
TIKANGA AS THE FIRST LAW OF NEW ZEALAND: AN IMPORTANT COGNITIVE SHIFT

KO TE TIKANGA MĀORI TE TURE TUATAHI O AOTEAROA: HE ARONGA NEKEHANGA NUI

ACTING CHIEF JUDGE CAREN FOX*
Māori Land Court

Abstract

This article provides an overview of the history of the Māori Land Court, as well as present day developments of the Court. It considers the role that tikanga (Māori customary values and practices) plays in the Māori Land Court, and how the Court has applied tikanga in a number of contemporary judgments. It then considers the Waitangi Tribunal (a Commission of Inquiry which examines Crown breaches of its obligations to Māori), and how tikanga can be demonstrated in the process and the findings of the Tribunal. It discusses how both judicial bodies have approached the challenge of competing tikanga claims. Finally, the article poses ideas of how tikanga can be applied going forward.

Keywords: tikanga; Māori Land Court; Native Land Court; Waitangi Tribunal; indigenous law; cultural considerations.

Tēnā koutou, koutou e whakarongo mai nei—kei te mihi ki a koutou. Ahakoa he iti tēnei wāhanga, he mihi mahana rawa atu mai i te Tairāwhiti. (Translation—Greetings to those who are listening. Despite this small mihi, know that is very warmly given from the East Coast of New Zealand).

[A] INTRODUCTION

I wanted to start by acknowledging what Chief Judge Taumaunu has said. Namely, procedure is as important as the substantive law. This presentation builds on that theme by reviewing both the procedure and substantive law of the Māori Land Court and the Waitangi Tribunal.

* For full citations of cases and reports and all slides referred to in this article, see the appended PowerPoint presentation.

[B] THE MĀORI LAND COURT

The modern Māori Land Court is a product of its history. It has been operative since 1865. In fact, it was initially established in 1862. But, it was revamped into what was the forerunner of the modern Māori Land Court—namely the Native Land Court—in 1865. So it is a very old, established institution of the New Zealand legal system.

The modern Māori Land Court (since 1993):

- ◇ is a court of record;
- ◇ is a creature of statute administered under Te Ture Whenua Māori Act 1993;
- ◇ is primarily a land title court; and
- ◇ has jurisdiction to deal with disputes concerning fisheries representation issues, Te Ao Māori and taonga tūturu cases, which are protected objects cases, family protection matters and a number of other jurisdictional issues.

Tikanga is bolstered by the fact that before judges are appointed, they must have knowledge of te reo Māori under Te Ture Whenua Māori Act 1993, section 7(2A).¹ Some of us are better at speaking Māori than others, but all the judges are competent enough to conduct their roles in te reo should they need to, or at least with the assistance of interpreters who can guide them through proceedings if need be. They are also competent in tikanga in the sense that they know enough about the law and about how tikanga has been analysed and implemented in the law, to do their jobs when it comes to dealing with tikanga in the courtroom. They must also be knowledgeable about the principles of the Treaty of Waitangi. They must have and bring that knowledge with them to the role of being a judge of the Māori Land Court.

They should also know the history of the Native Land Court. Emeritus Professor David Williams's book *Te Kooti Tango Whenua (The Land Taking Court)*, just in that title, captures the history of the old Native Land Court (Williams, 1999). That Land Court was, through the legislation that supported its operation, designed to individualize title, and thereby to facilitate alienation of land. It was a very effective tool in facilitating that outcome.

The modern Māori Land Court's purpose runs in the opposite direction. Under Te Ture Whenua Māori Act 1993 it must work with owners to retain what is left of the land, less than 6% of New Zealand's land base.

¹ Slide 3 "Tikanga in the MLC".

Figure 1: Maori Land Court hearing in Wairoa.



Figure 1: Maori Land Court hearing in Ruatoria.



Today judges are assigned to the seven districts of the Māori Land Court. They are encouraged to familiarize themselves with the iwi (tribe), the hapū (sub-tribes), and the marae (gathering places) of the area.²

Under section 66 of Te Ture Whenua Māori Act 1993, a judge may apply to their hearings such rules of marae kawa as the judge considers appropriate and make any ruling on the use of te reo Māori during the hearing. They should also avoid unnecessary formality. That necessarily means that they allow a fair degree of interaction from people who are generally unrepresented. In practice judges will attempt to understand and follow the local tikanga and kawa of tangata whenua (local indigenous people) in all aspects of the ceremonial duties, and that is a matter that they have worked hard to do.³

² Ibid.

³ Slide 4 “Procedure”.

Figures 1 and 2 are pictures I wanted to share with you because a picture paints a thousand words. They depict Māori Land Court hearings in Wairoa and Ruatoria.

