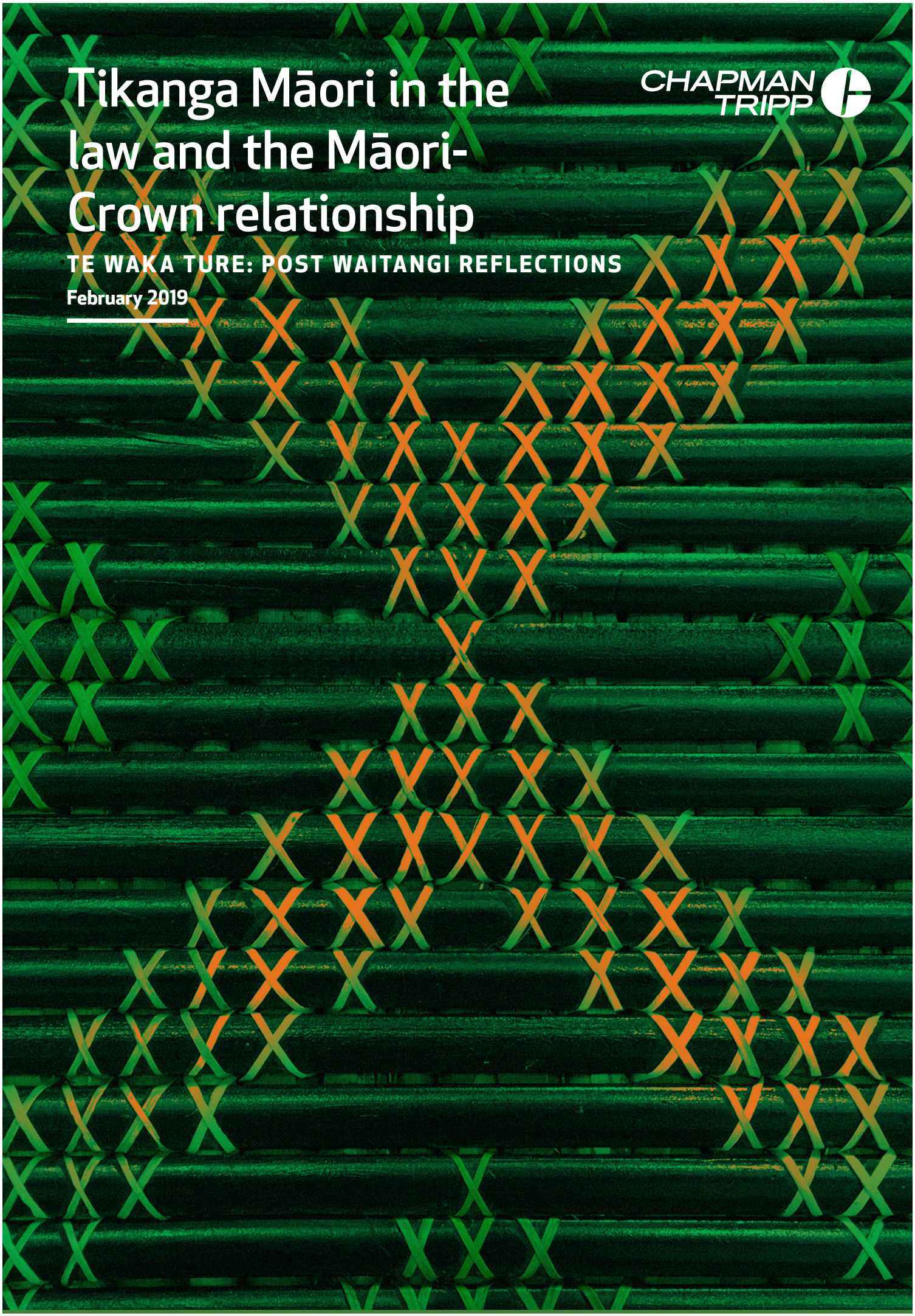
Tikanga Māori in the law and the Māori-Crown relationship

CHAPMAN TRIPP

TE WAKA TURE: POST WAITANGI REFLECTIONS

February 2019



Erratum

Page 2 – this report has been updated electronically on 27 February 2019 due to an editing error.

