

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

TE MANUTUKUTUKU

Kia puta ki te whai ao ki te ao mārama

From the world of darkness moving into the world of light

Issue 81



Waitangi Tribunal

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Nau Mai Chief Judge Fox

CAREN FOX was appointed as chief judge of the Māori Land Court in July and subsequently as chairperson of the Waitangi Tribunal in September. She is the first woman to hold both roles.

Chief Judge Fox's swearing-in as chief judge took place before 300 attendees at The Pā at Waikato University in Hamilton on 24 August. Every court in New Zealand was represented on the occasion, with those present including past and current chief justices and other distinguished judges and Māori leaders. The chief judge explained that she would have liked the swearing-in to have taken place in her tribal homeland of Ngāti Porou but the danger of road closures on the East Coast meant another venue was necessary.

Chief Judge Fox was first appointed as a judge of the Māori Land Court in 2000 – one of the first two women appointed to the role and the first wahine Māori. Over the years, she has presided over many important Tribunal inquiries, including the Central North Island, Te Rohe Pōtae, and Porirua ki Manawatū district inquiries (the latter of which is ongoing) and the aquaculture, Te Kōhanga Reo, Māori Community Development Act, and Te Arawa mandate and settlement inquiries. She is currently also the presiding officer of the Constitutional Kaupapa Inquiry.

Chief Judge Fox's background is as a lawyer, a law academic, and an expert in international human rights, her work on which led to her being awarded the New Zealand Human Rights Commission



Chief Judge Dr Caren Fox

2000 Millennium Medal. She has been a Harkness Fellow to the United States and a Pacific Fellow in Human Rights Education. In March this year, she completed her PhD at Te Wānanga o Awanuiārangi. Her thesis is titled 'Ko Te Mana Te Utu' and concerns the Ngāti Porou legal system. She has also been an Alternate Environment Court judge since 2009.

In her speech at The Pā, Chief Judge Fox acknowledged the many supporters she had had in her legal career. She promised to 'reshape the Māori Land Court as we move towards 2040 – 200 years after the signing of the Treaty of Waitangi', enhancing access to justice and enabling the court to remain central to Māori development. □

From the Chairperson

IT is an honour to be writing my first introduction to *Te Manutukutuku* since becoming the Tribunal chairperson in September. As always, the Tribunal is delivering a full programme of work across its inquiries, and 2024 promises to be an equally busy year. Thinking further ahead, I am looking forward to leading the Tribunal into its 50th anniversary year in 2025 and beyond.

Over my more than two decades as a Tribunal presiding officer, I have been able to observe the Tribunal's adaptations and changes first hand. Shortly after my appointment as a Māori Land Court judge in 2000, we began to employ the new approach to historical district inquiries, which was in turn modified in the Central North Island inquiry to support the claimants' intentions regarding their settlement timeframe. As the district inquiries have begun to conclude, we

have steadily shifted our focus more towards the kaupapa inquiries. Along the way, there have been the usual array of urgent and priority inquiries that we have had to accommodate within the broader work programme. My experience is that the Tribunal has always responded to the challenge at hand.

As chairperson, my focus will be on resetting the strategic direction of the Tribunal in 2024 to ensure that we decrease the number of claims before the Tribunal as quickly as possible. I also want to continue to deliver timely inquiries into the claims we have before us. We have made excellent progress within the bounds of our resources.

I am greatly heartened to see that the Crown has committed to a resolution of the shortfall in funding for the participation of kaupapa inquiry claimants, which is further detailed

on page 8. As a result, I have just initiated our eighth kaupapa inquiry, this one into education services and outcomes.

This edition of *Te Manutukutuku* also outlines the recent release of both the Tribunal's first annual report and the updated *Guide to Practice and Procedure* (page 5). The latter is the result of extensive consultation and reflects the modernisation of the Tribunal's processes as our transition to the kaupapa inquiries has progressed. That progress will be enhanced further as we march towards our 50th Anniversary in 2025.