During the hearings, the ceremonial formalities include beginning with karakia (prayers) and mihi whakatau (greetings). The use of te reo Māori is actively encouraged, and that can happen without warning, so the judges have to be prepared to respond to that. Judges also must have knowledge of the poroporoaki (farewell) process, and how to close proceedings at the end with karakia whakamutunga (final prayer).⁴

All of these aspects of our work are designed to make the process tika (right), a matter we have heard so much about today. We attempt to hear applications in the appropriate and respectful way, and we finish in a way that Māori people would want to see, namely to release all that is sacred or bad that has occurred during the hearing of an application(s), and we bring everybody back from that state so they are able to conduct their affairs in accordance with the notion of whakanoa (cause to be free of anything sacred) and whakaea (cause to be restored to balance).

At the end of last year, the first fully bilingual te reo Māori judgment of our court was issued. It has taken this long time to get to the position of being able to issue judgments in this way because the predominant language of the judges and the court has been English. This was a judgment of his Honour Judge Warren in *Pokere v Bodger—Ōuri 1A3* (2022). In this case the applicants' counsel submitted both written and oral submissions in te reo Māori. Prior to the substantive hearing a pūkenga was appointed under section 32A Te Ture Whenua Māori Act 1993, who assisted the judge in both hearing the matter bilingually and in producing this first bilingual judgment. This judgment represents a significant milestone in the development of the court because it means that we have almost reverted back to what the court was like in the initial years of its history, where nearly everybody spoke Māori in proceedings, including the judges.⁵ It has taken this long to get back to what was a tika procedure for hearing matters. I want to come back to this case because it also has quite a lot to say about tikanga. But it is a more recent judgment and I want to demonstrate its place in our history.

The court receives an average of between 5000 to 6000 applications per annum. There has been a drop over the last year or two because of

⁴ Slide 5 “Karakia, Mihi whakatau, Kōrero Reo Māori Poroporoaki, Karakia whakamutunga”.

⁵ Slide 6 “Te Reo Māori”.

Covid.⁶ The number of applications that we have been processing has been steadily rising, yet our disposal rate has slowed. There have been a number of factors impacting on the accessibility to the court process and then to the disposal process, which I will not go into, but it has meant that there are many applications sitting in the system both before and after court, waiting for processing.

The applications tend to cover successions constituting management structures, governance issues, reviews of trusts, fencing issues, trespass and injury to land claims, actions for recovery of land, mortgagee issues, relief against forfeiture issues, actions for specific performance of leases, easements and covenants, Māori reservation issues and issues concerning significant cultural sites. So our work is really focused on land titles.⁷

The preamble to our statute and sections 2 and 17 guide the interpretation of Te Ture Whenua Māori Act 1993, and there are sufficient provisions to argue that tikanga applies both procedurally and substantively to all that we do. The preamble recognizes that the Treaty of Waitangi established the special relationship between Māori people and the Crown. It notes the exchange of kāwanatanga (governance) for the protection of the rangatiratanga embodied in the Treaty, and it recognizes that land is taonga tuku iho of special significance to Māori people, and it has been retained and utilized by the owners, their whānau and hapū. So, because of those directions given in the legislation, tikanga has been embedded since 1993 in various ways through procedure and through the substantive law.⁸

Section 4 of Te Ture Whenua Māori Act 1993, defines tikanga as meaning Māori customary values and practices. Those of you who are familiar with the Resource Management Act 1991 will know it is almost the same definition in that legislation. The Supreme Court has stated that such definitions are not to be read as excluding tikanga as law or that tikanga is not law; rather tikanga is a body of Māori custom and practice, part of which can be properly described as customary law. Thus tikanga as a law is a subset of the customary values and practices of Māori. That is taken from *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors* (2021: para 169), which for those of you who have been following developments in this field, you will be familiar with. This definition is really important, because it makes it clear that, when we are working with our legislation as judges, we must have regard to

⁶ Slide 7 “Nature of Applications”.

⁷ Ibid.

⁸ Slide 8 “Tikanga in Substantive Law”.

tikanga components that may affect the way we are generally applying the provisions of Te Ture Whenua Māori Act 1993.

Turning to tikanga in the substantive law, I wanted to deal with a number of cases concerning the application of tikanga. The first case is called *Gibbs v Te Rūnanga o Ngāti Tama—Part Lot 2 and Lot 1 DP 4866* (2011). It is a decision of Judge Harvey (now Justice Harvey). He was a judge of our court before he went to the High Court. In this decision, he discusses tikanga in relation to an application to establish a Māori reservation. The case involved the legal owners of general land, held by a general land trust, known as the Gibbs Family Trust. The beneficiaries of the Trust were the Gibbs family, and that included their children. Mrs Gibbs was Māori, and she affiliated to Tūhoe. The land involved in this case was 227 hectares of general land north of Taranaki, well outside the area of land normally associated with Tūhoe. Mr Gibbs was European. The children were obviously Māori because of Mrs Gibbs. Again, the affiliation to the land was non-existent because other than living on the land, there was no genealogical link to the land as their tribal affiliation was through their mother, who was Tūhoe. Justice Harvey denied this application on the following basis:

- 1 the size involved with the reservation;
- 2 the link needed to establish customary entitlements to the land, which was unavailable to the applicants in this case; and
- 3 the application had been opposed by Ngāti Tama of Taranaki. The Gibbs family were supported by some tangata whenua (people of the land).