Contents

Reflections on Waitangi Day

Waitangi Day creates an opportunity each year to take stock of how the Articles of Te Tiriti o Waitangi are being reflected, or not, in present day Aotearoa, and what is happening in the Māori-Crown relationship. Below are our reflections on these themes in 2019.

Had there been one Te Tiriti o Waitangi (the te reo Māori text), and had it been taken seriously, New Zealand might have been a happier and healthier country than it is now.

But differences between the Māori and English versions meant that there were in effect two treaties and that a contract which was meant to forge a bond has at times become a source of contention, frustration and bad faith on behalf of the Crown.

This was exacerbated by the New Zealand Company's and the Courts' perception of, and attitude towards, the Treaty - that it was a legal "nullity".

Māori understood that they were giving the British Crown "kāwanatanga", the right to govern, but the English version refers to "sovereignty", the Māori equivalent of which is "tino rangatiratanga" – an entirely different concept.

Kāwanatanga is a transliteration of the word "governance". Sovereignty implies a transfer of authority, or cession – which is exactly what Governor Hobson proclaimed in May 1840, and the integration of Ngāi Pākehā and Ngāi Māori began.

The tragedy is that, had the engagement between Māori and the Crown proceeded on a kāwanatanga basis, had Te Tiriti secured tribal rangatiratanga and Māori land ownership, had Te Tiriti been treated as a founding document of Aotearoa and not as a legal "nullity", had the New Zealand Company not seen it as "*a praiseworthy device for amusing and pacifying savages for the moment*", the impact of colonisation on Māori would, without doubt, have been less devastating.

We can't rewrite history but we can address its present day legacy.

Me wehi ki a Io-Matua-Kore e noho nei ki te toi o ngā rangi.

Me wehi hoki ki a Rangi e tārewa nei, ki a Papa e takoto nei.

E kore e wareware i a tātau ngā mate kua riro atu rā ki te pōhorotaniwha. Ā, ko ō rātou wairua ki a Rangi, ko tātau wā rātou waihōtanga iho ki a Papa.

Ki ngā whakakanohi maunga, ngā whakakiko whakapapa, ngā mana whenua o tēnā, o tēnā o tātau, anei rā te kupu whakamihi e rere kau ana, e rere kau ana.

Ko Te Waka Ture e mihi nei i tēnei wāhanga o te tau. Tērā ko Huitanguru, ko Rūhī-te-rangi, e rewa ake nei i runga rā hei tāwharautanga mō tātou i tēnei wā e patu tonu mai ana a Rēhua.

Ana, kua rewa ake anō tēnei pūrongo mō te rā o Waitangi hei pānui ake mā koutou.
E te iwi, me whatu hōmiro mai!

What is the way forward for Aotearoa?

In this paper, we

- trace the growing recognition of tikanga Māori in the law
- explore what the Ngāti Whātua Ōrākei Supreme Court decision means for Crown engagement
- assess the importance of Te Arawhiti (the new Office for Māori-Crown Relations), and
- propose a child-focused approach to improve outcomes for Māori.

Tikanga Māori – a lever for cultural assertion

Tikanga Māori is establishing a meaningful place in New Zealand law and is providing a powerful lever to assert Māori cultural values.

Statutory recognition began in the early 1990s with the Resource Management Act 1991, Te Ture Whenua Māori Act 1993 and the Treaty settlement Acts. And the associated concepts of mana tamaiti, whakapapa and whanaungatanga will be introduced by amendment to the Oranga Tamariki Act 1989 in July this year.

Tikanga Māori now recognised and promoted in the Courts

The first confirmation that tikanga Māori is part of New Zealand's common law was in 2013 in *Takamore v Clarke* – a case involving the burial of a Tūhoe man in accordance with the tikanga of Tūhoe.

It was also reflected last year in *Ngāti Whātua Ōrākei v Attorney-General* where the Supreme Court refused to strike out an application by Ngāti Whātua Ōrākei for declaratory relief as to its rights and interests in central Tāmaki Makaurau.

Ngāti Whātua Ōrākei argued that the transfer to Marutūāhu and Ngāti Paoa of Crown-owned properties in respect of which Ngāti Whātua Ōrākei claimed mana whenua was:

- contrary to tikanga Māori, and
- a breach of the Treaty settlement already entered into between Ngāti Whātua Ōrākei and the Crown.

