

Wai 3555, #2.5.7

Wai 558, #2.34

Wai 864, #2.46

Wai 1781, #2.5.8

Wai 2160, #2.5.8

OFFICIAL

Wai 900, #2.5.65

Wai 814, #2.948

Wai 87, #2.102

WAITANGI TRIBUNAL

Wai 900

Wai 814

Wai 87

Wai 558

Wai 864

Wai 1781

Wai 2160

CONCERNING

the Treaty of Waitangi Act 1975

AND

claims participating in the North-Eastern Bay of Plenty District (Wai 1750) Inquiry that make claims to the Mangatū Crown Forest Licensed Land in the East Coast inquiry district

HE PĀNUI WHAKAHAU O TE TIAMANA KAIWHAKAWĀ MATUA DR C L FOX

/ MEMORANDUM-DIRECTIONS OF CHIEF DR C L FOX

28 November 2024

Background

1. On 10 March 2023, the Ngāti Ira o Waiōweka Rohe (Wai 558) claimants filed submissions in the North-Eastern Bay of Plenty District (Wai 1750) Inquiry claiming they have interests in the Mangatū Crown Forest Licensed Lands (CFLL) in the East Coast inquiry district, including parts of the Waipāoa blocks east of Mangatū (Wai 1750, #3.1.433).
2. Following a judicial conference in September 2023, several parties in Wai 1750 indicated that they wished to be heard regarding interests in the Mangatū CFLL. The Presiding Officer accordingly directed parties to file submissions in support or opposition of hearing claims to Mangatū CFLL, as well as for counsel to address issues of jurisdiction in light of the Whakatōhea settlement and binding recommendations made by the Tribunal in the Mangatū Remedies report 2021 (Wai 1750, #2.5.97).
3. Following a judicial conference on 23 July 2024 to hear submissions in respect of an inquiry into claims relating to Mangatū CFLL, the Presiding Officer issued directions referring these claims to me as Chairperson (Wai 1750, #2.5.8 at [53]).
4. On 11 October 2024, I referred these claims to Judge Milroy as presiding officer, and Dr Paul Hamer, Emeritus Professor Williams and Prue Kapua as members of the tribunal panel (Wai 558, #2.31). I also directed parties to file submissions on Prue Kapua and Emeritus Professor David Williams' disclosures.
5. Although referred to in the summary of decisions, I did not directly specify what blocks the panel would inquire into. The Crown submit in their memorandum dated 22 October 2024 discussed below, that the direction appointing the panel to determine the Mangatū Crown Forest Licensed land is not clear as to whether the panel would inquire into claims by Te Aitanga a Māhaki regarding the Waipāoa Crown Forest Licensed block, and whether the panel will inquire into claims concerning only Waipāoa, not the Mangatū blocks.
6. For the avoidance of doubt, I confirm that the panel will inquire into the Waipāoa blocks and that portion of the Mangatū CFLL situated inside the East Coast inquiry district (Wai 900). The panel will not inquire into any land that falls within the Tūranganui-a-kiwa (Wai 814) district inquiry, including all Mangatū blocks. The claims of Te Aitanga a Mahaki are not the subject of inquiry at this stage, but that situation will depend on any decision of the presiding officer and panel should that tribe seek to be a party.

Submissions received

7. On 18 October, the Tribunal received a memorandum of counsel for the Crown requesting an extension to file submissions on the appointment of Ms Kapua and Professor Williams by Monday 21 October 2024. This extension was granted by Judge Milroy, the presiding officer appointed to determine these applications.
8. On 22 October 2024, the Tribunal received a memorandum of counsel for the Crown responding to the invitation for submissions on the disclosures made by Prue Kapua and Professor David Williams in relation to their appointment to the panel to determine the applications concerning the Waipoua blocks (Wai 558, #2.33). As I am responsible for the appointment of panel members, I am dealing with these submissions.

Prue Kapua

9. The Crown considered that apparent bias may apply. It was submitted that Ms Kapua acted for Mr Ruru whose claims were on behalf of his claims for Te Aitanga a Mahaki during the Wai 814 Tūranganui a Kiwa inquiry. Her engagement included filing the consolidated Wai 274 and Wai 283 amended statements of claim containing allegations

concerning the CFLL lands, briefing evidence for Mr Ruru and filing submissions. The Crown noted that where a judge has acted for a party in proceedings before them, the Courts look at whether the issues arising in the proceeding are connected to those involved in the Judge's former instruction. The Courts also consider whether it may be perceived that a Judge is remembering even subconsciously, something about their former clients' instructions, and whether that could therefore affect their impartiality in evaluating the present issues in the case. The lapse of time means little in determining the matter.