Justice Harvey concluded that if you look at why reservations are created in the first place, what the purposes of them are, then the Gibbs family could not meet the criteria in the legislation. They could not demonstrate that all the purposes for which a reservation should be set aside had been addressed.

There is a really good discussion in that case of competing tangata whenua views over whether an application is supported, and then how the judge reconciled the competing assertion of mana whenua that came from the two different groups. I really recommend this judgment to those people who are grappling with these issues, as, although it is a decision out of the Māori Land Court, it does raise contestable tangata whenua evidence, analyses it and goes through the process of reasoning why an outcome is decided in favour of one party over another.

The next judgment is *Tautari v Mahanga—Mohini 3B2B* (2011). It is a decision of the late Judge Ambler who was one of our most competent judges in terms of the substantive law in our jurisdiction. In this case, he discusses tikanga in relation to an application for an occupation order. He analyses the importance of the mana of individuals who had leadership in a whānau (family), and how they guided their whānau. This involved decisions made concerning what should happen to land, the rangatiratanga (authority) of the people involved, their mana and ultimately the answer. The answer in this case was that the whānau had developed their tikanga for land allocation. Different parts of the land were granted to different branches of a large extended family. Those people who had direct lines of descent from each of those siblings that had divided the land were to stay and occupy within the areas of land that were allocated to their ancestor, rather than traverse into other areas of the land, and thereby unsettle the tikanga that was very much at the heart of this extended family. The decision is really useful for reminding all the participants that tikanga rights exist at the whānau level, it is ever evolving and dynamic, it has hard parameters. As Justice Whata said, you end up having to come to the point where tikanga is restricted in how it can be applied. Everybody knows its metres and bounds even if sometimes they come to court to argue the opposite. It is a really good judgment in that respect.

The third judgment is called *Mihinui—Maketu A100* (2007: 243). It is a Māori Appellate Court judgment that involved our former Chief Judge, two chief judges ago, now Sir Justice Joe Williams. His judgment is the dissenting judgment in this case. It is about the definition of the preferred class of alienee under our legislation. Only certain classes of alienees in our jurisdiction can be the recipients of land or receive land that is transferred, especially Māori land interests called shares. Section 4 of Te Ture Whenua Māori Act 1993 defines the preferred classes, and the only category that the applicants could have fallen into in this case were “whanaunga of the alienating owner who are associated in accordance with tikanga Māori with the land”. This is a decision about whether or not Te Arawa Lakes Trust could claim to be whanaunga (a relative or relation) of the alienating owner who was selling her shares to the Lakes Trust, and whether or not they could be said to be associated with the land in accordance with tikanga. It is a really fascinating discussion by Justice Harvey, Justice Joe Williams and Judge Savage (now retired). I really recommend it as a judgment that considers the role of tribal authorities *vis-à-vis* landholding hapū. It analyses whether or not, as a matter of

tikanga, the Trust, representing all of Te Arawa, could take shares that were centralized in one hapū territory. The hapū was Ngāti Whakaue.

Returning to the judgment of *Pokere v Bodger-Ōuri 1A3* (2022), this is a judgment by a judge who is very familiar with the substantive law that is coming out of the superior courts. In this case there was evidence about a house that was partly built by traditional means in 1938. It was not a marae. It was used for whānau purposes. It was a central hub where whānau gatherings occurred. It was argued that the ahu whenua (land-holding) trustees in this case had acted inconsistently with their duties as trustees, including that they had breached tikanga in choosing to make the decision to demolish the homestead. The line of the whānau who had recently been associated with the house objected to the decision and were arguing tikanga principles to prevent the demolition. Dr Ruakere Hond was appointed as a pūkenga under section 32A of the Te Ture Whenua Māori Act 1993 to assist with the case. As the pūkenga he was an active judicial officer, making decisions and writing parts of the judgment, including that part in te reo Māori on Taranaki kawa. That last section is not translated. Dr Hond took a very active role in determining the outcome of the proceedings.

This judgment takes quite a different structure from our previous judgments. It starts with a tikanga framework. It looks at what tikanga the parties said were relevant, it assesses that tikanga framework against the facts, and then it draws conclusions. It is an interesting judgment because it is innovative. I highly recommend it for people to review just to see how the judge and the pūkenga go through the reasoning process.

[C] WAITANGI TRIBUNAL

Turning to the Waitangi Tribunal, we are on the cusp of 50 years since its establishment. There are 20 members of the Tribunal. Māori Land Court judges preside in the Waitangi Tribunal. It sits in panels of four to five members and a Māori Land Court judge. We have tikanga experts on the panels. People are appointed because of their knowledge and experience of different aspects of matters likely to come before the Tribunal and tikanga is one of those aspects.