The potential implications of this decision are significant. We discuss them next.

More recently, the Supreme Court held in *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* that a degree of preference to Māori and to Māori economic interests is consistent with – and perhaps even required by – the Treaty.

The Court ordered the Department of Conservation (*DoC*) to reconsider concessions it had granted to Fullers Group Limited and Motutapu Island Restoration Trust for their respective commercial tour operations on Rangitoto and Motutapu.

The basis for the order was that the application may not have been allowed had DoC given appropriate consideration to factors of mana whenua exercised by Ngāi Tai ki Tāmaki over the islands.

We expect this trend to continue and for tikanga Māori to become more integrated into the statute books and into the decisions of the Courts. It will mean that public actors making public decisions will need to consider tikanga-based interests and will, over time, lead us closer to the cultural partnership that the Treaty intended.

Canada is further down the track. In *Restoule v. Canada*, the Ontario Superior Court of Justice ruled that proper analysis of Treaties entered into between First Nations and the Crown must have regard to the indigenous perspective – in this case, the concepts of respect, responsibility, reciprocity and renewal as manifested in Anishinaabe stories, governance structures and political relationships.

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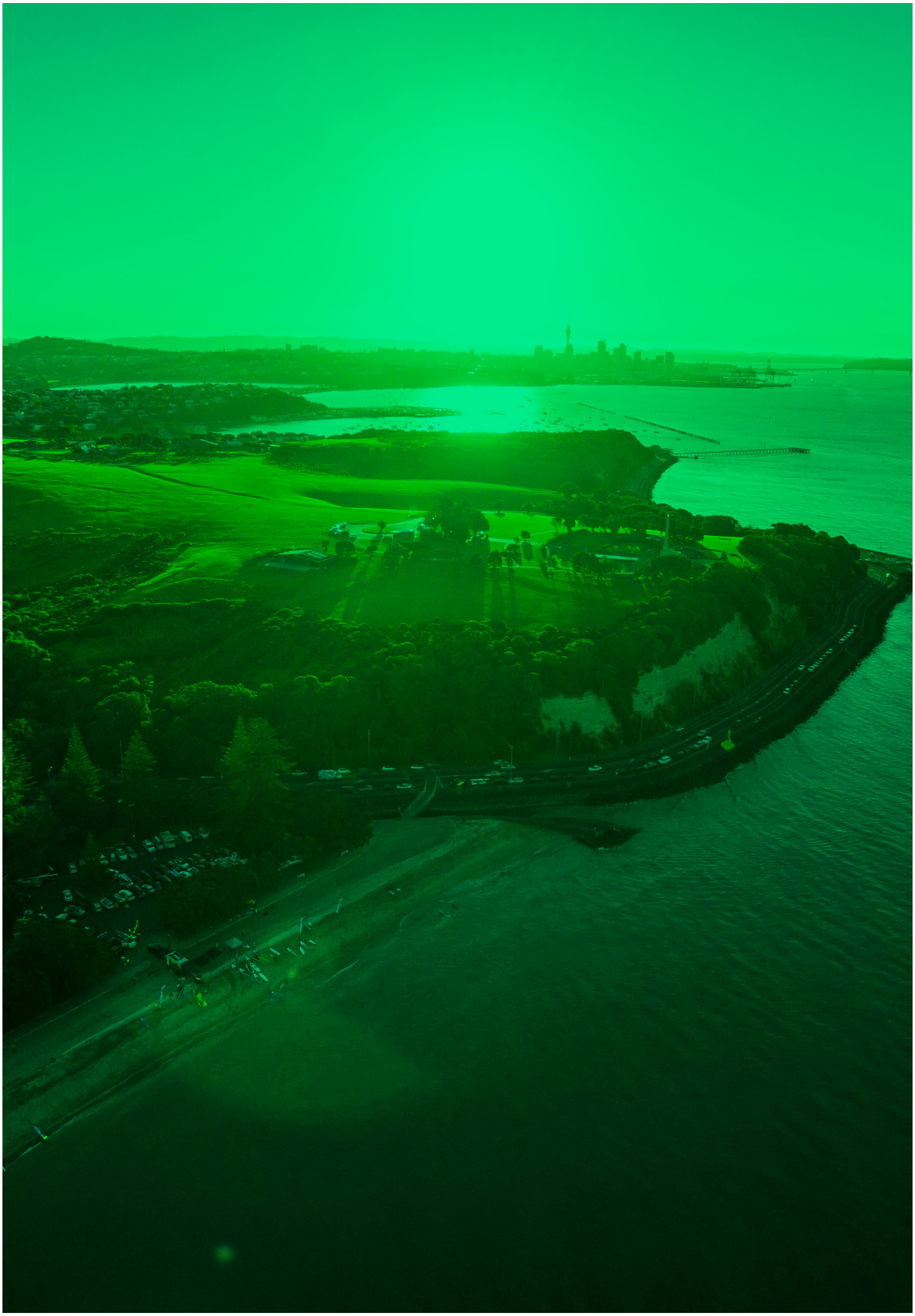

