

Tikanga and the Law

Thoughts on Advocacy

Re Edwards (Te Whakatōhea No 2)

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A sermon on the importance of evidence!

- *Tikanga is law proved as a matter of fact*
- Therefore, your evidence is absolutely critical
- Consider the following:
 1. Conceptual framework
 2. Expert evidence on tikanga
 3. Tangata whenua evidence on custom
 4. Pūkenga to assist the Court



Re Edwards (Te Whakatōhea No 2)

- Claims for ‘Customary Marine Title’ under Marine and Coastal Area (Takutai Moana) Act 2011 (MACA)
- Section 58(1) test – applicant group has to establish that it:
 - (a) - “holds the specified area in accordance with tikanga”
 - (b) – “exclusively used and occupied it from 1840 to the present day without substantial interruption”
- Churchman J awarded Customary Marine Title to the six hapū of Te Whakatōhea

Tikanga as a system of law

- Expert evidence from Dr David Williams, Emeritus Professor of Law, University of Auckland
- Purpose to explain to the Court the conceptual framework underpinning how tikanga operates as a system of law
- The ambit of tikanga is much wider than rules or laws and includes moral and spiritual aspects of human behaviour (i.e. culture)
- Tikanga is about the right way of doing things (*process*) as well as the right result or outcome (*substance*) (*Ellis (SC)*)

Tikanga vs state law (David Williams)

State law

- State law is institutional.
- Pākehā law tends to be highly prescriptive & rules-based.
- High degree of certainty as to what the rules of the legal system are.

• Tikanga Maori

- Custom law - not at all prescriptive.
- The focus of tikanga Māori - the values underlying the conduct or approach required in a given situation.
- Thus, tikanga Māori as a social system is traditionally pragmatic and open ended.
- A person imbued with the understandings of tikanga Māori will focus on the value base, therefore, rather than on any rules which may express them.

Tikanga values

- **Whanaungatanga** - the centrality of relationships to Maori life
- **Mana** - the importance of spiritually sanctioned authority and the limits on Maori leadership
- **Utu** - the principle of balance and reciprocity including the accompanying values of aroha and manaakitanga requiring respect, empathy and generosity
- **Kaitiakitanga** - the obligation of stewardship and protection of one's own
- **Tapu** - respect for the spiritual character of all things

Expert evidence on relevant tikanga

- Tikanga fluid and highly context-specific - what is tika in one context may not be in another (e.g. High Court decision in *Wairarapa Moana*)
- Not all opinions on tikanga are created equal!
- Pou tikanga/ pūkenga/ kaumātua are the experts in forming judgements based on tikanga values and cultural knowledge
- Tangata whenua witnesses can also provide valuable evidence on customs and practices of hapū based on their lived experience
- A relationship of trust is required, as well as time and patience
- Consider whether to brief in te reo Māori (Annette)

Relationship with the takutai moana

Pou tikanga Dr Te Riaki Amoamo gave evidence on the rights and responsibilities of his hapū to the takutai moana:

*Under our tikanga, our ancestral connection to Tangaroa gives us the right to enjoy the bounty of the sea, but those rights are conditioned by our responsibility to nurture our ancestor. We must exercise **kaitiakitanga** as the custodians of our rohe moana (customary sea territory). Acting as the kaitiaki includes a responsibility to maintain the spiritual connection and respect for Tangaroa. Spiritual protocols need to be conducted when there are deaths at sea, whether they be people or taonga species such as whales, and karakia performed to whakawātea te tapu (clear the tapu). It may be necessary to impose a rāhui for a period. Rāhui can also be imposed if resources are under threat.*

Proving customary title

- *Take tūpuna* (inheritance from one's ancestors)
- *Take raupatu* (conquest)
- *Take tuku* (gifting)
- *Take taunaha* (naming during discovery and exploration)
- *Take ahikā* (keeping the home fires burning)

Dr Te Riaki Amoamo (pou tikanga)

- *'Under our tikanga, we belong to our customary land and sea through a combination of our **whakapapa** to the land, the **occupation** of our ancestors keeping the home fires burning over many centuries (or **ahi kā roa**, literally the long burning fires), and **conquest** over other tribes in battle.'*
- *Whakapapa evidence* – belonging to the land
- *History* - ancestors naming the rohe, where they lived, and where they gathered the bounty of the land and sea
- *Evidence of ahi kā* – e.g. acting as kaitiaki

‘Shared exclusivity’ of the 6 hapū

- How does tikanga reconcile multiple hapū claims to the same area of the takutai moana? Dr Amoamo explained the nuanced mutual understanding:

*‘We have the right to exercise our customary authority (**mana** and **rangatiratanga**) in relation to our own seascape. For the same reason, we would not go into other tribal (iwi) seascapes because we would be challenged. Our customary areas are not as rigid as Western boundaries however. 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**). In that respect we are a tribal collective.’*

*‘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. Ngāti Rua holds the mana in Ngāti Rua’s sea territory. For instance, if somebody drowns out there in our rohe, Ngāti Patu would not do the karakia, I would, because it’s my customary area.’*

- Practical examples are best way to illustrate the underlying rights – e.g. placement of rāhui tells you who holds mana (authority) in particular area

Pūkenga to assist the court

- High Court can appoint pūkenga as court experts:
 - MACA s 99
 - High Court Rule 9.36
 - Inherent jurisdiction (*Ngāti Whātua Ōrākei (No 1)*, [36])
- Court weighs potential assistance to be gained against risk of prejudice to litigants, the importance of tikanga issues, the expert evidence before court etc
- High Court has power to state case on question of tikanga to Māori Appellate Court – Te Ture Whenua Maori Act 1993, s 61

Edwards - pūkenga solution based on tikanga values

- Pūkenga report proposed a poutarāwhare – a metaphorical construct comprising the six hapū as the pou of the whare and the people gathered inside (i.e. inclusive of all)
- This placed emphasis on whanaungatanga – the whakapapa relationships connecting the hapū
- It avoids (without directly saying so) the fraught exercise of drawing boundaries for the rohe of each hapū – not only is certainty impossible to achieve, but it would be divisive