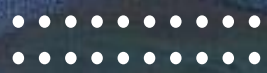


# Indigenous Special Proceedings and Legal Aid

Presentation for the International Forum on Indigenous Peoples Legal Aid –  
Taiwan 2024

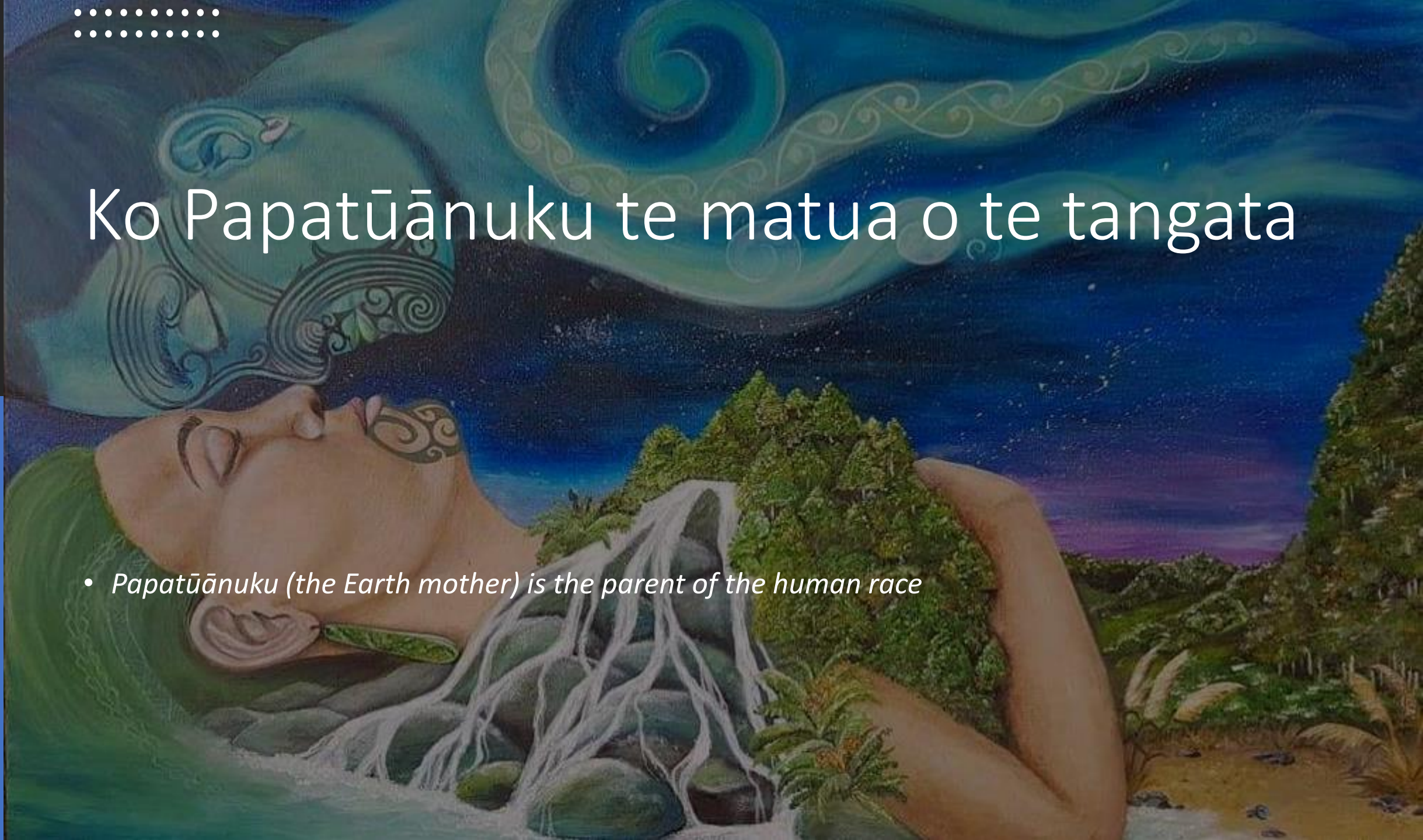
Judge Miharo Armstrong  
Māori Land Court – Te Kooti Whenua Māori





