



High Court finds arbitration is not the appropriate forum to determine whakapapa

By Gerald Lanning, John Shackleton, and Dave Barr

Key takeaways

Arbitration agreements may not be enforceable where endeavouring to resolve a dispute through arbitration would be inconsistent with tikanga Māori.

This reflects the evolving approach the courts are making to recognising tikanga Māori and accepts that defining tikanga (including whakapapa) should be left with iwi and hapū.

What happened?

In *Nawala v Ngāti Rehua-Ngātiwai ki Aotea Trust Board*¹ the High Court found that arbitration would not be an appropriate forum to determine the whakapapa of two people in relation to the Ngāti Rehua-Ngātiwai ki Aotea Trust. Consequentially, an arbitration agreement entered into between two groups of a trust's beneficiaries during mediation was null and void.² The Court directed that the kaumātua validation committee process be re-initiated to resolve the disputes consistent with tikanga.

The decision relates to the registration of beneficiaries of the Ngāti Rehua-Ngātiwai ki Aotea Trust. The dispute arose from previous discussions surrounding various aspects of administration of the Trust, Treaty of Waitangi settlement negotiations, and the basis on which beneficiaries and trustees should be elected.

What does this mean for parties entering into agreements with arbitration clauses?

The decision creates a novel exception to the general position that all disputes are arbitrable under the Arbitration Act 1996. In doing so, it provides further judicial recognition that a court cannot change the underlying fact of tikanga as determined by a hapū or iwi, exercising their rangatiratanga.

General position

A key principle underpinning the Arbitration Act is that parties ought to be free to determine the forum in which to resolve a dispute and there is accordingly a presumption that all disputes are arbitrable.

Arbitrations are most often entered into in a commercial context, but can be used to address a wide subject area of disputes. The Court generally won't intervene in any dispute which parties have agreed to submit to arbitration unless specific exceptions apply: the agreement is contrary to public policy; or is incapable of determination by arbitration under any other law.

That said, the Court retains residual judicial discretion to determine what is and is not arbitrable. This decision illustrates the flexibility

¹ [2021] NZHC 291.

² Pursuant to section 10 of the Arbitration Act 1996.

of the Court to make important findings on the appropriate setting for a dispute where it is not well fitted to arbitration.

Tikanga Māori and referral to arbitration

Tikanga Māori “was the first law of Aotearoa” and is recognised both through Acts of Parliament and in the common law of New Zealand.

In this case, the Court considered how best to resolve the dispute: through arbitration or to leave it within the tikanga-based process within the hapū.

The Court observed that it was not the role of the Court, or even possible for the Court, to determine the whakapapa of two people. This was something that could only be determined by the tikanga of the hapū represented by the Trust. Accordingly, an external arbitrator determining whakapapa without a strong connection to Ngāti Rehua-Ngātiwai ki Aotea and a deep understanding of its tikanga, would be inconsistent with tikanga Ngāti Rehua-Ngātiwai ki Aotea.

Our comments

This is a case that reflects on the evolving approach the courts are making towards recognising the importance of tikanga Māori. It accepts that defining tikanga (and whakapapa) should properly be left with iwi and hapū rather than determined by the court or an arbitrator.

We note that the High Court referred to the statement of the Court of Appeal in the recent *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* case:

It is (or should be) axiomatic that the tikanga Māori that defines and governs the interests of tangata whenua in the taonga protected by the Treaty is an integral strand of the common law of New Zealand.

The High Court's emphasis on upholding the role of tikanga is consistent with the Court of Appeal's position. The *Trans-Tasman* case currently sits in the Supreme Court.

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