

WAITANGI TRIBUNAL

Wai 2490

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Ngāpuhi Mandate Inquiry

MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER

1. The Tribunal convened the substantive hearing of the Wai 2490 urgent claims at the Copthorne Resort, Waitangi on 1 December 2014 to 5 December 2014.
2. This memorandum-directions addresses post-hearing evidential matters and convenes a teleconference to discuss further steps in the urgent inquiry.

Follow-up evidence and amendments

3. During questioning by Crown counsel, Mr Erima Henare noted he would be happy to provide the Tribunal with the alternative models he suggested to the Minister for Treaty of Waitangi Negotiations. Counsel for Wai 2341 is directed to file the outline of Mr Henare's models.
4. Counsel for Wai 2341 is also to provide the Tribunal with the missing footnote for the brief of Evidence of Lee Harris (#A79, para 136).
5. During the cross-examination of Ms Willow-Jean Prime, Crown counsel asked the witness to provide documentation regarding how many people are on the Te Kapotai hapū roll and how many of these live within the rohe. Counsel for Wai 2431 is directed to file any relevant documentation.
6. Counsel for Wai 2489 and counsel for Wai 2437 are to file the PowerPoint presentations that their witnesses (Dr Guy Gudex and Mr Arapeta Hamilton) presented at the hearing.
7. As requested at the hearing, counsel for Mr Tukoroirangi Morgan is granted leave to re-file Mr Morgan's evidence with typographical errors corrected. Counsel is required to provide the amended evidence.
8. During cross-examination by counsel for Wai 2433 and counsel for Wai 2434, Mr Raniera (Sonny) Tau noted that his lawyers could make an enquiry to Electionz to see if the voting information on the Tūhoronuku Mandate can be broken down into hapū sub-groups. Counsel for Tūhoronuku are to update the Tribunal on their progress in this matter.
9. During cross-examination, Mr Tau also stated that he would provide his understanding of the hapū withdrawal process to the Tribunal. Counsel for Tūhoronuku is to provide this further evidence.
10. Mr Sam Napia submitted, in his opening statement, that during the cross-examination of Mr Gray Theodore, an incorrect and unsworn affidavit had been projected behind Mr Theodore. The Tribunal confirms that the original unsworn affidavit of Gray Theodore filed on 7 November 2014 (#A55) was amended, sworn and re-filed on 25 November 2014 as Wai 2490, #A55(a). Counsel for Wai 2436 are to address any further outstanding matters relating to the affidavits and/or minutes tabled by Mr Napia.

11. Counsel are directed to file the above additional evidence, corrections and clarifications by **4pm, Friday 19 December 2014.**

Questions in writing

12. I grant leave for questions in writing to be filed for the following witnesses:

- a) Ms Marcia Hau (#A95) and Ms Susan Huria (#A94) (from counsel for all parties)
- b) Mr Tukoroirangi Morgan (#A113) and Mr Raniera (Sonny) Tau (#A25 and #A98) (from Mr Sharrock, counsel for Wai 2437)
- c) Mr Nigel Fyfe (#A103) (from Ms Sinclair, counsel for Wai 2436)
- d) Dr John Yeabsley (#A105), Mr Herbert John Clark (#A106) and the Hon. Raymond (Tau) Henare (#A107) (from counsel for all parties)

13. Post-hearing questions in writing for these witnesses are to be filed by **4pm Wednesday 17 December 2014.** Answers from the witnesses to these questions (except Mr Morgan) are to be filed by **4pm Tuesday 23 December 2014.**

14. Counsel for Mr Morgan is to update the Tribunal when these questions can reasonably be answered by **4 pm, Friday 19 December 2014.**

15. On 9 December 2014, counsel for Wai 2483 filed questions in writing for Mr Toko Tahere. Counsel for Tūhoronuku are to file Mr Tahere's answers to these questions by **4pm, 19 December 2014.**

16. Following the presentation of claimant evidence, counsel for interested parties in support of the claimants (Mr Sharrock) requested to submit questions in writing for Mr Pita Tipene, Mr Rudy Taylor and Mr Erima Henare. The Tribunal has received 81 questions from counsel. Due to time constraints and in the interest of brevity, counsel is directed to refine the questions he wishes to put to these witnesses as much as possible by **4pm, Wednesday 17 December 2014.** Answers from the witnesses to these questions are to be filed by **4pm Tuesday 23 December 2014.**

Evidence of Moana Tuwhare

17. At the urgent teleconference convened on 26 November 2014, counsel for Wai 2437 submitted that Ms Moana Tuwhare's participation in the Wai 2490 inquiry, as a witness in support of Tūhoronuku, constituted a conflict of interest as Ms Tuwhare was currently representing claimants opposed to Tūhoronuku in the inquiry.