# Ko Papatūānuku te matua o te tangata

- *Papatūānuku (the Earth mother) is the parent of the human race*





# Tāne-mahuta

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- Created Hineahuone
- The origin of the human race



# Kōrero tuku iho (Māori tribal histories)

Births

Deaths

Marriages

Migration

Settlement

Occupation

Cultivation

Resource gathering and  
maintenance

Alliances

Warfare

Peace agreements

These are not just a  
history of the people

It is a history of their  
connection to, and  
relationship with, the  
land

This complete history  
and relationship with  
the land establishes Iwi,  
Hapū and Whānau as  
tangata whenua

# Pepeha

- Ko Mihimarino te maunga
  - Ko Waipapa te awa
  - Ko Mātaatua te waka
  - Ko Te Whānau-a-Apanui te iwi
  - Ko Te Whānau-a-Kahu te hapū
  - Ko Pahaoa te marae
- Mihimarino is my mountain
  - Waipapa is my river
  - Mātaatua is my canoe
  - Te Whānau-a-Apanui is my tribe
  - Te Whānau-a-Kahu is my sub-tribe
  - Pahaoa is my meeting place

Māori rights  
and  
obligations  
are regulated  
by tikanga

- Māori customary law

- Whakapapa / geneaology



## What is tikanga? Tā Hirini Moko Mead

- “[T]ikanga Māori reaches out to many different aspects of life... it pervades and informs whatever we do... its tentacles reach far and wide.”
- A means of social control: tikanga controls interpersonal relationships, provides ways for groups to meet and interact, and even determines how individuals identify themselves
- Māori ethics: Acting ‘tika’ or the correct way of doing something. This involves moral judgments about appropriate ways of behaving and acting in everyday life
- A normative system: addressing what is normal and right, including processes for correcting and compensating for bad behaviour
- Customary law: binding on the Māori population
- An essential part of mātauranga Māori



## The arrival of Europeans in New Zealand

- Abel Tasman (left)
- James Cook (right)





# Treaty of Waitangi 1840

## Maori version

### Article one

*Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki ki hai i uri ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu - te Kawanatanga katoa o o ratou wenua.*

### Article two

*Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Na Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa...*