Chief Judge Dr Caren Fox
Chairperson
Waitangi Tribunal



From the Director

TĒNĀ TĀTOU. I am pleased to provide you with my second director's update for 2023. Firstly, I acknowledge and warmly congratulate our newly appointed Tribunal chairperson, Chief Judge Dr Caren Fox.

Since *Te Manutukutuku* last came out in July, the Tribunal has issued *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660). A detailed summary of this report is contained later in this issue (see pages 6–7).

That brings the number of reports issued this calendar year to three. On the events front, a total of 35 Tribunal hearings, judicial conferences, and wānanga have been held in 2023, and

24 Tribunal-commissioned research reports have been completed or are currently underway.

As we near the end of 2023, I reflect on how the work of the Tribunal would not be possible without the team of 65 staff that make up the Waitangi Tribunal Unit and provide event and document management and administrative, research, and report-writing services to the Tribunal. I would like to express my sincere appreciation to the team for enabling the Tribunal to deliver on a significant work programme of events, reports, and research this year.

As we look ahead, 2024 will bring its own unique challenges and

opportunities. We will continue to adapt and respond to deliver justice services for Māori and our other stakeholders.

Finally, on behalf of myself and the Waitangi Tribunal Unit team, we wish you all a safe and restful Christmas and New Year break. Kia tau te rangimārie ki a koutou katoa.



Steve Gunson
Pae Matua / Director
Waitangi Tribunal
Māori Land Court



Member News

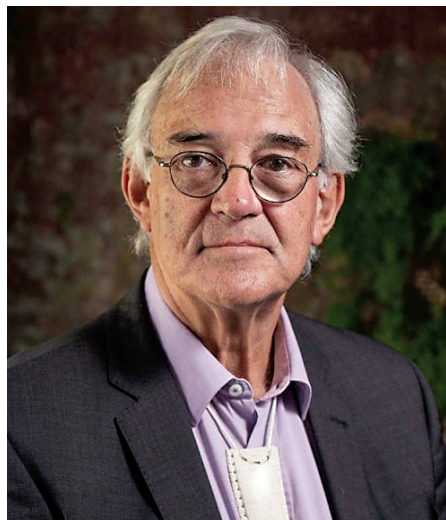
David Williams

In April 2023, the Waitangi Tribunal held a mihi whakatau at its Wellington offices to welcome recently appointed member Professor David V Williams FRNZ, and Judge Alana Thomas (profiled in issue 80). Professor Williams's appointment acknowledges a lengthy career of advocacy and scholarship in the field of indigenous–state relations.

Professor Williams studied law at Te Herenga Waka Victoria University of Wellington before winning a Rhodes Scholarship to Balliol College, University of Oxford. He later received his PhD from the University of Dar es Salaam in Tanzania.

Professor Williams has published many books and articles, as well as Tribunal research reports and resources, related to the administration of Māori land and the Māori political relationship with the Crown. Between 1991 and 2001, he was particularly involved in legal history research relevant to Treaty of Waitangi claims. For decades, he lectured and produced research at Waipapa Taumata Rau University of Auckland, where he now holds the title of professor emeritus. Since his retirement from academia,

Tribunal member David Williams



Professor Williams has returned to Tribunal-commissioned research, recently completing a report for the North-Eastern Bay of Plenty Inquiry (Wai 1750).