Ngāti Whātua Ōrākei – implications for Crown engagement

This case is potentially transformative in the influence it could have on Māori-Crown engagement.

Settled groups

The Supreme Court's recognition of rights arising from settlement deeds, settlement legislation and at common law may have the effect of making those rights enforceable by Māori against the Crown, including an obligation to respect ahi kā and mana whenua of iwi and hapū. This could extend to areas of central and local government decision-making – as evidenced in the *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* decision.

Overlapping claims policy and Treaty settlements more generally

Chief Justice Elias noted in *Ngāti Whātua Ōrākei v Attorney-General* that the Court had not heard "*any justification of the reasonableness of [the Crown's] published general policy on overlapping claims*". She then went on to suggest that this policy may be vulnerable to judicial review "*as indeed may be the case with the wider system of settlements conducted by the Office of Treaty Settlements*".

Freshwater rights

Following their win in the Supreme Court, Ngāti Whātua Ōrākei must now apply for relief in the High Court, which will require proving that they have mana whenua over the land in dispute.

Should they succeed in establishing this argument, it would reinforce the status of tikanga Māori in the law and could open the door to:

- the Courts and Parliament formally recognising Māori rights and interests in freshwater in accordance with tikanga Māori
- the Crown engaging in takutai moana applications with the relative interests of iwi and hapū, particularly those who hold primary interests in the takutai moana as ahi kā or mana whenua, and
- more diligent performance by local authorities of their obligations under the Resource Management Act 1991 to recognise Māori culture, traditions and kaitiakitanga.

Te Arawhiti – The Office for Māori-Crown Relations

The establishment of Te Arawhiti deserves an appreciative nod. It is tasked with supporting the Crown to act fairly as a Treaty partner and the remit it has been given signals a definite and progressive shift in the Crown's approach.

But good intentions are not sufficient in themselves. They need to be supported by political will and by appropriate resources. We will watch Te Arawhiti's progress with interest.

The next generation

The evidence of the Treaty's failure to deliver to Māori is everywhere – Māori are 15.2% of the population but 51% of prison inmates; 68.3% of children under the care of the Oranga Tamariki Act 1989, and 80.3% of the rangatahi in Youth Justice residences.

As Children's Commissioner Andrew Becroft tweeted on Waitangi Day:

"179 years ago, a contract was signed. It was broken and continues to be broken. Mokopuna Māori have been deprived of the richness of their own land, culture and potential ever since. We must do better as a country for our children."

We agree. It is well understood that early intervention can transform young lives; that education is a leading determinant of future success, and that good health care is a basic human right.

Our challenge to the Government and all political parties is to pick up on the work of Dr Lance O'Sullivan and dramatically increase the level of state sponsored health care and meals in schools so that all children are given a decent start in life and can fulfil their true potential.

It's not such a radical idea. Finland and Sweden have been doing it for years, the UK provides school lunches and, in New Zealand, there are some good private sector and Māori initiatives the Government could draw on.