18. On 26 November 2014, Tribunal staff contacted counsel for Ms Tuwhare on my behalf to request Ms Tuwhare formally withdraw from representing claimants in the Wai 2490 inquiry.

19. On 30 November 2014, Ms Tuwhare sought to formally withdraw from representing claimants in support of the original application.

20. In a memorandum dated 1 December 2014, counsel for Wai 2488 noted that their clients 'had serious concerns about Ms Tuwhare seeking to withdraw and then present evidence opposed to her former clients' position'. Counsel also submitted that Ms Tuwhare's previous participation in and representation of Te Kotahitanga presented 'a serious conflict of interest' (#3.2.5, paras 4-7). Accordingly, counsel requested that Ms Tuwhare's evidence be removed from the Record of Inquiry.

21. On 1 December 2014, I convened a chambers conference to discuss outstanding procedural issues. At the conference, counsel for Wai 2488 noted that the issue surrounding Ms Tuwhare's potential conflict of interest remained a major concern for their clients. Counsel for Wai 2437 submitted that given Ms Tuwhare's involvement in the Te Rōpu Whaiti working group as a member of Te Kotahitanga, her continued participation in the Wai 2490 inquiry would be a breach of ethics.
22. Counsel for Ms Tuwhare noted that she did not have instructions to act for Te Kotahitanga, and was only instructing-counsel. Counsel for Ms Tuwhare asked for leave to meet with his client following the conference to seek instructions. Leave was granted.
23. On 2 December 2014, counsel for interested parties in support of Tūhoronuku filed a memorandum which confirmed that Ms Tuwhare had made a personal decision to withdraw her evidence from the Record of Inquiry. Counsel submitted that Ms Tuwhare did not act against her former clients, and was instead providing evidence in support of Te Pōpoto and at no point did she use any confidential information in her evidence (Wai #3.2.7, paras 2-3).
24. The following evidence will be removed from the Wai 2490 Record of Inquiry:
 - a. The brief of evidence of Moana Tuwhare (#A99);
 - b. Paras 384-386, and 389 of Maureen Hickey's affidavit (#A108);
 - c. The last sentence of para 2.19, paras 5.3, 6.4, 7.5, of Tūhoronuku's opening submissions (#3.3.13); and
 - d. Paras 463-465 and part of the first sentence of para 470 of Willow-Jean Prime's reply evidence (#A130);
 - e. Tamihana Pomare's reply evidence in full (#A129).
25. If parties wish to re-file the above documents with reference to Ms Tuwhare's evidence removed they are invited to contact the Registrar (wt.registrar@justice.govt.nz) by **12pm, Wednesday 17 December 2014** to organise this. If not, the Registrar is directed to redact the above information by **4pm, Friday 19 December 2014**.

Crown disclosure of documents and possible adjournment of the inquiry

26. At the 1 December 2014 chambers conference, counsel discussed preliminary ideas about how the late documents disclosed by the Crown on 26 November 2014 could be incorporated into this inquiry.
27. At the conference, it was agreed that counsel could make use of selected documents as long as they provided other parties with notice of those documents well before cross-examination began.
28. I thank counsel for their efforts in this regard. The Tribunal appreciated hardcopies being made available and was satisfied that no witnesses were ambushed by questions on documents they had not seen prior to questioning.
29. During the conference, Crown counsel indicated that it would take the Crown 10 to 12 weeks to fully review all of the remaining withheld (or partially withheld) documents. I noted that the Tribunal had serious concerns with this solution: if parties wish to give further evidence on the information included in these documents this may impact upon the Tribunal's ability to produce the final report in a timely manner.