## English version

### Article one

*The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.*

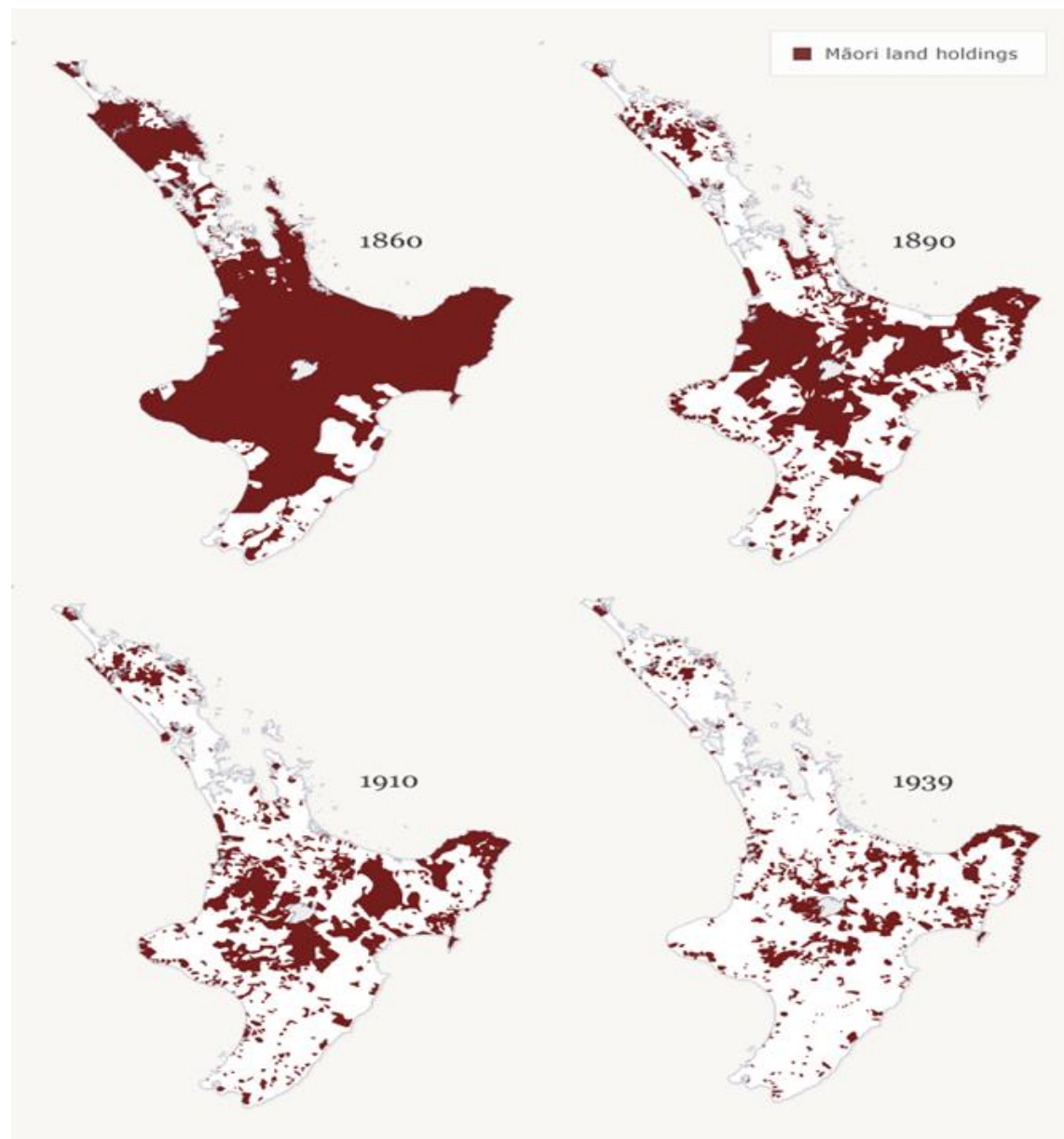
### Article two

*Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession...*

# Native Land Court

- Established by the Native Land Act 1862 and 1865
- Converted ancestral (communal) land to individual titles to facilitate the alienation of land
- The Waitangi Tribunal has repeatedly found that the establishment and operation of the Native Land Court breached the protections afforded to Maori under the Treaty
- Historian Judith Binney described the Native Land Act as an 'act of war'
- Maori described the Court as 'Te Kooti Tango Whenua' (the land taking / stealing Court)