The Waitangi Tribunal currently has 3263 registered claims before it. Of those claims, around 1086 have been settled by legislation. There are 2177 claims that have yet to be heard or have been heard but not settled or are contemporary thematic claims, which are part of the kaupapa inquiry program. This is all important background because there are big

changes that are happening in the Tribunal which we wish to share with you.⁹

Currently, there are two district inquiries that have largely been completed and are in the report-writing phase. These are Taihape ki Rangitikei ki Rangipō (Wai 2180) and Te Paparahi o te Raki (Wai 1040). Those reports should be out in the next year or two. Then there are three district inquiries in active hearings. These are North Eastern Bay of Plenty (Wai 1750) with Judge Doogan as the presiding officer; Muriwhenua Land (Wai 45), with Judge Wainwright presiding; and Porirua ki Manawatū (Wai 2200). With respect to the last one, I am the presiding officer and we have already issued reports for two of the tribes in the district, and there is only one tribe to hear from. We will produce their report on iconic issues and then a very short generic issues report. The point is that nearly all historical inquiries are complete.¹⁰

The kaupapa inquiry program commenced several years ago. These are claims that raise issues that affect Māori generally. The kaupapa inquiries that are under way are:

- ◇ The Military Veterans Claim (Wai 2500);
- ◇ The Health Services and Outcomes Inquiry (Wai 2575);
- ◇ The Mana Wāhine Inquiry (Wai 2700);
- ◇ The Housing Policy and Services Inquiry (Wai 2750);
- ◇ The Marine and Coastal Area Act Inquiry (Wai 2660);
- ◇ Te Rau o te Tika—the Justice Inquiry (Wai 3060); and
- ◇ The Constitutional Inquiry (Wai 3300).

Thus seven out of 13 kaupapa inquiries are underway.

Those who are appointed as Waitangi Tribunal members and who have tikanga expertise assist the inquiry program. For the 2023-2024 year there will be 189 events. Of these 110 will be hearing days, 21 will be judicial conferences and 58 are panel hui. There will also be three to four wānanga over and above the 189 days. So the program for 2023 to 2024 is busy. It is a program that depends on the tikanga experts to support the many activities that are taking place. There are at least 10 members who fit into this category. They really work hard at providing support for their Waitangi Tribunal panels.¹¹

⁹ Slide 14 “Waitangi Tribunal: Nature of Claims”.

¹⁰ Ibid.

¹¹ Slide 17 “Work Programme 2023-2024”.

Venues for Waitangi Tribunal hearings are dominated by the cultural motif of being Māori, whether they are in Māori venues like marae or they are in neutral venues which are taken over by the claimants and made very Māori during the proceedings. This is again another reason why tikanga is really important in our procedure because, as the *Wairarapa Moana ki Pouakani Inc v Mercury NZ Ltd* (2022: paras 86-87) decision of the Supreme Court makes clear, the Tribunal has to get its processes tika (right) in order to make sure that the outcome substantively is correct and tika in tikanga terms.¹²

That decision is also important, as you will know, because it dealt with the issue of mana whenua. In summary, the High Court's decision was criticized because not enough consideration was given to other tikanga values and principles that were relevant in the weighing-up of the issues. In the context *Wairarapa Moana* (2022: paras 86-87) facts, the principles of hara, utu, ea and mana should have been given due weight as was done in the Waitangi Tribunal. The matter was returned to the Waitangi Tribunal for completion of its hearing. The Government moved to settle the claims by legislating, but that is neither here nor there (*Wairarapa Moana* 2022: paras 76-77). What the judgment does is that it sends a direction to the Waitangi Tribunal about how it may analyse tikanga principles in its work.

There are many challenges that the Waitangi Tribunal is facing in its work. There is, for example, a perception that the Waitangi Tribunal's historical (district inquiry) claims process is too legalistic. Those who have been to a district inquiry hearing would know that they are dominated by lawyers. The judges are very instrumental in deciding procedure. Researchers have dominated the research process and claimant evidence is used to supplement their reports and those of other experts. It is not a process that puts claimants front and centre. So, that has caused its own problems with the way claimants engage in the hearing process. Then there is a perception that the Waitangi Tribunal is unable to produce timely reports. Notably the process is one that can be flexible. The Tribunal can set its own process as *Wairarapa Moana* (2022) noted as per schedule 2 of the Treaty of Waitangi Act 1975, which governs our procedures.

The seven kaupapa inquiries are an opportunity for innovation. So what you are seeing at the moment are the appointment of pou tikanga and reo. These pou are appointed to assist Tribunal panels in developing new procedures with claimants that are tikanga and/or reo-centred.¹³

¹² Slide 20 "*Wairarapa Moana ki Pouakani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [86] – [87]".

¹³ Slide 22 "Issues".