Māori disproportionately represented

15% OF POPULATION

51%

ORANGA TAMARIKI **68%**

YOUTH JUSTICE

80%


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Glossary of te reo Māori terms

Ahi kā

An occupational fire (a metaphor used to describe physical occupation of a place over a long period)

Kāwanatanga

Direct transliteration of the word 'governorship'

Mana whenua

Authority over a certain geographical area

Takutai moana

Coastal area OR foreshore and seabed

Tino rangatiratanga

Unqualified authority and autonomy

Te Waka Ture primary contacts

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

TE AOPARE DEWES – HOA RŌIA KAITIRIWĀ
SENIOR ASSOCIATE
NGĀTI POROU, NGĀTI RANGITIHI, NGĀTI WHAKAUE
Māori Law
T: +64 9 358 9839 **M:** +64 27 209 0810
E: teaopare.dewes@chapmantripp.com

JUSTIN GRAHAM – HOA RŌIA MATUA
PARTNER
Litigation & dispute resolution
T: +64 9 357 8997 **M:** +64 27 209 0807
E: justin.graham@chapmantripp.com

Chapman Tripp's Te Waka Ture team

GRAEME OLDING – HOA RŌIA MATUA
PARTNER
Tax
T: +64 9 357 9259 **M:** +64 27 591 6103
E: graeme.olding@chapmantripp.com

LAURA FRASER – HOA RŌIA MATUA
PARTNER
Litigation & dispute resolution
T: +64 9 357 9883 **M:** +64 27 702 6909
E: laura.fraser@chapmantripp.com

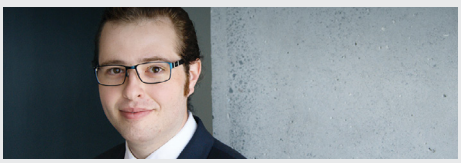
GREER FREDRICSON – HOA RŌIA KAITIRIWĀ
SENIOR ASSOCIATE
Corporate & Commercial
T: +64 9 358 9815 **M:** +64 27 205 7560
E: greer.fredricson@chapmantripp.com

BRIAR PEAT – RŌIA
SOLICITOR
NGĀTI RANGIWEWEHI, NGĀTI WHAKAUE
Corporate & Commercial
T: +64 9 357 9036
E: briar.peat@chapmantripp.com

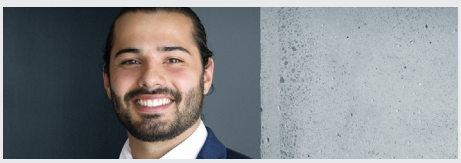
HANAMARAEA WALKER – RŌIA
SOLICITOR
NGĀTI POROU, TE WHĀNAU A APANUI, NGĀTI KAHUNGUNU
Corporate & Commercial
T: +64 9 357 9695
E: hanamaraea.walker@chapmantripp.com

LIAM STONELEY – RŌIA
SOLICITOR
NGĀI TAHU
Corporate & Commercial
T: +64 9 357 8985
E: liam.stoneley@chapmantripp.com

KATE ROBERTS-GRAY – RŌIA
SOLICITOR
NGĀTI POROU
Tax
T: +64 9 357 9509
E: kate.roberts-gray@chapmantripp.com



CAMERON JACOB-SAUER – RŌIA
SOLICITOR
NGĀI TE RANGI
Tax
T: +64 9 357 9033
E: cameron.jacob-sauer@chapmantripp.com



FINDLAY JACOB-SAUER – RŌIA
SOLICITOR
NGĀI TE RANGI
Corporate & Commercial
T: +64 9 357 2725
E: findlay.jacob-sauer@chapmantripp.com

RACHEL ROBILLIARD – RŌIA
SOLICITOR
NGĀI TAHU
Resource Management
T: +64 3 353 1234
E: rachel.robilliard@chapmantripp.com

TONI LOVE – RŌIA
SOLICITOR
Property
T: +64 4 498 6327
E: toni.love@chapmantripp.com

ROIMATA MITCHELL – RŌIA
SOLICITOR
RANGITANE, NGĀTI KAHUNGUNU
Finance
T: +64 9 357 9003
E: roimata.mitchell@chapmantripp.com

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AUCKLAND

23 Albert Street
PO Box 2206, Auckland 1140
New Zealand

T: +64 9 357 9000
F: +64 9 357 9099

WELLINGTON

10 Customhouse Quay
PO Box 993, Wellington 6140
New Zealand

T: +64 4 499 5999
F: +64 4 472 7111

CHRISTCHURCH

60 Cashel Street
PO Box 2510, Christchurch 8140
New Zealand

T: +64 3 353 4130
F: +64 3 365 4587

chapmantripp.com