# Māori Land Ownership 1860-1939





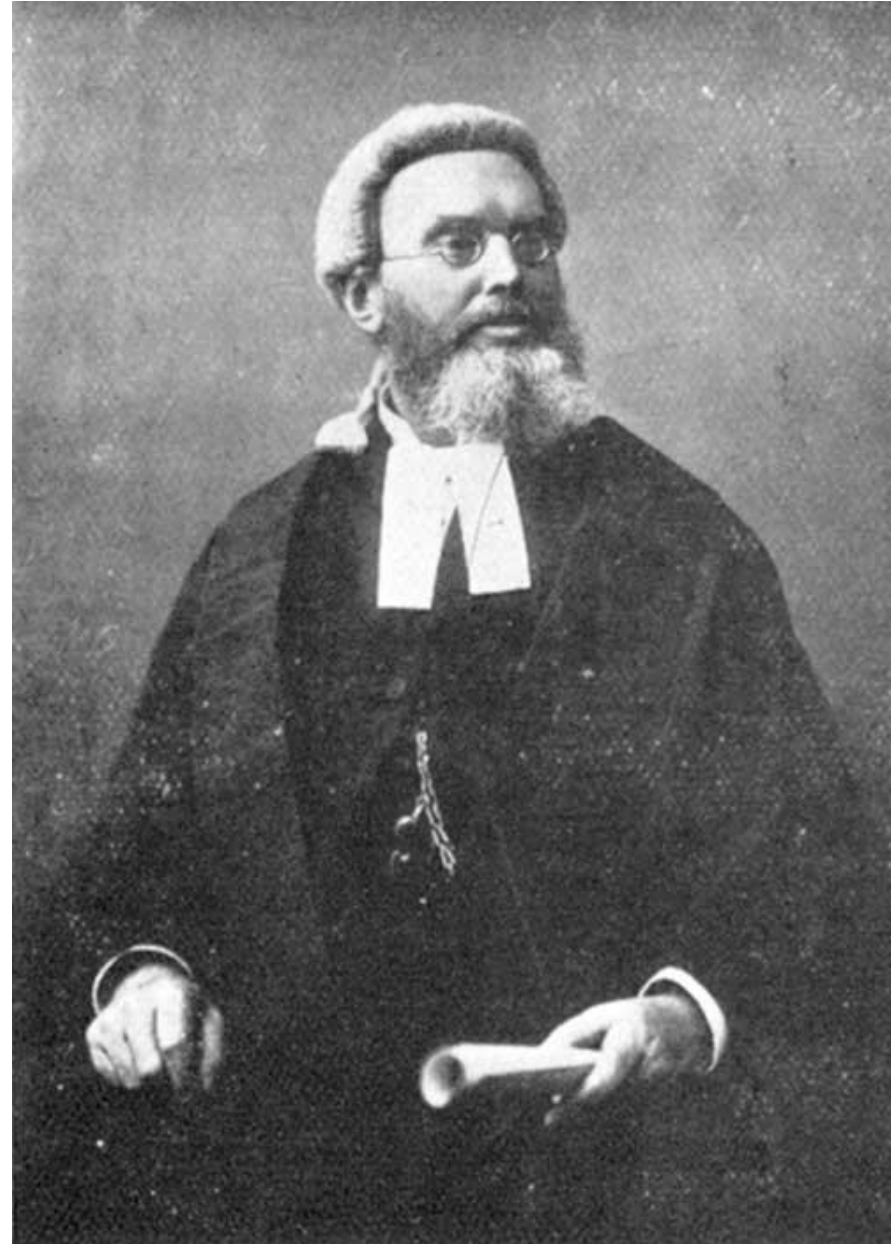
# Wi Parata v The Bishop of Wellington

- In 1848, Ngāti Toa gifted land to the Anglican Church to build a school to be used by Ngāti Toa youth
- The Church never built the school
- In 1850, the Crown issued a Crown grant to the Church confirming it owned that land
- Ngāti Toa filed a court proceeding to investigate the ownership of the land
- They also claimed the Crown breached the Treaty by granting the land to the Church

# Wi Parata v Bishop of Wellington

- 1877, Chief Justice James Prendergast issued his decision:
  - The courts couldn't consider claims based on aboriginal or native title
  - The Treaty was 'worthless' because it was signed 'between a civilised nation and a group of savages' who were not capable of signing a treaty
  - As the Treaty had not been incorporated into domestic law it was a 'simply nullity'
  - This decision influenced the law for decades

Chief Justice  
Sir James  
Prendergast







### **Remaining Māori land today**

- 1.4 million ha of land held in Māori Freehold title (5.3% of New Zealand's land mass)
- 1,200 ha remaining in Māori customary title
- 27,507 individual titles
- 3.2 million ownership interests recorded across all Māori Freehold land titles