The Kura Kaupapa Inquiry is an example of this procedure. It will hear and report in te reo Māori on all issues raised before it. We are watching that inquiry with interest to see how the process works out. I noted while viewing the live stream that the claimants were actively engaged in determining the procedure as well as the production of evidence. It was very interesting to see how the power dynamic had changed, how the lawyers were all behind the claimants, and how the claimants were very engaged with the Waitangi Tribunal members. We will see whether that has been a successful way of dealing with some of the perceptions that currently plague the Waitangi Tribunal.

We also have developed this idea of staged reporting. The Kaupapa hearings have also introduced the tūāpapa or foundational hearings that facilitate staged reporting. This assists both the claimants and the Crown to address issues that have some degree of priority with some timely reporting. In this way the parties can actively do something about any of the issues the Waitangi Tribunal identifies in its recommendations.

Looking to the future, the Standing Claims Panel is being deployed into areas not under district inquiry. It will deal with any claim that for some reason did not get captured by treaty settlement legislation. There are many of them that still have to be tidied up. That is ongoing stick-to-our-knitting work.

We also need to review the relevance of the Waitangi Tribunal beyond the completion of historical claims and the kaupapa inquiries. We are continuously evaluating that because the timeframes keep changing.

I want to investigate whether the tikanga expert members of the Waitangi Tribunal should be recognized as a unit now in their own right. That is because of the dependency that we have on them as the experts in tikanga. Their assistance to the tribunal is significant. They should be more actively engaged with mediation. The Tribunal's power to order mediation will be used more to encourage their involvement.

In terms of reports and the substantive law. All reports deal with tikanga matters in one shape or form. But those presented below are some of my favourites, namely:¹⁴

- 1 Waitangi Tribunal (2011), *Ko Aotearoa tēnei: Report*—Justice Joe Williams's report on law and policy affecting Māori culture and identity.

¹⁴ Slide 23 "Reports that have tikanga components".

- 2 Waitangi Tribunal (2008), *He Maunga Rongo—Report on Central North Island Claims*.
- 3 Waitangi Tribunal (1988), *Muriwhenua Fishing Report*—this report has one of the best succinct summaries of a tribal fisheries system that I have ever read and I really recommend it.
- 4 Waitangi Tribunal (2018), *Te Mana Whatu Ahuru—Report on Te Rohe Pōtae Claims*—we had Ta Hirini Mead and Ta Pou Temara on that panel for that inquiry. The tikanga discussion in that report is very significant.
- 5 Waitangi Tribunal (2014), *He Whakaputanga me te Tiriti—The Declaration and the Treaty Report on Stage 1 of the Te Paparahi o Te Raki*, and Waitangi Tribunal (2022), *He Whakaputanga me te Tiriti—The Declaration and the Treaty Report on Stage 2 of the Te Paparahi o Te Raki*. The Te Paparahi o Te Raki panel reports consider the constitutional and jural issues.

In response to the question about whether regional variations in tikanga cause issues for our work, I do not think they do. Once you are aware of the history and the nature of the tribes and their settlement patterns and the knowledge of how each became neighbours to each other you soon start to work out very quickly, why they might be either supportive of each other or in oppositional terms in any litigation that is before you. Waitangi Tribunal reports can assist your learning in this regard.

So, respectfully dealing with each side's story is how the Waitangi Tribunal has managed overlapping claims issues. Because the Waitangi Tribunal's jurisdiction does not require firm decisions about mana whenua, we tend to talk about spheres of influence. So we do not demarcate boundaries or say that groups on this side of a boundary belong here and groups on that side belong there, unless determining boundaries is important to the claim, and the Motiti Island Inquiry was one where it was. There are occasional exceptions. However, most of the reports do not have to determine the issue. Rather they acknowledge peoples' mana whenua or claim to mana whenua. They talk about peoples' tikanga as being their tikanga, their kōrero, what they say, because they are not really that important to the jurisdictional issues before the Waitangi Tribunal. You can very quickly work out, with the help of pūkenga, or through authoritative texts, or your own general knowledge, how to deal with competing tikanga claims.

In the Māori Land Court, judgments can be more definitive.

I end by recommending Justice Whata's methodology as a way that a lawyer should approach trying to get a case ready for judges that work in this space.

About the author

Acting Chief Judge Caren Fox was appointed to the Māori Land Court on 1 October 2000 and was later appointed as Deputy Chief Judge on 20 February 2010, and Acting Chief Judge on 1 May 2023. She is one of the resident judges for the Tairāwhiti District of the Māori Land Court, hearing cases in Gisborne. Acting Chief Judge Fox has also sat as the presiding officer for the Waitangi Tribunal on inquiries into claims in the Central North Island, Te Rohe Pōtae and Porirua ki Manawatū regions, as well as numerous urgent inquiries into specific Treaty of Waitangi claims. She was also appointed as an Alternate Environment Court Judge in 2009.