10. The Crown also cited the High Court recusal guidelines which provide that a Judge should recuse themselves where they have served as a legal advisor.
11. The Crown submit that the panel would be inquiring into claims involving asserted customary interest to CFLL, and there is a connection between the issues and Ms Kapua's previous engagement for Wai 274 and Wai 283. The Crown therefore submit that Ms Kapua's previous engagement for Te Aitanga a Māhaki could fairly be perceived as giving rise to apparent bias and the recusal of Ms Kapua should be considered.

Decision

12. The Crown has correctly cited the common law test for apparent bias. The test is a two-step one requiring consideration of:
 - a. what are the circumstances relevant to the possible need for recusal because of apparent bias?
 - b. whether those circumstances lead to a reasonable apprehension the judge may not be impartial.
13. That test therefore requires ascertainment of, first, what it is that might possibly lead to a reasonable apprehension that the Judge might decide the case other than on its merits and, secondly, whether there is a logical and sufficient connection between those circumstances and that apprehension.
14. Ms Kapua acted for John Ruru who was the named claimant for Te Aitanga a Mahaki, Ms Kapua took no further instructions from him after the *Tūranga Tangata Tūranga Whenua : The Report on the Tūranganui a Kiwa Claims* was released in 2004. I understand that he is now deceased.
15. Ms Kapua was not involved in any of the subsequent proceedings concerning the Mangatū Crown Forest lands. While her work did involve attempting to prove customary interests within the Tūranganui a Kiwa inquiry district including in the Mangatū CFLL, her instructions did not include the Waipaoa blocks.
16. Therefore, I do not consider that there could be a reasonable apprehension that Ms Kapua would exercise her role as a member and decide the claims before the Tribunal other than on merit. There is no logical and sufficient connection between her work as legal counsel and her role as a member of the Tribunal hearing claims to the Waipaoa blocks and associated CFLL.
17. The Crown also cited the *High Court Guidelines*. These provide as follows:
 - 1.1 A judge has an obligation to sit on any case allocated to him or her unless grounds for recusal exist.

1.2 A judge should recuse him or herself if, in the circumstances, a fair-minded, fully informed observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.

1.3 The standard for recusal is one of “real and not remote possibility”, rather than probability.

1.4 The test is a two-stage one. The judge must consider

1.4.1 First, what it is that might possibly lead to a reasonable apprehension by a fully informed observer that the judge might decide the case other than on its merits; and

1.4.2 Second, whether there is a “logical and sufficient connection” between those circumstances and that apprehension.⁽¹⁾

1.5 The question of recusal is for the judge hearing the case. Some of the matters the judge should consider are:

1.5.1 A judge should apply the above principles firmly and fairly and not accede too readily to suggestions of bias.

1.5.2 A judge should be mindful of the burden that passes to other judges if the judge recuses him or herself unnecessarily.

1.5.3. A judge is not required to recuse him or herself merely because the issues involved in a case are in some indirect way related to the judge’s personal experience or that the judge has previously dealt with the case.

....

1.5.5 If, after considering all relevant circumstances, there is doubt about whether there may properly be an appearance of bias, it may be prudent for the judge to decline to sit in that case.

1.6 Conflicts of interest can arise in a number of different situations. A judge should be alert to any appearance of bias arising out of connections with litigants, their legal advisors or witnesses. ...

3. Recusal arising from legal practice

3.1 A judge should recuse himself or herself if he or she served as a legal advisor in respect of the matter in issue when in practice.

3.2 If the matter in issue was dealt with by the firm at a time when the judge was a member of the firm, the judge may need to consider recusal even if the judge had no personal involvement in providing advice about it if the Judge obtained relevant knowledge about the matter in issue or had formed a view of the parties.

18. Ms Kapua has not served as legal advisor in respect of the claims before the Tribunal. There is also nothing in these *Guidelines* to displace my findings at paragraphs [13]-[15] at this stage.

