

## MĀORI LAND

# Supreme Court considers place of tikanga in recent seabed mining case

BY **CLAIRE TYLER**

THE PLACE OF TIKANGA IN THE LEGAL system of Aotearoa has been receiving increasing attention of late, including by the Supreme Court in the recent case of *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127. The comments made in that case have wider reaching implications for other areas of law, including property law.

The case related to Trans-Tasman Resources Limited's desire to mine iron sands in an area within New Zealand's exclusive economic zone in South Taranaki, and its application for consents under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act). The Court, in dismissing the company's appeal, set out its position on the correct approach to a number of provisions of the EEZ Act.

Particularly notable points included findings to the effect that:

- Treaty of Waitangi/Te Tiriti o Waitangi clauses, including the clause in the EEZ Act require a "broad and generous



construction" to their interpretation. The Court concluded that "[a]n 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."

- Tikanga was discussed, with the Court finding that tikanga-based customary rights and interests constituted "existing interests" when considering "...any effects on the environment or existing interests of allowing the activity" under a section in the EEZ Act.

Further, the Court also concluded that, drawing on the approach to tikanga in earlier cases, tikanga as law must be taken into account as "other applicable law" under another section of the EEZ Act, "...where its recognition and application is appropriate to the particular circumstances of the consent application at hand".

The court gave a strong and clear direction about the central role of Te Tiriti and how clauses related to Te Tiriti should be interpreted going forward. It has also set the precedent that tikanga is law and must be considered as such.

The implications of this going forward are yet to be uncovered as the decision is so recent, but a unanimous Supreme Court decision sets a strong precedent.

The case marks a significant development at a time when tikanga is becoming progressively more intertwined into the legal system of this country. It is clear that the implications of increased recognition of tikanga as law are likely to be substantial, not only for the public sector, but also beyond this to other areas including property law.

In particular, areas of property law which are concerned with planning and the Resource Management Act 1991 will likely be impacted, as this Act makes reference to Te Tiriti and tikanga. This means it is likely to be interpreted and applied differently after the decision in *Trans-Tasman Resources Ltd* to reflect the new developments in law created by this case.

This is a developing area of law, and one to keep an eye on as its implications are likely to be many and far-reaching. ■

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