30. Counsel for Wai 2437 and Wai 2341 submitted that the 10 to 12 week timeframe suggested by Crown counsel would only be feasible if the Crown would undertake to stop further dealings with Tūhoronuku until a Tribunal report was released.
31. At the end of the 1 December 2014 conference, I highlighted the claimants concern that undue delay would cause possible additional prejudice. I asked Crown counsel what assurances the Crown could offer to claimants to allay any potential concerns and granted leave for the Crown to seek instructions and update the Tribunal at their earliest possible convenience.
32. On 9 December 2014, Crown counsel submitted a memorandum which discussed their review of withheld (and partially withheld) documents on the Official Information Act (OIA) lists and the next steps they are intending to undertake.
33. On 5 December 2014, the Tribunal observed that given the previous four and half days evidence (including Mr Tau's reassurances that he wished to work more closely with the claimants), there may be an opportunity for parties to undertake further engagement to see if any issues might be resolved. If parties wished to take that opportunity, the Tribunal noted they would be willing to adjourn the inquiry. The Tribunal also indicated that such a process would be aided by the Crown and Tuhoronuku "pressing the pause button" and undertaking not to take the next steps towards negotiation while parties worked together.
34. Following the afternoon tea break, claimant counsel submitted that the preliminary indications they had received from their clients was that they were not interested in a pause and asked the Tribunal to carry on with the inquiry without delay.
35. Claimant counsel confirmed this position in a joint memorandum filed on 9 December 2014. Claimant counsel also asked the Tribunal to issue a formal direction setting out my suggestion so that they could seek considered instructions (para 5).
36. Claimant counsel indicated that any engagement process would be assisted by the Crown and Tūhoronuku confirming their intention to halt any further steps in negotiations (para 6). But until such a time, claimant counsel submitted that the status quo should remain (para 7).
37. I wish to discuss this matter further at the teleconference this week. After this, I will consider any direction to be released.
38. On 9 December 2014, Counsel for the Crown noted that the Crown is currently reviewing all fully and partially withheld documents on the OIA lists and expect that this will be completed by 18 February 2015 (paras 2-3).
39. Counsel stated that approximately half of the documents that were previously redacted were redacted only to keep the names of junior officials private. The Crown submitted this information would not assist the Tribunal in its inquiry and requested a direction that they would not have to reassess the redacted documents that only redact officials' names (para 7).
40. Given the Crown's assurance on this matter, the Tribunal does not require the Crown to reassess previously redacted documents where the documents only redact junior officials' names.

41. Crown counsel also submitted that the next step in their process with Tūhoronuku is to sign the terms of negotiation. After this, negotiations will be able to commence (paras 8-9).
42. Crown counsel noted that they are not currently in the position to sign these terms before February 2015, but if this date changes, the Crown will advise the Tribunal and parties (para 11).
43. Crown counsel also submitted that they are not in the position to give an undertaking that the Crown will not sign terms until the Tribunal's report is released (para 12).
44. They submitted their reasons for this decision are broadly that:
 - a. 'The review and disclosure of documents should proceed as not to interfere with the Tribunal's process' (para 14); and
 - b. The signing of the terms of negotiation 'cannot involve any prejudice to claimants [as] nothing will occur in this process that is irreversible' and the Crown can withdraw from negotiations at any time (para 16).
45. On 10 December 2014, a joint memorandum of counsel on behalf of claimants and interested parties opposing Tūhoronuku was filed which addressed the Crown's plan regarding the release of further OIA documents and their advice that they would not halt their process with Tūhoronuku.
46. Claimant counsel requested a direction that the Crown confirm their position that they have identified and disclosed all relevant documents (paras 8-9). Crown counsel is to update parties on this matter at the teleconference to be held at **12pm Wednesday 17 December 2014**.
47. Claimant counsel also restated their request for a written direction or minute confirming the Tribunal's position on further engagement by parties now that the Crown has responded (para 16). Counsel submitted they do not accept the Crown's submission that the signing of the Terms of Negotiations will not cause prejudice to the claimants and interested parties (paras 17-18).
48. Counsel for Wai 2488, Wai 2435 and Wai 2437 also filed a separate memorandum on 10 December 2014 submitting that their clients are not, at this stage, in favour of an adjournment and although they are willing to discuss resolution of this matter, further delay is inconsistent with the basis of an urgent hearing (para 2). This position was partially informed by the Crown declining to pause the negotiations process while documents relevant to Wai 2490 are prepared for release (para 3).

Teleconference

49. A teleconference to discuss outstanding matters will be held at **12pm, Wednesday 17 December 2014**. The agenda is as follows:
 - a. Crown disclosure;
 - b. Post-hearing filing;
 - c. Terms of negotiation; and
 - d. Additional process in 2015.
50. Parties are to confirm their intention to participate in the teleconference and provide their telephone numbers to the Registrar by email (wt.registrar@justice.govt.nz) by **12pm, Tuesday 16 December 2014**.

51. The Registrar is directed to send a copy of this direction to counsel for the claimants, Crown counsel and all those on the distribution lists for Wai 2490, the Ngāpuhi Mandate inquiry.

DATED at Wellington this 15th day of December 2014

A handwritten signature in black ink, appearing to read 'S F Reeves', written in a cursive style.

Judge S F Reeves
Presiding Officer

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