Before becoming a Judge, Acting Chief Judge Fox was a Lecturer in law at Victoria University and a Senior Lecturer in law and Director of Graduate Studies at the University of Waikato. In addition, she acted as legal counsel for Treaty claimants and Māori land clients. A specialist in international human rights, Acting Chief Judge Fox was a Harkness Fellow to the USA from 1991 to 1992 and a Pacific Fellow in Human Rights Education employed by the Commonwealth Fund for Technical Co-operation 1997-1999. For her work in human rights she won the NZ Human Rights Commission 2000 Millennium Medal. In March 2023 Judge Fox received her PhD at Te Whare Wānanga o Awanuiārangi for her thesis "Ko te mana te utu: Narratives of sovereignty, law, and tribal citizenship in the Pōtikirua ki te Toka-a-Taiau District".

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Mihinui—Maketu A100 (2007) 11 Waiariki Appellate MB 243 (11 AP 243)

Pokere v Bodger and Others—Ōuri 1A3 (2023) 466 Aotea MB 120 (466 AOT 120)

Tautari v Mahanga—Mohini 3B2B (2011) 18 Taitokerau MB 6 (18 TTK 6)

Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board & Ors [2021] NZSC 127 [169]

Legislation, Regulations and Rules

Resource Management Act 1991 (NZ)

Te Ture Whenua Māori Act 1993 (NZ)

Treaty of Waitangi 1840

Treaty of Waitangi Act 1975

Tikanga in the Māori Land Court and the Waitangi Tribunal

Deputy Chief Judge Caren Fox
Acting Chief Judge

The Māori Peoples' Court

- It is a product of its history (1865-2009)
- It is a court of record
- It is a creature of statute administered under the Te Ture Whenua Māori Act 1993 (TTWM)
- It is primarily a land title court
- It also has jurisdiction to deal with disputes concerning fisheries, representation, taonga tuturu & family protection

Tikanga in the MLC

- Judges must have knowledge of te reo, tikanga and the Treaty of Waitangi before they are appointed as per s 7(2A) of TTWM Act 1993.
- They should also have knowledge of the history of the Native Land Court and experience in the modern Māori Land Court.
- Where sitting in a Court district, judges are encouraged to familiarise themselves with that district, the iwi, hapū and marae of the area.

Procedure

- In terms of procedure, s 66 of Te Ture Whenua Māori Act 1993 allows any judge to apply to the hearing such rules of marae kawa as the Judge considers appropriate and make any ruling on the use of te reo Māori during the hearing. They should also avoid unnecessary formality.
- In practice judges will attempt to understand and follow the local tikanga and kawa of the tangata whenua in all aspects of their ceremonial duties.

Karakia, Mihi Whakatau, Kōrero Reo Māori Poroporoaki, karakia whakamutunga



Te Reo Māori

- In *Pokere v Bodger – Ōuri 1A3* (2022) 459 Aotea MB 210, applicant counsel submitted both written and oral submissions in te reo Māori. Prior to the substantive hearing, a pūkenga was appointed under s 32A who assisted the judge in both hearing the matter bilingually, and in producing the first MLC bilingual judgment.

Nature of Applications

- The Court receives on average between 5-6000 applications per annum and these are heard in court houses, on marae or in other appropriate venues.
- Process is one where the applicant should be treated as manuhiri subject to our manaakitanga until the end of process.
- Cover successions, constituting management structures, governance (particularly trust) reviews, fencing issues, trespass and injury to land claims, actions for recovery of land, mortgagee issues, relief against forfeiture, actions for specific performance of leases, easements and covenants, Māori reservation issues and significant cultural sites

Tikanga in Substantive Law

- Preamble, ss 2 & 17 guide the interpretation of TTWM 1993. There is sufficient evidence to argue tikanga applies both procedurally and substantively to all we do.
- The Preamble recognises the Treaty of Waitangi established the special relationship between the Māori people and the Crown: It notes that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed. It recognises that land is a taonga tuku iho of special significance to Māori people, to be retained and utilised by the owners, their whānau and hapū.

Tikanga

- S 4 of TTWM 1993 defines tikanga as meaning Māori customary values and practices
- The Supreme Court has stated that such definitions are not to be read as excluding tikanga as law or that tikanga is not law. Rather tikanga is “a body of Māori customs and practices, part of which is properly described as custom law. Thus, tikanga as law is a subset of the customary values and practices ...” *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board & Ors* [2021] NZSC 127 at [169].

