

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.
- When 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 to assist 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 to argue tikanga applies both procedurally and substantively to all we do.
- The Preamble recognises that 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].

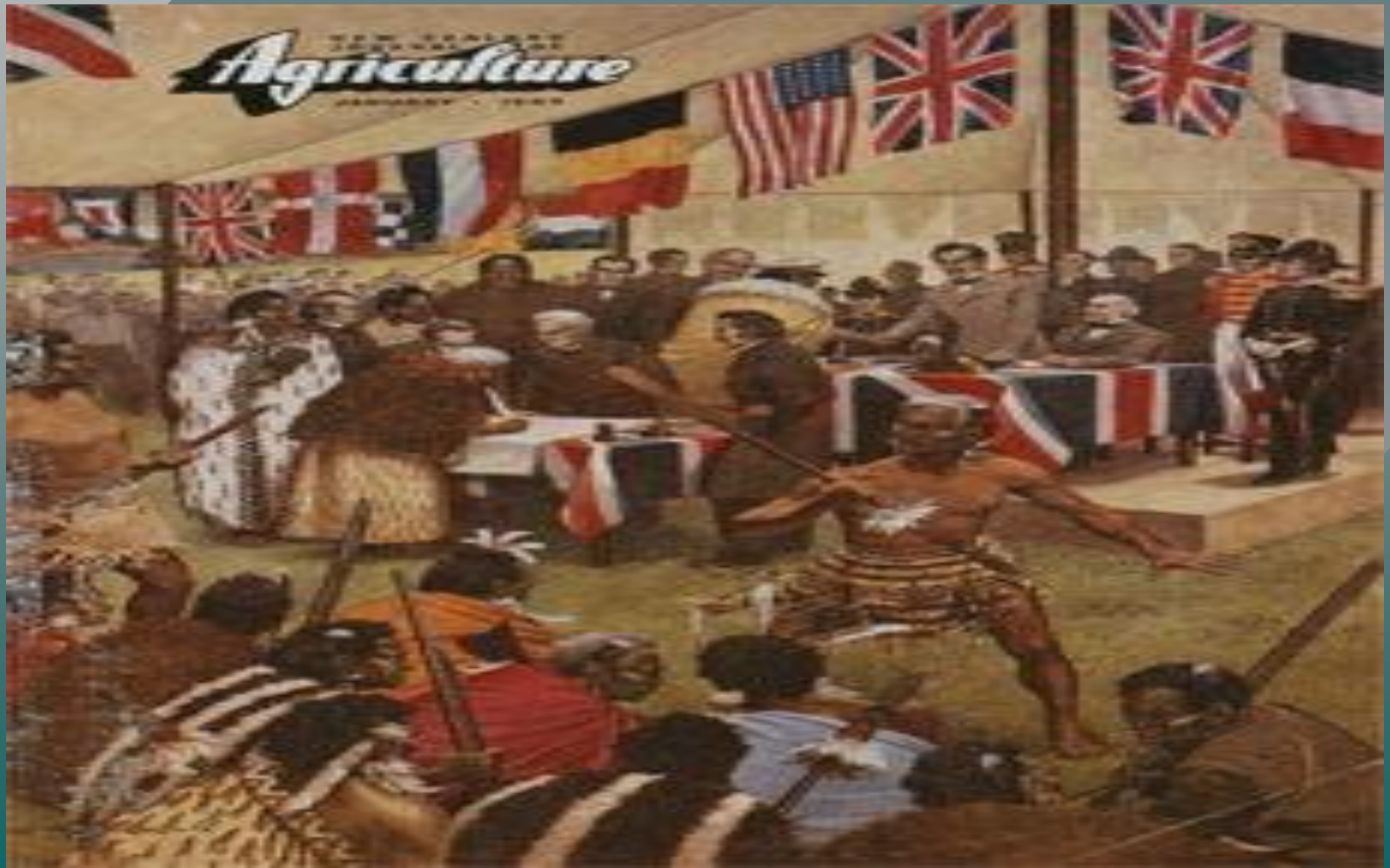
MLC Tikanga Cases – Numerous

- *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 (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 Whakatau, 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