Te Pūrongo Ture Hōngongoi 2020

CHAPMAN TRIPP

Supreme Court hears tikanga arguments in *Ellis v R*

Ellis v R, recently heard in the Supreme Court, will be the first case directly to address whether tikanga is a part of Aotearoa New Zealand's common law since *Takamore v Clarke* (the Tūhoe "body snatching" case) in 2013.

The judgment will set a precedent for how and when tikanga can be incorporated into our laws. The metaphor that counsel for the plaintiff used was that judges "weave the fabric" that is the law, and that they should draw on both common law threads (from our Western legal tradition) and tikanga Māori threads.

Peter Ellis died last year, shortly after the Supreme Court granted leave to appeal against his historical convictions for sex offending. At common law, his death meant that any ongoing interest in his appeal ceased to exist. On 26 June, the Supreme Court heard submissions on whether this common law position should be modified by tikanga, and whether the interests that continue to exist under the principles of tikanga Māori warrant the continuation of his appeal.

The parties agreed that the relevant tikanga when a person's personal representatives or family wish to continue an appeal in their name after they have died are:

- ***mana tangata*** – particularly the idea that mana endures after death, and that mana can be collective, and
- ***ea*** – achieving a state of finality or balance.

Counsel for Mr Ellis argued the appeal should continue because: (a) Mr Ellis' *mana* and the mana of his whānau remained at stake and did not die with him, so there is an interest in the appeal going ahead; and (b) it was necessary to determine the appeal in order to achieve *ea*.

Te Hunga Roia Māori, having successfully applied to intervene in relation to the questions at issue, advanced three key propositions:

- tikanga has been recognised in a number of different ways under our laws
- tikanga should continue to transform our laws and legal system so that they reflect our unique circumstances and identity, and
- tikanga values and principles have broad resonance and can be applied generally, rather than only to "Māori" issues.

Significance

At our *Disruption and forging new pathways* symposium in February, we identified three key trends for 2020 – one of them being that tikanga Māori concepts will increasingly be recognised by the courts as an integral part of the law of Aotearoa. This case presents an important opportunity for this progression. If the arguments of Mr Ellis and Te Hunga Roia Māori are accepted, it will set a precedent for how and when tikanga can be incorporated into the law. It also presents an opportunity in future litigation for parties to have substantial input into the development of the law by providing relevant tikanga evidence for the court to draw on.

Privacy Act passes into law

The long awaited Privacy Bill has passed into law as the Privacy Act 2020 (the *Act*). The majority of the provisions in the Act come into force on 1 December this year. Key changes for agencies (meaning your PSGE or business) to be aware of include:

- **a mandatory privacy breach reporting regime:** agencies must notify the Privacy Commissioner and affected individuals where it is reasonable to believe that a privacy breach has caused, or is likely to cause, serious harm. Failing to notify the Privacy Commissioner will be an offence punishable by a fine of up to $10,000
- **restrictions on transferring personal information overseas:** agencies can send personal information outside of New Zealand only if one of six grounds apply, the overall effect of which is that the information will remain protected by security safeguards comparable to those required under New Zealand law, or if the individual authorises the transfer. These restrictions won't apply to transfers of personal information to overseas cloud service providers or any other party that holds information solely as agent, and
- **collecting information from children and young people:** agencies must have particular regard to the vulnerability of children and young people when deciding what is a fair a non-intrusive way to collect their information.

The Act modernises privacy law in New Zealand, but it does not go as far as the EU's General Data Protection Regulation. It is likely that further reform will be required in a few years' time to keep New Zealand in line with international developments and standards. Please get in touch if you would like to discuss the implications of the new Act on your PSGE or business with one of our privacy experts.

Te Pūrongo Ture Hōngongoi 2020

CHAPMAN TRIPP

The new Trusts Act changes coming

The Trusts Act 2019 (the *Act*), which comes into force at the end of January 2021, is the first major trust law reform in New Zealand in 70 years. The changes seek to make trust law more accessible to beneficiaries, while also strengthening the ability of beneficiaries to hold their trustees to account.