# Maori enter politics



# Waitangi Tribunal

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Treaty of Waitangi Act 1975 created a permanent Commission of Inquiry called the Waitangi Tribunal

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The role of the Tribunal is to inquire into claims by Māori that the Crown has breached the Treaty of Waitangi

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Initially, the Tribunal's jurisdiction was limited to contemporary claims

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In 1985, the Tribunal's jurisdiction was extended so that it could inquire into historical claims



# How does the Tribunal work?



**A panel is appointed to hear the claims**



**This includes a Presiding Officer  
(usually a Māori Land Court  
Judge)**



**And panel members – kaumatua  
(Māori elders), historians  
academics and other experts**

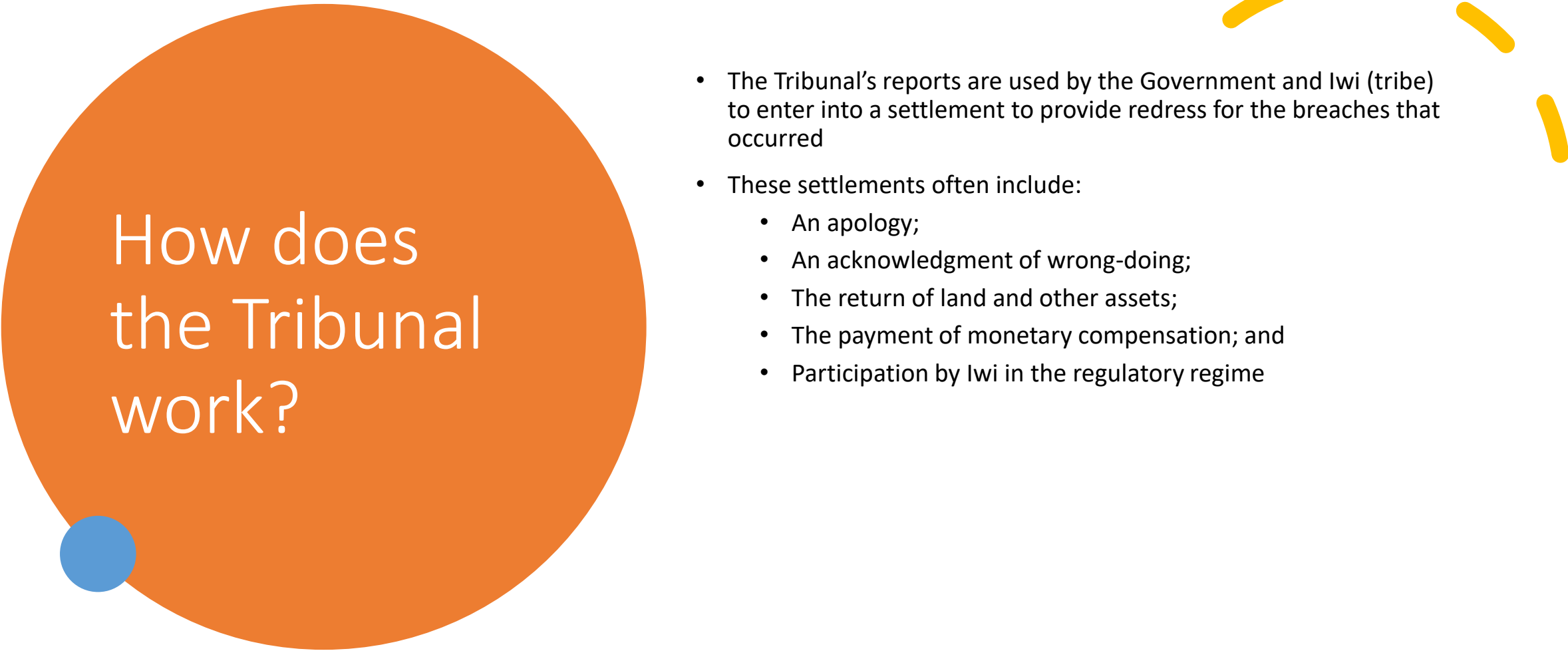


**The panel hears the claims and  
reports back to the Government  
on:**

Whether the Government breached the Treaty;

