

IN THE WAITANGI TRIBUNAL

**WAI 2490
WAI 2442
WAI 2443**

IN THE MATTER

of the Treaty of Waitangi Act 1975

AND

IN THE MATTER

the Ngāpuhi Mandate Inquiry

**MEMORANDUM OF COUNSEL NOTICE REGARDING WITNESSES AND
DOCUMENTS FOR CROSS-EXAMINATION**

Date: 18 February 2015

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Counsel Acting: Darrell Naden and Barney Tūpara

MAY IT PLEASE THE TRIBUNAL

Introduction

1. This memorandum of counsel is filed on behalf of the following:
 - a. Frank Rawiri, Bobby Newson and Nga Taurira Tawhito o Hato Petera (Wai 2442); and
 - b. the Wiremu Hemi Harris and Meri Otene whanau and Ngati Rangi, Ngati Here, Ngati Tupoto, Ngati Kopuru, Te Rarawa and Ngati Uenuku, Wiremu Reihana and Ngati Tautahi ki Te Iringa hapu, Reuben Porter and his whanau, Kaitangata, Nga Tahawai and Whanau Pani, Denise Egen her whanau and Te Mahurehure, and James Te Tuhi, his whanau and Te Hikutu (Wai 2443).

("the Claimants")

2. By Memorandum-Direction dated 13th February 2015¹, the Tribunal stated that additional hearing days will be held on Wednesday 4 March and Thursday 5 March 2015.² By the same Memorandum-Direction, the Tribunal confirmed that Claimant Counsel were required to provide notice of which witnesses they wish to recall and what documents they will be referring to during those hearing days by 4pm, Wednesday 18 February 2015. This memorandum of counsel is filed in response to that requirement.

Witnesses to be recalled

3. Counsel requests that the following witnesses be recalled by the Tribunal for cross-examination:
 - a. Raniera (Sonny) Tau, Chairperson of Te Rōpu o Tūhoronuku Independent Mandated Authority;

¹ Memorandum-Directions of the Presiding Officer, Wai 2490, #2.7.7.

² Memorandum-Directions of the Presiding Officer, Wai 2490, #2.7.7, paragraph 8.

- b. Maureen Hickey, Negotiation and Settlement Manager for the Office of Treaty Settlements; and
- c. Nigel Fyfe, Lead Negotiator for the Office of Treaty Settlements.

Witnesses not previously called

- 4. The leave of the Tribunal is respectfully sought to allow Counsel to cross-examine the following witnesses, none of whom have previously given evidence during this inquiry:
 - a. Hon Christopher Finlayson, Minister for Treaty of Waitangi Negotiations;
 - b. Hon Bill English, Minister of Finance; and
 - c. Angela Foulkes, Trustee on the Crown Forestry Rental Trust.
- 5. Counsel accepts that it is unusual for Ministers to be called as witnesses at a Tribunal inquiry. Nevertheless, we submit that questioning the Ministers will assist the Tribunal with its inquiry. The cross examination that will be put to the Ministers concerns the Claimants' pre-determination cause of action. It is understood that parliamentary privilege does not prevent Ministers from being summonsed unless Parliament is sitting. We note that Parliament is not sitting on 3, 4 or 5 March 2015.
- 6. During the December hearing, Counsel did not call the Ministers or Ms Foulkes for cross-examination. This was because at the time, we were not aware of the information that we have now as a result of recent document releases by the Crown. Some of the documents that were released on 26 November and some of the documents released since that time will form the basis of the cross-examination. These documents were not available to us prior to the December hearing. Therefore, at the time we had no reason to call the witnesses.
- 7. We refer to the Tribunal's reference to recalled witnesses in the abovementioned Memorandum-Directions. We submit that the recently released documents give rise to cross-examination that can only be put to the Ministers and to Ms Foulkes. It would be inappropriate and even

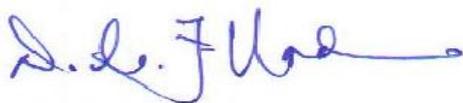
meaningless to put the proposed cross-examination to OTS officials. We propose to question the witnesses about their actions and the reasons for them and only these witnesses can properly respond. The pre-determination cause of action is a claim that is based on the Minister of Treaty of Waitangi Negotiations' closed mind in approving Tuhoronuku's mandate. It is submitted that only the Ministers can properly respond to cross-examination that concerns his state of mind when the mandate was approved. The questions to the Minister of Finance relate specifically to his decision making in that role.

8. We will address the Tribunal on this request for leave at the judicial conference being held on Thursday 19 February 2015. If required, Counsel will file a confidential memorandum to the Tribunal providing greater detail regarding the proposed cross-examination of these witnesses. The suggested memorandum of counsel can be filed by 12pm, Friday 20 February 2015.

Documents to be referred to during cross-examination

9. Counsel attaches as Appendix "A" the list of documents that will be relied on for the cross-examination of the aforementioned witnesses.

Dated at Auckland this 18th day of February 2015



Darrell Naden
Counsel Acting