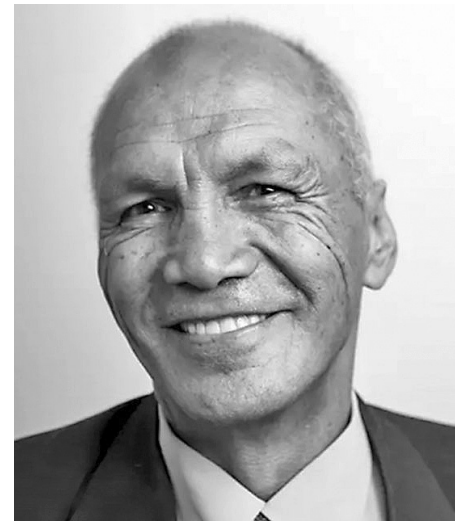
In addition to his career as a scholar, Professor Williams has a public profile for activism as a member of the Citizens Association for Racial Equality, participating in anti-racism protests in the late 1970s and the 1980s. He is also a long-term legal adviser to Ngāti Whātua Ōrākei, is a priest in the Anglican Church, and was a legal adviser to Te Pihopatanga o Aotearoa (the Māori Anglican Synod).

Professor Williams has been appointed to the Constitutional Kāpapa Inquiry panel (Wai 3300).

Kevin Prime

We congratulate Tribunal member Kevin Prime CNZM, MBE (Ngāti Hine, Ngāti Whātua, Tainui), on being appointed Companion of the New Zealand Order of Merit in the King's Birthday Honours List. Kevin's latest honour reflects his five decades of community service. Previously, he became an Officer of the New Zealand Order of Merit in 2016 and a Member of the Order of the British Empire in 1991. In 2021, Kevin was appointed to the Tribunal, where he serves on the Standing Panel and Constitutional Inquiries.

Kevin has dedicated his life to uplifting Māori and the environment through roles working with numerous investment funds, non-profit organisations, and Crown entities. He gave advice that helped shape the Resource Management Act 1991 and served as an expert panellist for its review by the Government in 2019. In 1992, he was the founding secretary of the Ngāti Hine Health Trust, of which



Tribunal member Kevin Prime

he is now a lifetime patron. With over 400 kaimahi, the trust is today one of Northland's largest employers.

From 2003 until his recent retirement, Kevin was a commissioner of the Environment Court, where he assisted with the determination of many significant cases. He also retired as vice chairman of the Ngā Whenua Rāhui conservation fund on 31 December 2022 after 31 years' service. He has helped to guide Foundation North, an investment fund anchored in a commitment to Te Tiriti, both as a previous chairman and in his present role as kaumātua. In 2015, he chaired a Māori Advisory Committee to the Biological Heritage National Science Challenge Board and worked towards equal representation of Māori on that governance board before retiring in 2018. Kevin also played a significant role in the establishment of the Ngāti Hine Forestry Trust.

Reappointments

Congratulations to Professor Susy Frankel, Dr Paul Hamer, and Basil Morrison on their July 2023 reappointments as Tribunal members. □

Staff Profiles

Ross Webb

Dr Ross Webb was born in Johannesburg, South Africa. When he was young, Ross's family emigrated to New Zealand, settling in Auckland. He attended Macleans College and then the University of Auckland Waipapa Taumata Rau, where he undertook a MA in New Zealand history. His master's thesis, reflecting an interest he had developed in labour and oral history, examined the experience of a group of people who worked in New Zealand's freezing works between 1973 and 1994.

In 2015, Ross moved to Wellington to join the Waitangi Tribunal Unit. Ross initially worked as a researcher/analyst and eventually a senior researcher/analyst in the Research Services Team. During this time, he presented evidence in the Te Paparahi o Te Raki Inquiry on rural rivers, environmental management, and the Resource Management Act 1991, and completed a Tribunal-commissioned research report on inland waterways for the Porirua ki Manawatū inquiry. Ross also completed a research report for the Military Veterans Inquiry.

Principal Researcher/Analyst Dr Ross Webb



In 2019, Ross left the Tribunal Unit to begin doctoral studies in history at Te Herenga Waka Victoria University of Wellington. His doctoral thesis, completed in 2022, examined how the national union movement responded to the economic crisis of the 1970s and the restructuring that followed 1984. During this period, Ross had a short stint working as a senior historian at Te Arawhiti, before returning to the Tribunal Unit as a principal researcher/analyst in 2022.