If this caused prejudice to Māori; and

Makes recommendations on how the Government can provide redress to address that prejudice



# How does the Tribunal work?

- The Tribunal's reports are used by the Government and Iwi (tribe) to enter into a settlement to provide redress for the breaches that occurred
- These settlements often include:
  - An apology;
  - An acknowledgment of wrong-doing;
  - The return of land and other assets;
  - The payment of monetary compensation; and
  - Participation by Iwi in the regulatory regime

# How does the Tribunal work?

The Tribunal has issued 125 reports

The historic reports cover 83% of the land area in NZ

There are 3 remaining district inquiries that are ongoing

Once those reports are issued the reports will cover 91% of the land area in NZ

The Tribunal is still hearing ongoing contemporary claims



# Access to the Tribunal

Any Māori person can  
file a claim with the  
Tribunal

Māori are eligible for  
legal aid to cover legal  
costs to bring a claim in  
the Tribunal

There is an established  
bar of lawyers who  
specialise in Waitangi  
Tribunal claims

# Māori Land Court



# Te Ture Whenua Māori Act 1993

## Preamble (English version)

*Whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown: And whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to **recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu** : And whereas it is desirable to maintain a Court and to establish mechanisms to assist the Maori people to achieve the implementation of these principles:*

# Te Ture Whenua Māori Act 1993

- Retaining ancestral land in the hands of the owners, their whānau and hapū is a primary objective
- The Act contains a number of protection mechanisms to promote this objective
- This includes restrictions on alienation to ensure that Māori ancestral land remains in the hands of those who can whakapapa (have genealogical ancestral connections) to the land

