

IN THE WAITANGI TRIBUNAL

Wai 2561

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Ngātiwai Mandate Inquiry

**MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER
REGARDING STATEMENT OF ISSUES AND HEARING PLANNING**

19 July 2016

Judicial teleconference on interlocutory matters

1. This memorandum-directions addresses matters discussed at the judicial teleconference held with parties on 13 July 2016, regarding a statement of issues, discovery and disclosure of documents, timeframes for hearing and filing of evidence, and other inquiry matters.
2. Counsel representing nine of the 11 claimant groups in this inquiry (Wai 156, Wai 745 and 1308, Wai 1837, Wai 2181, Wai 2337, Wai 2455, Wai 2546, Wai 2548, Wai 2549) appeared at the judicial teleconference. Counsel for the Ngātiwai Trust Board (NTB), and Crown counsel, also appeared. Counsel representing two of the claimant groups (Wai 2550 and Wai 2557) was unable to join due to counsel's technical difficulties.

Statement of Issues

3. As directed, counsel filed memoranda with draft Statements of Issues in advance of the judicial teleconference. The Tribunal received the following memoranda:
 - a. Joint memorandum of counsel filed by coordinating claimant counsel (representing Wai 2181, Wai 2544, Wai 2545, Wai 2546 and Wai 2548), the Crown, and the Ngātiwai Trust Board (NTB) (Wai 2561, #3.1.100; #3.1.100(a)-(b)).
 - b. Memorandum of counsel for Wai 745 and 1308 (Patuharakeke) (Wai 2561, #3.1.99).
 - c. Memorandum of counsel for Wai 2549 (Te Waiariki, Ngāti Korora and Ngāti Taka Pari) (Wai 2561, #3.1.97).
 - d. Memorandum of counsel for Wai 2550 (Te Waiariki, Ngāti Korora and Ngāti Taka Pari) and Wai 2557 (Ngātiwai) (Wai 2561, #3.1.101).
4. Counsel agreed on most questions (or variations thereof) for a draft Statement of Issues. The main issues in disagreement were whether the Tribunal should inquire into:
 - a. the process and events leading up to the Crown's recognition of the NTB's Deed of Mandate (proposed by most claimants, opposed by the Crown and the NTB); and
 - b. how Ngātiwai is structured, and the extent to which the claimants represent Ngātiwai hapū (proposed by the Crown and the NTB, opposed by most claimants).
5. In regards to the first issue (mandating process), coordinating claimant counsel Chelsea Terei submitted that an essential part of the Crown's decision to recognise the Deed of Mandate is the process. Ms Terei submitted that the process offered the contextual basis for why the Crown came to the decision it did. Counsel further submitted that Deputy Chairperson Judge Savage had stated in his decision granting urgency that contextual matters may be of interest to answer whether the NTB has the support of the Ngātiwai people. Counsel Kelly Dixon (for Wai 745 and 1308), Linda

Thornton (for Wai 2181) and Moana Tuwhare (for Wai 156 and Wai 2337) agreed that the Tribunal should inquire into the Crown's process.

6. In response, Crown counsel Andrew Irwin stated that the question is whether the Tribunal is willing to further open up the inquiry into process. Counsel for the NTB, Peter Andrew, submitted that Judge Savage had already looked into this matter, and there would need to be a compelling reason to reopen it.
7. As I stated at the teleconference Judge Savage did not grant urgency in respect of Crown process (see Wai 2561, #2.5.8 para 314) and after hearing from claimant counsel I am not persuaded that that issue should be added to the inquiry. I consider that it will be more beneficial to keep the focus of the urgent inquiry on the central theme as defined by Judge Savage (see Wai 2561, #2.5.8 para 314).
8. In regards to the second issue (NTB structure, and claimant representivity), Ms Terei stated that draft questions about the NTB's structure presume that the claimant hapū agree they are part of Ngātiwai, when many of the applications for this urgency were made on the basis that they are not part of Ngātiwai. Counsel John Kahukiwa (for Wai 2549) and Kelly Dixon (for Wai 745 and 1308) both took issue with how the draft questions are framed.
9. Counsel for the NTB submitted that questioning claimant representivity is unavoidable. Crown counsel endorsed these submissions of Mr Andrew, and also suggested some rewording of the issues questions.
10. I consider that a question focusing on the structure of Ngātiwai is necessary in this inquiry so that the Tribunal can understand the history and rationale for the NTB's structure, and whether these circumstances provide for hapū rangatiratanga.
11. After considering all written and oral submissions on this matter, the Tribunal has now finalised the Statement of Issues (see Wai 2561, #1.4.1).