Ross enjoys his work as technical leader in Research Services Team, which is responsible for producing commissioned research and advising the Tribunal on research issues. His role involves providing expert research advice and professional leadership to support the development and delivery of research commissioned by the Tribunal for its inquiry work programme.

Malesana Tie'tie

Ko Vaea te maunga, ko Lata te awa, ko Hāmoa te whenua ō ōku tīpuna, engari, i tipu ake au ki Te Whanganui-a-Tara, Aotearoa. Ko Sana tōku ingoa.

Malesana Tie'tie (Sana) hails from the villages of Vaialele and Lona in Upolu, and from Salailua and Gataivai in Savai'i on her mother's side. Born and raised in Newtown, Wellington, Sana comes from a big family whom she says, 'I am very close with and who are very important to me.'

Since starting as the senior business adviser in 2020, Sana has been providing essential support for the Waitangi Tribunal Unit Leadership Team, as well as the unit and judiciary more widely. She delivers operational support for the Tribunal's Governance Group and other official meetings, events, projects, and committees,



Senior Business Adviser Malesana Tie'tie

including the *Te Manutukutuku* editorial committee, the annual members' conference, and the case management migration project.

For Sana, the Tribunal was a new place: 'I hadn't heard about the Tribunal prior to working here. I saw the vacancy, checked out the website, and was drawn to the kaupapa as I believed it was very important mahi . . . I am very proud and honoured to be a part of this kaupapa.'

Sana attended St Catherine's College in Kilbirnie from 2007 to 2011 and started as the Claims Team administrator in 2014. In 2017, she took up the role of claims coordinator, providing administrative and logistical support for Tribunal inquiries and at official events, such as hearings, judicial conferences, and panel hui. She has worked on almost all the Tribunal's current inquiries at some point. One of her highlights has been working with the National Transcription Service to ensure a quicker turnaround for transcripts of official events.

Sana is looking forward to working on the website upgrade project and the Tribunal's 50th anniversary celebrations in 2025. □

News

Guide to Practice

On 21 August 2023, the Tribunal released its newly updated *Guide to Practice and Procedure*. The *Guide* is the formal instrument that informs all actors in the Tribunal's jurisdiction of the Tribunal's processes. Although a guide rather than a set of rules, it has authority as a comprehensive practice note issued under the Tribunal's statutory powers to determine its own procedure.

The *Guide* has not had a comprehensive revision since its initial release in October 2000. Following extensive consultation with key stakeholders, the *Guide* reflects the shift in direction of the Tribunal's focus towards its Kaupapa Inquiry Programme and makes procedural changes that modernise and update its processes. It also affirms the Tribunal's support for the use of te reo.

The Tribunal thanks all those who took the time to provide feedback during the consultation phase. Your support and responses were critical to the completion of this work.

The *Guide* is available to download from the Tribunal's website. A te reo version will be uploaded to the website in the new year.

Annual Report

In November 2023, the Tribunal issued its first annual report. Covering the period of Matariki 2022 to Matariki 2023, the report provides an overview of the inquiry work programme, an update on progress towards the Tribunal's strategic goals, and summaries of Tribunal reports released over the period. It also sets out key contextual information about the Tribunal's jurisdiction, membership, and operation. Copies are available to download from the Tribunal's website.

Kete Pūputu

This month, the Mana Wāhine Kaupapa Inquiry will launch 'Kete Pūputu: The Online Guide to the Mana Wāhine Tūāpapa Evidence'.

In its tūāpapa phase, the inquiry gathered a rich tapestry of evidence about tikanga as it relates to wāhine Māori and the Māori understanding of wāhine in te ao Māori, setting the tūāpapa (foundation) for the inquiry. The panel travelled the motu, hearing from over 120 witnesses in Kerikeri, Ngāruawāhia, Whāngārei, Whakatāne, Lower Hutt, and Christchurch.


