claim that a particular outcome is required to meet those directions in accordance with tikanga Māori, resource management decision makers must meaningfully respond to that claim, including when different iwi make divergent tikanga based claims as to what is required to meet the Part 2 obligations.

- This may involve evidential findings in respect of the applicable tikanga.
- To hold otherwise would be to emasculate those Part 2 directions of their literal and normative potency for iwi. (Whata J, *Ngāti Maru trust v Ngāti Whātua Ōrākei*).

But note need for caution in these types of assessments:

"Where there are layers of interests in a site, all the layers are valid. They derive from centuries of complex interaction with the whenua and give all the groups with connections mana in the site. For an external agency like The Office of Treaty Settlements to determine that the interests of only one group should be recognised, and the others put to one side, runs counter to every aspect of tikanga we can think of. It fails to recognise the cultural resonance of iconic sites, and the absolute imperative of talking to people directly about what is going on when allocation of exclusive rights in maunga is in contemplation." (Tamaki Makaurau Settlement Process Report: Waitangi Tribunal 2007)

See *Ngāi Te Hapū Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73 at [82]

See also Motiti Report on the Te Motere o Motiti Inquiry: Waitangi Tribunal 2023 for examples of forensic weighting of competing mana whenua or customary authority claims.

Some metrics for the exercise of the jurisdiction to consider relational claims:

“the rule of reason’ approach (Ngāti Hokopū):

- whether the values correlate with physical features of the world (places, people);
- peoples' explanations of their values and their traditions;
- whether there is external evidence (e.g., Māori 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 peoples' 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.

An example: *Mt Messenger* case

(*Mt Messenger (Director General of Conservation vs Te Runanga o Ngāti Tama Trust and others* [2019] NZEnvc)

The case concerned a planned upgrade of the Mt Messenger section of a state highway east of New Plymouth. Required for the project was over 20 hectares of land returned to Ngāti Tama as part of its 2003 Treaty of Waitangi Settlement.

Some features to note:

A public authority with compulsory acquisition powers wishes to acquire land returned to Māori under a Treaty settlement	Non-Māori assert tangata whenua status	Māori with whakapapa to a different area assert tangata whenua status	Internal conflict within an iwi/hapu	Evidence including expert evidence	Role of counsel

The Court cited with approval the following submission of counsel for Ngāti Tama:

“Tangata whenua and mana whenua are accorded special recognition and rights under the RMA. As the Privy Council has noted, these rights are "strong directions to be borne in mind at every stage of the decision-making process". These rights are hard won and reflect the culmination of over 150 years of protest and advocacy on behalf of Māori. It is therefore extremely important that such rights are reserved for tangata whenua/mana whenua alone. Extending such rights to non tangata whenua/mana whenua interests, is inconsistent with the RMA, and diminishes both the value and meaning of such rights, and the mana of the iwi or hapū that holds mana whenua.”

Some observations:

- Early recognition by Waka Kotahi that it would not be right to use compulsory powers and early appointment of external consultant to manage engagement with Ngāti Tama and other Māori.
- Commitment not to proceed with the preferred road realignment unless agreement could be reached with Ngāti Tama.
- Relevant findings:
  - Ngāti Tama has mana whenua over the project area and it is therefore appropriate that it be the only body referred to in conditions addressing cultural matters.
  - Neighbouring land owners also effected by the proposal (the Pascoes) are not kaitiaki in the sense that the word kaitiakitanga is used in the Act. The relationship of the Pascoes to the land is of stewardship.
  - A collective known as Poutama are not tangata whenua exercising mana whenua over the project area and therefore not appropriate that they be recognised in any consent condition addressing cultural matters.

How to advocate well on tikanga and the law

- Tikanga: (“integrate to perpetuate”) Williams J, Lex Aotearoa.
- When tikanga comes to the Environment Court, the Court must have evidence grounded in and defined in accordance with tikanga Māori and matauranga Māori to make the best decisions.
- The best evidence of tikanga Māori and matauranga Māori will of course be in te reo Māori.

Cultural competency: what does it mean?

- Build and maintain capability in te reo.
- Building and maintaining understanding of Treaty of Waitangi jurisprudence, both the Courts and the Waitangi Tribunal.
- If a non-Māori practitioner acting for Māori hapu or iwi, you may not be able to locate, understand or receive most relevant tikanga knowledge and evidence unless the knowledge holders trust you. The more central the knowledge to hapu or iwi identity, the harder it will be to earn that trust. It will also take time.

- No matter how good you are as an advocate, you are very unlikely to be trusted with tikanga or matauranga Māori unless you show genuine respect for it.
- The same general point applies to Court procedure. It is now far more common across courts in all jurisdictions to allow appropriate space for mana whenua to open and close proceedings with mihi and karakia. If procedure on the day is uncertain or unclear, counsel should advocate for this and also if leading tikanga evidence in te reo Māori ensure that the Court is notified early so that arrangements for simultaneous translation are made (if possible).
- Where appropriate, propose that the Court sit on the relevant marae (or similar venue) to receive tikanga evidence.

- Be sensitive to the ongoing affects of the second law:

  "Tikanga and Māori society, more generally, have been subject to the devastating impact of colonisation on its institutions and practises. This is meant that for many Māori, they have become alienated from their lands, culture and are unfamiliar with tikanga." (Statement of Mātanga Tikanga, Ellis case at para 38)

- Cross-examination where there is competing evidence as to tikanga may be required, but try to first narrow issues in contention pre-hearing and be aware that traditional adversarial cross-examination of a Pou Tikanga will seldom be productive or helpful.
- Allegations of bias or suggestions that the evidence may not be genuinely held are not likely to be viewed favourably by the Court (*Greymouth Petroleum v Heritage NZ* [2016] NZEnbC11).
- Be aware of, and where appropriate, use extrinsic evidence as context for tikanga evidence such as reports of the Waitangi Tribunal and primary sources such as texts on tikanga Māori.