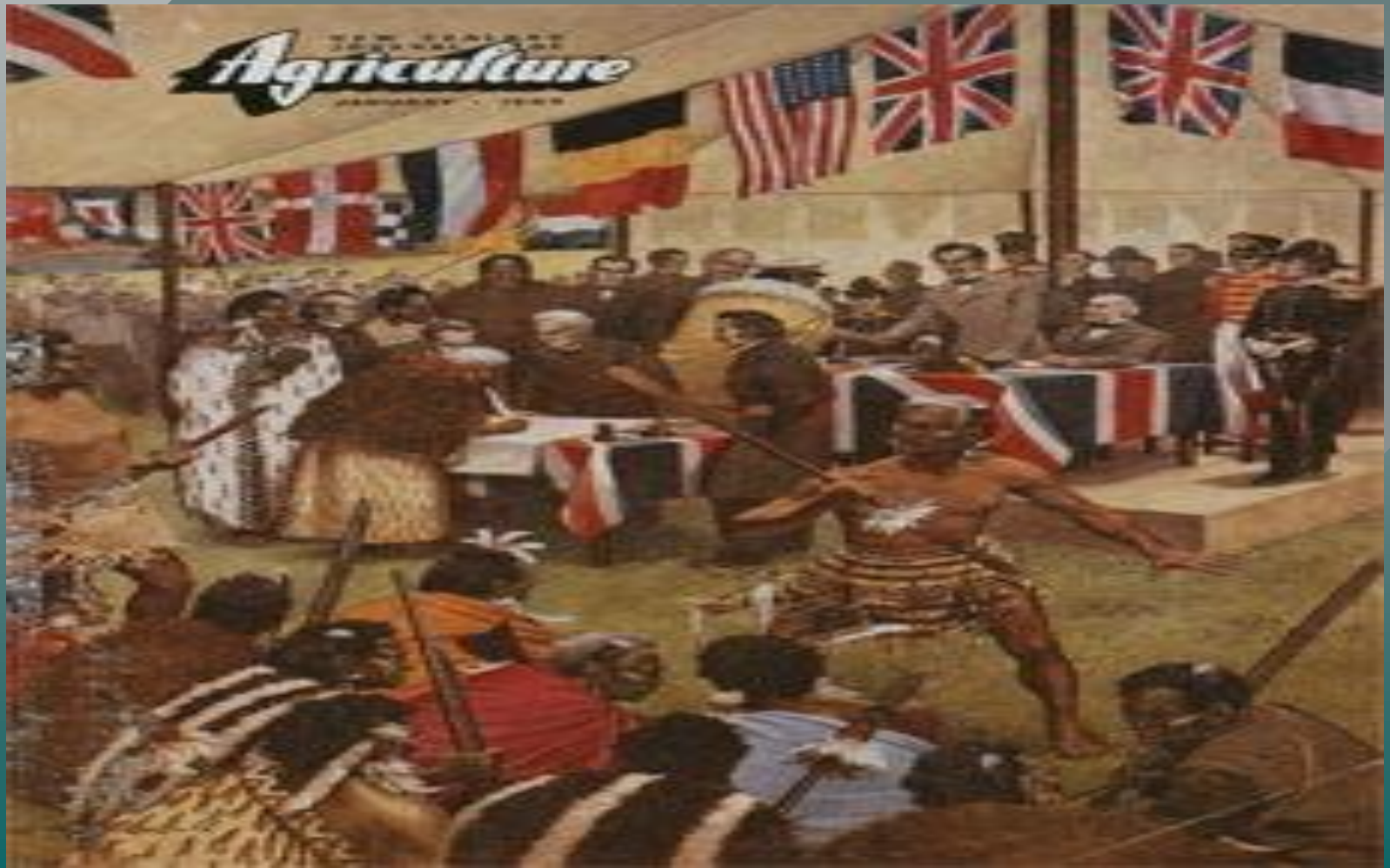
MLC Tikanga Cases – Numerous

- *Gibbs v Te Rūnanga o Ngati Tama - Part Lot 2 and Lot 1 DP 4866* (TNK 4901) (2011) 274 Aotea MB 470 (274 AOT 470) – Discusses tikanga in relation to an application to establish a Māori reservation.
- *Tautari v Mahanga – Mohinui 3B2B* (2011) 18 Taitokerau MB 6 (18 TTK 6) – Discusses tikanga in relation to an application for an occupation order.
- *Mihinui – Maketu A100* (2007) 11 Waiariki Appellate MB 243 (11 AP 243) – concerns the Preferred Class of Alienee question, turning on whether the Te Arawa Lakes Trust can be said to be associated with the land in accordance with tikanga.

Contested tikanga issues

- *Doney v Adlam* [2023] NZHC 363 (HC) Harvey J. Case concerned *inter-alia* leave to issue enforcement proceedings against Adlam. A judgment was issued by the Māori Land Court in 2014 where Mrs Adlam was ordered to repay various amounts totalling approximately \$15 million to a land trust. She had paid just over \$4 million. The trustees were seeking enforcement of the outstanding judgment debt including by the sale of two of her properties.
- Adlam raised mana, whakapapa, whanautanga, turangawaewae to argue against enforcement. The applicants contested the meanings ascribed to those terms by Adlam, and relied on tino rangatiratanga, kaitiakitanga, muru, hara and utu. There were no independent tikanga experts but Harvey J used various authorities to inform his judgment in favour of the applicants.