Rather than presenting this kōrero in a traditional report, the panel decided to create a website that allows readers to explore the mātauranga for themselves.

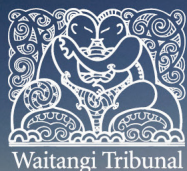
The website can be accessed via the Mana Wāhine Kaupapa Inquiry page on the Tribunal's website.

Fiftieth Anniversary

Kia hiwa rā, kia hiwa rā! Karanga mai, karanga mai e te whānau whānui o Te Rōpū Whakamana i Te Tiriti o Waitangi. Nau mai, whakapiri mai.

October 2025 will mark 50 years since the Waitangi Tribunal was established in 1975 by the Treaty of Waitangi Act. If you would like to receive updates on anniversary events and other information, please email WT.50years@justice.govt.nz with 'subscribe' as the subject line.

The Tribunal invites all past and present stakeholders (claimants, whānau, hapū, iwi, and iwi organisations, counsel, Crown, Crown agencies, historians, academics and former Tribunal staff) who wish to share any 50th anniversary memorabilia such as photos or memories to email WT.50years@justice.govt.nz. 



Waitangi Tribunal
50 years

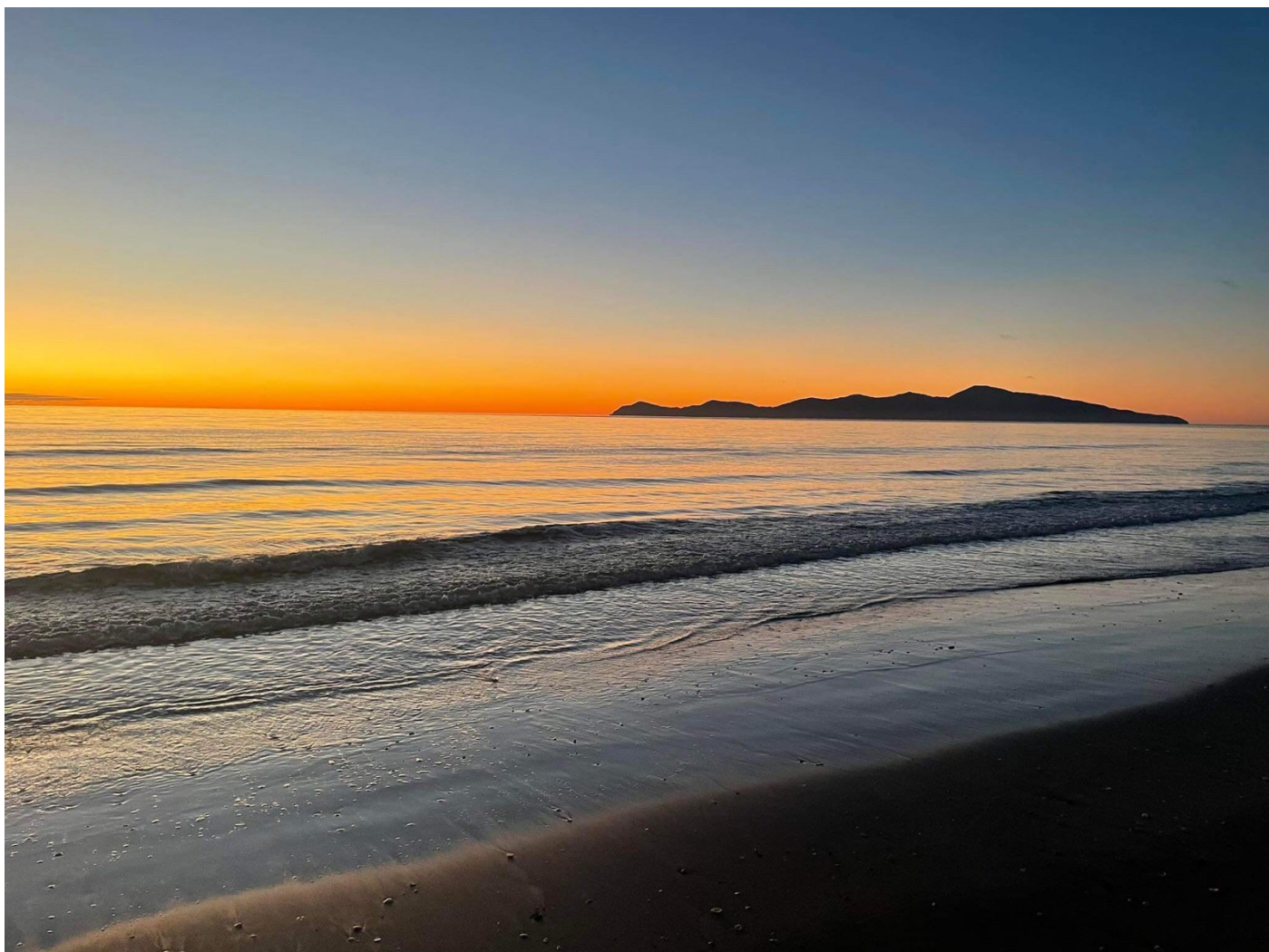
Waitangi Tribunal

Te Rōpū Whakamana i te Tiriti o Waitangi

2025

Kia puta ki te whai ao ki te ao mārama | From the world of darkness moving into the world of light

MACA Stage 2 Report Released



Thomas Buocz

Paekākāriki Beach, looking towards Kāpiti

ON 5 October 2023, the Tribunal released the *Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry: Stage 2 Report* in pre-publication format.

The Marine and Coastal Area (Takutai Moana) Act was introduced in 2011 to replace the controversial Foreshore and Seabed Act 2004. The Act restores customary interests in the foreshore and seabed extinguished under the 2004 Act, institutes statutory tests and awards to recognise those interests, and provides for public access to these areas. Under the Act, Māori can obtain legal rights recognising their customary interests in the

form of either customary marine title or protected customary rights. The Act provides two application pathways for this purpose. Māori can apply to the High Court for a recognition order or engage directly with the Crown. They may also do both. In either pathway, applications for customary rights had to be filed by the statutory deadline of 3 April 2017.

