

Wānanga on Tikanga and the Law



Ellis v R [2022] NZSC 114

- Facts
- Supreme Court questions
- Wananga process
- Principles engaged
- Argument advanced
- Decision: 3/2



Decision

- Unanimous: “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”.
- Majority: colonial tests for incorporation of tikanga in the common law should no longer apply. That relationship will evolve on a case by case basis.
- Majority: “tikanga was the first law of Aotearoa / New Zealand and it continues to shape and regulate the lives of Māori.”
- Majority: “In light of this, 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”.



Select quotes

- “Tikanga is part of the common law of Aotearoa. What this means in practice will need to be worked out on a case by case basis”. It might be controlling, a relevant consideration, have an influence, provide a new vocabulary of framework for thinking.” (Glazebrook)
- “Tikanga will continue to be applied by Maori 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”. (Glazebrook)
- “Tikanga must inform, and in appropriate cases, control how decisions about tikanga in the common law are made and how tikanga may develop to meet new circumstances. I recognise that in general the sources of tikanga and those vested with the expertise and authority to expound on it will be external to the Courts”. (Glazebrook)
- “The common law is structurally more sensitive to the context of the case than is legislation, so even if there appears to be no space for tikanga to apply, it may also necessary to ask whether space should now be made.” (Williams)



Implications?



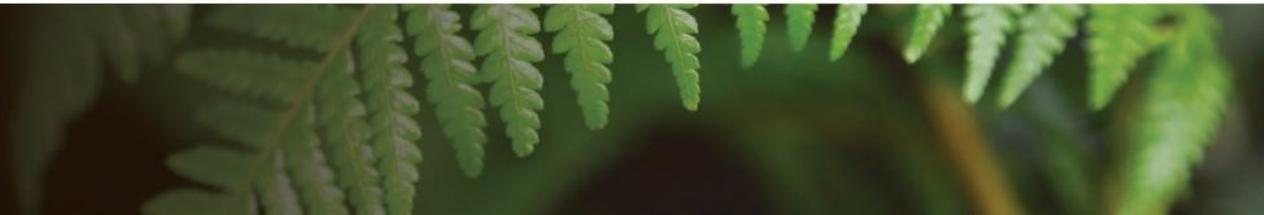
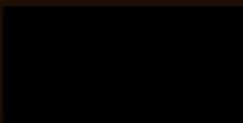
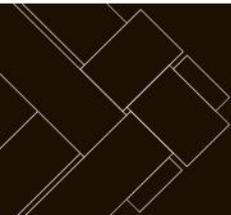
***Wairarapa Moana ki Pouakani* [2022] NZSC 142**

- Emphasises the tikanga is not linear but dependant on context and circumstance.
- Illustrates the challenges faced by the Courts in the application of tikanga, especially where there are disputes between Maori parties as to the application of relevant tikanga principles.
- Affirms the relevance of tikanga to the application of Treaty principles.



***Wairarapa Moana ki Pouakani* [2022] NZSC 142**

- “[74] All that said, we take the view that in tikanga, as in law, context is everything. It is dangerous to apply tikanga principles, even important ones, as if they are rules that exclude regard to context”.
- “[76] ...Every system of law recognises that core principles applied to real life will have exceptions and adaptations. Indeed, as the matanga (experts) noted in the course of the tikanga wananga held by the Tribunal prior to completion of its preliminary report, tikanga is a principles-based system of law that is highly sensitive to context and sceptical of unbending rules.”



***Trans-Tasman Resources Ltd* [2021] 1 NZLR 801**

Relevant to tikanga in two ways:

1) Strong Treaty interpretation comment (relevant to tikanga)

[151] .. The move to more finely tuned subtle wording does not axiomatically give support to a narrow approach to the meaning of such clauses. Indeed, the contrary must be true given the constitutional significance of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. It ought to follow therefore that Treaty clauses should not be narrowly construed. Rather, they must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.



***Trans-Tasman Resources Ltd* [2021] 1 NZLR 801**

2) Tikanga grappled with

- Tikanga relevant as an “existing interest” (s59(2)(a)) and as “other applicable law” (s59(2)(l)) to be taken into account.
- Important footnote at 282: “We leave open for determination the questions of whether or not tikanga is a separate or third source of law and whether or not there should be any change to the tests for the recognition of customary law”.
- Tikanga rights and interests included kaitiakitanga, rights claimed but not yet granted under the MACA Act and interests under the fisheries settlement Act.