WAITANGI TRIBUNAL – on the cusp of 2025 (50 years)



Presiding Officers & Members

- There are 20 members of the WT. The WT sits in panels.
- Presiding officers are MLC judges or barristers & solicitors of the High Court with 7 or more years standing. (See Schedule 2, Cl 5)
- Under s 4 of the Treaty of Waitangi Act 1975, and in considering the suitability of persons for appointment to the WT, the Minister of Māori Development has regard to the partnership between the 2 parties to the Treaty; and must have regard not only to a person's personal attributes but also to a person's knowledge of and experience in the different aspects of matters likely to come before the Tribunal. Tikanga is one of those matters.

WAITANGI TRIBUNAL

Nature of Claims

- The Tribunal currently has 3263 registered claims. Of those claims, around 1086 claims have been settled by legislation
- There are 2,177 claims that have yet to be heard, have been heard but not settled or are contemporary claims and part of the kaupapa inquiry programme.
- There are two district inquiries that have largely been completed and are in report writing stage: Te Paparahi o te Raki Inquiry (Wai 1040) and Taihape ki Rangitikei Inquiry (Wai 2180); and
- The three district inquiries in active hearings: are North Eastern Bay of Plenty Inquiry (1750), Muriwhenua Land (Wai 45) and Porirua ki Manawatū (2200).

7 KAUPAPA INQUIRIES

- 1. The Military Veterans (Wai 2500);
- 2. The Health Services and Outcomes Inquiry (Wai 2575);
- 3. The Mana Wāhine Inquiry (Wai 2700);
- 4. Housing Policy and Services Inquiry (Wai 2750);
- 5. Marine and Coastal Area (Takutai Moana) Act Inquiry (Wai 2660);
- 6. Te Rau o te Tika: the Justice System Inquiry (Wai 3060); and
- 7. The Constitutional Inquiry (Wai 3300).

4 Urgencies & Priority Inquiries

- Urgency: the Kura Kaupapa Inquiry (Wai 1718);
- Priority Inquiry: National Freshwater and Geothermal Resources (Stage Three) (Wai 2358);
- Remedy: the Mangatū Remedies Inquiry (Wai 814/1489); and
- Remaining Historical Claims: The Standing Panel Inquiry (Wai 2800).

Work Programme 2023-2024

- It is expected there will be a total of 189 event days. Of these 110 are hearing days, 21 are judicial conferences, 3-4 are wānanga and 58 are panel hui.
- Inquires that will be progressed are the:
 - Remaining historical inquiries.
 - 7 Kaupapa inquiries.
 - Remaining urgencies/priority matters
 - Standing claims

Venues for hearings



Tikanga in the WT

- WT Panels include members that have the following skills:
- Te reo Māori, Kawa and tikanga, Karanga, Whaikōrero, Waiata, Karakia, Mihi Whakataua, Knowledge of iwi and hapū history, Whakawatea skills, Poroporoaki skills

Wairarapa Moana ki Pouakani Inc. v Mercury NZ Ltd [2022] NZSC 142 at [86] - [87].

- WT understands that tikanga is as much about right or tika processes and it is about tika outcomes and *whaka-ea* is best achieved through tika processes – [86]
- The WT may regulate its procedure “as it sees fit” and may have regard to and adopt such aspects of “te kawa o te marae” as it thinks appropriate to the case – at [87] & Sch 2 cl 5 (9)

Tikanga

Wairarapa Moana [76]-[77]

- Mana whenua need not be the controlling tikanga because other tikanga principles were also in play.
- These included principles such as hara, utu, ea and mana. Taken together, they reflect the importance of acknowledging wrongdoing and restoring balance in a way that affirms mana.

Issues

- Perception that WT historical process is too legalistic
- Reality that it is research bound - perception that lawyers and historians holding the process to ransom
- Perception that WT is unable to produce timely reports
- WT process is flexible, can provide purpose built inquiries See Schedule 2
- 7 Kaupapa Inquires chance for innovation
- Appointment of Pou tikanga/reo to develop new procedures with claimants that are tikanga or reo centred. Kura Kaupapa urgency will hear and report in te reo.
- Use of wānanga –cf. formal JCs
- More directed mediation
- Tuapapa hearings with staged reporting

Reports that have tikanga components

- All reports and my favourites are:
- Waitangi Tribunal (2011). *o Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*. Wai 262.
- Waitangi Tribunal. (2008). *He Maunga Rongo – Report on Central North Island Claims*, Wai 1200, Legislation Direct
- Waitangi Tribunal. (1988). *Muriwhenua fishing report*, Wai 22. Government Printer.
- Waitangi Tribunal. (2018). *Te Mana Whatu Ahuru - Report on Te Rohe Pōtae claims*, Wai 898 Prepublication version.

Future Directions from 2025 and beyond

- Standing claims panel deployed in areas not under district inquiry
- Review relevance of WT beyond completion of historical claims and Kaupapa inquiries - focus on mediation
- Have a tikanga unit within the WT to optimally use WT membership expertise.
- Tikanga Unit to assist Crown and Māori where the Treaty relationship breaks down. This to be done through improved mediation, wānanga or other tikanga based procedures with adjudication as a default