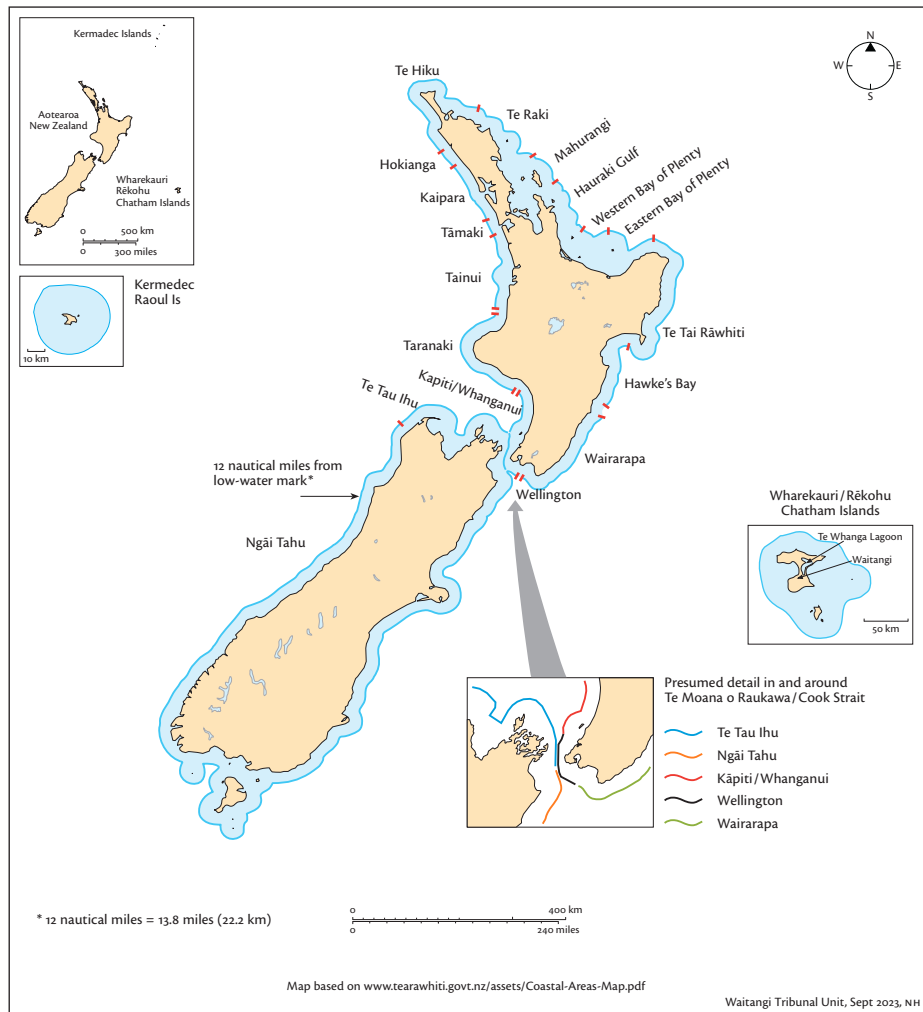
The Tribunal received 92 claims for its inquiry into the Treaty compliance of the Act and its supporting arrangements, and a further 80 parties were granted interested party status. The inquiry had priority designation, acknowledging the importance of

the customary rights at stake and the immediacy of the Act's alleged impacts on Māori.

The panel, which consisted of Judge Miharo Armstrong (presiding), Ron Crosby, Professor Rawinia Higgins, and Professor Tā Pou Temara, heard the claims in two stages. The stage 1 report, released in 2020, found that some aspects of the procedural and resourcing arrangements supporting the Act breached the Treaty and prejudicially affected Māori. The stage 2 report considered whether the Act itself breaches Treaty principles and causes prejudice to Māori. The Tribunal found that Māori have

been and will likely continue to be prejudiced by aspects of the Act that breach Treaty principles. In particular, the Tribunal found that the Act is not Treaty compliant because (among other reasons):

- ▶ The Crown failed to allow properly informed and meaningful participation for Māori during the consultation process.
 - ▶ The Act does not provide for a fair and reasonable statutory test for customary marine title. This is an interim finding, as the Court of Appeal is currently considering how the relevant provisions should be interpreted.
 - ▶ The statutory deadline was not and is not justified by any policy considerations that meet the standard of acting reasonably and in good faith toward Māori.
 - ▶ The Act does not give Māori the choice to have their applications under it heard by the Māori Land Court.
 - ▶ Certain exceptions to the scope of protected customary rights are unreasonable.
 - ▶ The exceptions of accommodated activities and deemed accommodated activities undermine the permission rights (certain regulatory rights available to customary marine title holders).
 - ▶ The wāhi tapu protection right does not allow Māori to effectively protect wāhi tapū and wāhi tapu areas.
 - ▶ Without compensation, the Act vests reclaimed land in the Crown, thus extinguishing Māori customary rights and preventing the grant of a customary marine title and protected customary rights.
- Overall, the Tribunal found that the Takutai Moana Act does not sufficiently support Māori in their kaitiakitanga duties and rangatiratanga rights and fails to provide a fair and reasonable balance between Māori rights and other public and private rights. As a consequence, the Act is in breach of the Treaty.