19. I am not prepared to require her to recuse from the panel based on what is known at this time. Should it become apparent to Ms Kapua during proceedings that she should recuse taking into account any change of circumstance and the above *Guidelines*, I encourage her to do so. The decision will be hers to make.

Emeritus Professor Williams

20. *First disclosure—Tribunal-commissioned tribal landscape report for Wai 1750 district inquiry.* The Crown submit the issue is whether Professor Williams’ report and evidence could be taken as demonstrating that Professor Williams has formed a fixed opinion on issues that may be considered by the determining panel. The Crown consider it possible that Professor Williams may be perceived to have reached a view on the extent and nature of customary interest groups in the Wai 1750 inquiry and whether those interests extend to Crown Forest Licensed lands. The Crown also submit that there is a chance that his commissioned report is added to the record of inquiry for Wai 1750. If that were to happen, he would be required to assess his own evidence.

21. *Second disclosure—Legal opinion regarding Waerenga-a-Hika.* The Crown submit that the legal issue involved is whether Professor Williams opinion would have any connection with issue before this panel. The Crown submit that the panel may in due course consider whether claims that are well-founded in relation to the Crown Forest Licensed lands. The Wai 814 remedies Tribunal found that events at Waerenaga-a- Hika were relevant to the determination for applications for interim recommendations in respect of Mangatū blocks. It is not clear whether the panel will inquire into claims to the Waipāoa blocks that participated in Wai 814 inquiry. However, it is submitted that the Wai 814 inquiry took a broad approach to what claims and prejudice relate to Crown Forest Licensed lands, so that events beyond the blocks concerned are considered when assessing whether to transfer Crown Forest Licensed land to Māori ownership.
22. *Third disclosure—Expert evidence in Re Edwards proceeding.* The Crown submit they do not perceive any issue of apparent bias to arise in relation to this disclosure.

Decision

23. With respect to whether I consider that there is no reasonable risk of ‘apparent bias’ on the part of Emeritus Professor Williams. First, he advises that he has no ‘personal or professional relationship with any party or witness in the Wai 1750 inquiry or in this inquiry. He also has expressed no fixed view in the report as to customary interests in the Mangatū or Waipāoa blocks and he has no knowledge of any findings and remedies that claimants might seek. He undertook no research at all into those blocks as they were not relevant to his research commission. A word search of his report indicates there are 7 references to the word ‘Waipaoa’ and 29 references to the word ‘Mangatū’. Those references mainly appear in his consideration of the Statements of Claim filed in the Wai 1750 inquiry. Almost all of them appear in the Wai 87 Statements of Claim, in the evidence of Adriana Edwards, and in citations of Tribunal reports relating to Mangatū. At no point did he assess the validity or otherwise of the claims to interests in Mangatū or Waipāoa made by Wai 87 claimants or others.
24. With respect to the opinion regarding Waerenga-a-Hika, it was focused on the common law of England and the issue of rebellion and holding forts. It made no reference at all to the Treaty/Te Tiriti, or to the principles of the Treaty/Te Tiriti, or to prejudice referenced in the Treaty of Waitangi Act 1975, or to remedies. Nothing in that opinion relates to issues that may come before the Waipāoa blocks inquiry.
25. I am not prepared to require Emeritus Professor Williams to recuse from the panel based on what is known at this time. Should it become apparent during proceedings that he should recuse taking into account any change in circumstances and the *High Court Guidelines* for recusal, I encourage him to do so. The decision will be his to make.

Appointment of Additional Members

26. To assist with the work of the inquiry panel, and to ensure if there is any subsequent need for any panel member to recuse, pursuant to clause 5(1)(b) of Schedule 2 of the Treaty of Waitangi Act 1975, I appoint Professor Susy Frankel and Kevin Prime as additional members to the inquiry panel.

Me tuku atu te Kairēhita i tētehi kape o tēnei whakahau ki ērā ki te rārangi whakamōhio mō te Combined Record of Inquiry for the Gisborne claims (Wai 814).

The Registrar is to send this direction to all those on the notification list for the Combined Record of Inquiry for the Gisborne claims (Wai 814).

DATED at Gisborne this 28 day of November 2024



Kaiwhakawā Matua Dr C L Fox
Tiamana

WAITANGI TRIBUNAL