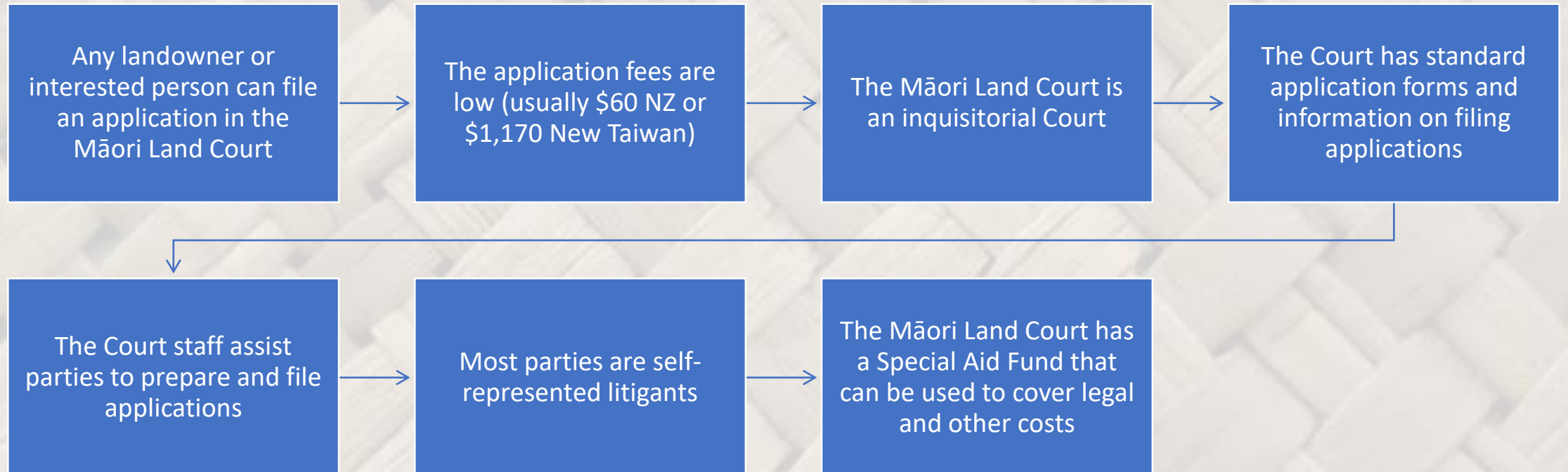


# The Māori Land Court recognises and incorporates tikanga into its operation

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- Succession is restricted to those who have ancestral connections to the land
- For any sale or gift of land, the land has to first be offered to those who have ancestral connections to the land over those who do not
- The Court can recognise whāngai (Māori customary adoption)
- The Court operates in a Māori way:
  - The majority of the judges are Māori
  - Judges, staff and applicants often speak in the Māori language
  - Court sittings follow Māori protocols – mihi (formal acknowledgments) and karakia (prayer)
  - Courtrooms incorporate Māori taonga (artwork) and designs to create a familiar setting

# Access to the Māori Land Court



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## Tikanga in the mainstream courts

- “The Court is unanimous that tikanga has been and will continue to be recognized in the development of the common law of Aotearoa/New Zealand in cases where it is relevant. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies.”
- Supreme Court – *Ellis v R* [2022] NZSC 114





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## How is tikanga 'defined' in the law?

- Māori customary values and practices
  - Te Ture Whenua Māori Act 1993
  - Marine and Coastal Area (Takutai Moana) Act 2011







# Edwards (Te Whakatohea) [2021] NZHC 1025

- It is not the Court's prerogative to define the applicants' tikanga
- The proper authorities on tikanga are those who have been given the mātauranga of their tīpuna
- In the context of section 58(1)(a) of the Act, 'tikanga' is intended to refer to the:
- "principles of customary law that govern the relationship between iwi, hapū, whānau and the takutai moana, and the rights and responsibilities that flow from that"

# How is tikanga applied by the Courts?



**Traditionally, tikanga was viewed by the Courts as 'local custom'**



**Tikanga was only incorporated into the common law where it met the 'colonial test' for recognising local custom:**

It is certain, consistent and longstanding;

It is not repugnant to justice and morality; and

It is not contrary to the principles at the root of the legal system



# The 'colonial test' no longer applies

- The 'colonial' test was rejected by the SC in *Ellis*
- It found that whether tikanga will be relevant in a legal dispute, and to what extent, will depend on context
- Williams J made interesting comments on this (para 261-267):
  - Factual context – Is there a tikanga context to the dispute?
    - Due to the identity or expectation of the parties or the dispute's setting?
    - Does the nature of the dispute give rise to broad policy considerations where tikanga may be relevant?
  - Legal context: Is there room among the common law rules and principles for tikanga to play a part?
  - Are there binding authorities or principles that leave no room for tikanga?
  - Is the law in this area developing and tikanga could assist?
  - Tikanga will be relevant when the facts suggest it is and the common law has not otherwise excluded it
  - What weight should tikanga carry? Is it the controlling rule or principle or merely an ingredient in a multi-layered assessment?

# Access to the mainstream courts

- The cost to bring proceedings in the mainstream courts is high
- Filing a standard proceeding in the High Court is \$1,755 NZ (or \$34,180 New Taiwan)
- There are additional fees for interlocutory applications, setting down fees and hearing fees
- Lawyer costs are often high
- It can be difficult to obtain legal aid for proceedings in the mainstream courts to recognise and enforce Māori rights
- Māori rights are communal rights held by the Iwi (tribe) or hapū (sub-tribe)
- Legal Services Act 2011, s 12 – Legal aid may be refused where:
  - The applicant appears in a representative or fiduciary capacity; or
  - There are numerous people who have the same interest in the matter as the applicant and the rules of the court permit the applicant to sue on behalf of those people

Whai iho mā te ahi kā ki te marae e whakaatu.

*A marae is shown by the lights of its cooking fires*

*Without its people keeping the home fires  
burning, the land is empty.*