Now is the time for trustees to seek professional advice regarding mandatory and 'best practice' changes to their trust deeds, to ensure that appropriate resolutions can be put before an AGM or SGM before the Trusts Act comes into force in six months' time.

Key provisions of the Act

- **Context and objectives of the trust:** the Act elevates the context and objectives of the trust to a key factor in decision making and exercise of trustee duties.
- **Mandatory and default trustee duties:** the Act defines the core trustee duties and classifies them as either 'mandatory' (will apply) or 'default' (can be modified). Default duties include things like a duty to invest prudently and to exercise a standard of care.
- **Special trust advisers/delegates:** the Act renames Advisory Trustees (people who advise trustees) as 'special trust advisers'. The trustee retains decision-making power and will not have to follow the special trust adviser's advice. The Act is also more restrictive on trustee delegation – for example, preventing trustees from appointing alternates.
- **Disclosure of information:** the Act creates a presumption that a trustee must make 'basic trust information' available to every beneficiary and 'trust information' available to beneficiaries who request it.
- **Retention of information:** the Act requires trustees to keep core trust documents, including documents setting out the terms of the trust or varying those terms, records of the trust property appropriate to the value and complexity of that property, records of trustee decisions, contracts, accounting and financial statements, appointment, removal and discharge documents, letters of wishes by the settlor, and other documents necessary for the administration of the trust, for the duration of the trust.
- **Exemption and indemnity clauses:** trustees have always been liable for their own dishonesty and wilful misconduct but the Act adds 'gross negligence' to this list. Any terms in a trust deed that are inconsistent with this are invalid.
- **Age of majority:** the age of majority for trust purposes is set at 18 (rather than the current age of 20).
- **Trust duration:** the maximum term of a trust is extended from 80 to 125 years (although this extension is not automatic for existing trusts).
- **Court review:** there are now specific grounds for a court to review trustee decisions.
- **Alternative dispute resolution (*ADR*):** new ADR procedures are provided.

Our trusts experts would be happy to assist trustees or Post Settlement Governance Entities (*PSGEs*) with advice on changes needed to their respective trust deeds.

Takutai Moana Act breaches Treaty of Waitangi

The Marine and Coastal Area Takutai Moana Act 2011 Inquiry Stage 1 Report, released on 29 June 2020, investigated the legislative framework and applications process established under the Marine and Coastal Area Act (the *Act*). This kaupapa inquiry is being conducted in two stages, with the first stage considering whether the Act's procedural and resourcing (including funding) arrangements breach Treaty principles and prejudice Māori.

The Tribunal made findings and recommendations relating to the Act's procedural and non-financial resourcing arrangements, as well as funding for both application pathways provided under the Act – through the High Court or Crown engagement.

In relation to procedural and non-financial arrangements, the Tribunal determined that:

- the Crown did not breach the Treaty principles of active protection and partnership in distributing information or consulting with Māori about funding
- the principles were breached by a failure to provide adequate and timely information about the Crown engagement pathway (significantly prejudicing applicants) and a lack of procedural arrangements to support the High Court pathway (although this was mitigated by steps taken by the High Court)
- the principle of active protection was breached by a lack of clarity and cohesion between the application pathways, causing prejudice to claimants, and
- the principle of active protection was breached by the Crown's failure to support efforts to resolve overlapping interests, causing prejudice to Māori.

The second stage of this kaupapa inquiry will consider the substantive nature of the Act and accompanying regime: does it, as the Treaty requires, provide adequate protection and recognition of Māori customary rights in the takutai moana?

A wider net for climate risk disclosure?

The Government is considering extending the proposal to implement – on a 'comply or explain' basis – the recommendations of the Taskforce on Climate Related Financial Disclosures (*TCFD*) to large emitting privately held companies and public entities.

Read our recent commentary here.

Whakapā mai

NICK WELLS – HOA RANGAPŪ WHAKARAE
CHIEF EXECUTIVE PARTNER
T: +64 9 357 9004
M: +64 27 449 0041
E: nick.wells@chapmantripp.com

TE AOPARE DEWES – RŌIA WHAKARAE
SENIOR ASSOCIATE
T: +64 9 358 9839
M: +64 27 209 0810
E: teaopare.dewes@chapmantripp.com