The marine and coastal area of Aotearoa New Zealand

To give effect to Treaty principles, the Tribunal recommended that the Crown make targeted amendments to the Act. Specifically, the Tribunal recommended that the Crown (among other points):

- ▶ improve the statutory test for customary marine title (subject to the outcome of appeals following the High Court's *Re Edwards (Te Whakatōhea No 2)* judgment);
- ▶ repeal the statutory deadline;
- ▶ allow applicants the ability to transfer their applications between the High Court and the Māori Land Court with both having concurrent jurisdiction;
- ▶ repeal specific exceptions to the scope of protected customary rights;
- ▶ repeal specific exceptions to the scope of permission rights;

- ▶ increase the scope of the Act's compensation regime;
- ▶ decouple the wāhi tapu protection right from the customary marine title regime; and
- ▶ compensate affected iwi, hapū, and whānau for all reclaimed land vested in the Crown.

The Tribunal emphasised that its recommendations should be implemented as a package to restore a fair and reasonable balance between the interests of Māori and those of the wider public in te takutai moana. it warned against the Crown 'cherry-picking' recommendations, as selective implementation would not restore the balance required by the principles of the Treaty.

The release of the report brings the Marine and Coastal Area (Takutai Moana) Act Inquiry to a close. □

Crown Reply to Whakatika ki Runga

IN FEBRUARY 2023, the Tribunal released *Report on Whakatika ki Runga, A Mini-Inquiry Commencing Te Rau o Tika* (summarised in issue 80). The Tribunal found that the Crown breached the Treaty for its ongoing failures to fund claimant participation in Tribunal inquiries, and it recommended both interim and long-term changes to the Crown's funding system.

On 31 July, the Crown decided to accept practically all of the Tribunal's recommendations. It committed to co-design with Māori a long-term solution to problems with claimant funding in the Tribunal. In the interim, common funding guidelines will immediately apply to claimants in all kaupapa and contemporary inquiries.

Cabinet empowered Ministry of Justice officials to undertake 'targeted engagement' with Māori on the co-design of an enduring funding system. Officials will 'take into consideration' the Tribunal's suggestion to engage with individuals who represent the interests of Tribunal claimants, as well as hapū and iwi. As per the Tribunal's recommendation, engagement will also consider the suitability of a centralised funding system; the categories of participant and activities to be funded; and the degree of independence a funding body should have. The Justice Minister will report back to Cabinet in mid-2024 on the scope, method, timing, and funding implications of designing a new funding system.

While this engagement is under way, all 'lead' agencies (whose portfolios the Tribunal is inquiring into) will adopt the same funding guidelines for current and future kaupapa inquiries, as recommended by the Tribunal. In her paper to Cabinet, then-Minister Kiri Allan said '[a] consistent approach to funding claimants in the



Judge Carrie Wainwright watches over AVL as claimant Tauri Lyndon gives his evidence, 18 July 2022, Pātaka Art + Museum

near term would be more efficient and clearer to everyone and demonstrate the Crown's commitment to support Māori access to justice'.

The Tribunal recommended that the Crown use an amended version of Manatū Wāhine's existing funding guidelines, which Cabinet agreed to. It also added some additional funding categories, including for claimants' attendance at Tribunal events, even when they are not giving evidence or acting as support people, and at non-hearing events, such as wānanga. Agencies also now have discretion to fund both interested parties' and claimant costs that are not explicitly listed in the policy.

The Crown has not yet addressed the Tribunal's recommendation to

stop relying on reimbursement-based funding. Lead agencies still retain discretion to distribute funding via reimbursement until a long-term system is in place. Some agencies are using upfront funding methods, however, with the Ministry of Justice using a travel management supplier to cover claimants' accommodation and travel costs for attendance at wānanga in Te Tūāpapa o te Tika (the contextual phase of the Justice Inquiry). The Ministry has also committed to responding to the Tribunal's 'operational recommendations regarding te reo Māori translation and legal aid provision'.

The Tribunal welcomes the Crown's expeditious response to its recommendations. □