Discovery process and the timely disclosure of documents

12. On 16 June 2016, I directed claimant counsel to update the Tribunal on the current status of their discovery document requests. I invited the Crown to respond to these submissions and provide substantive reasons as to why any documents are withheld (Wai 2561, #2.5.10).

Withheld Crown documents sought through discovery

13. Coordinating claimant counsel Chelsea Terei filed a joint memorandum on 27 June 2016 on behalf of nine claimant groups (Wai 156, Wai 745 and 1308, Wai 2181, Wai 2337, Wai 2544, Wai 2548, Wai 2550, Wai 2557) (Wai 2561, #3.1.93). Counsel identified 72 documents that the Crown continues to withhold in full or in part (Wai 2561, #3.1.93(a)). Claimant counsel submit that all documentation pertaining to this proceeding should be assessed for relevancy and therefore request the Tribunal to direct the Crown to release the withheld documents to the claimants. Alternatively, counsel seek Tribunal directions that the Crown provide the documents to the Tribunal for consideration.

14. Crown counsel Andrew Irwin and Kevin Hille filed a memorandum in response on 1 July 2016 (Wai 2561, #3.1.96). Counsel submit that the Crown has responded to the claimants' discovery requests by releasing the relevant documents, and withholding legally privileged material. The Crown is also withholding seven documents provided to the Crown in confidence. The Crown is ready to provide these confidential documents to the Tribunal if directed, but submit that the NTB should first be given the opportunity to make submissions about the documents' release. In terms of the documents the Crown is withholding due to irrelevance, counsel say that the claimants have not shown how any of the documents would in fact be relevant to the inquiry.
15. Coordinating claimant counsel filed a joint memorandum in response on 6 July 2016, on behalf of six claimant groups (Wai 745 and 1308, Wai 2181, Wai 2337, Wai 2544, Wai 2546, Wai 2548) (Wai 2561, #102). Counsel have no objections to any party – including the NTB – making submissions on the scope of discovery. Counsel submit that the claimants need to review all Crown documents, including those deemed irrelevant by the Crown, in order to address the central theme.

Claimants' request for the release of submissions on the NTB mandate

16. Claimant counsel seek directions that the Crown release to the claimants the full content of the submissions made to the Office of Treaty Settlements during the submission period in 2014 (Wai 2561, #3.1.102).
17. The Crown confirms that the submissions are publicly available on the Office of Treaty Settlement's website, with certain information redacted for privacy reasons (Wai 2561, #3.1.103). Crown counsel accept that the documents are potentially relevant to this inquiry, but remain concerned that there was an expectation from submitters that the submissions were made in confidence (Wai 2561, #3.1.103). The Crown is prepared to release the full unredacted copies of submissions, but seeks their release with certain conditions (noted in paragraph 18c below).

Summary of directions sought from the Tribunal

18. At the judicial teleconference, Crown counsel Mr Irwin summarised the directions sought from the Tribunal in regards to its three classes of documents.
 - a. If directed, the Crown will release the seven confidential documents to the Tribunal. As these documents were supplied to the Crown by the NTB, the Crown submits that the NTB should have the opportunity to make submissions on the release of the documents (see Crown memorandum dated 1 July 2016 (Wai 2561, #3.1.96, para 5)).
 - b. If directed, the Crown will release the documents it has assessed as irrelevant to the Tribunal. Crown counsel say the Crown assessed the documents as irrelevant because they are irrelevant, and the Tribunal may, if it prefers, choose from the list the documents it wishes to review (see Crown memorandum dated 1 July 2016 (Wai 2561, #3.1.96, para 9)).
 - c. If directed, the Crown will release full unredacted copies of all the submissions on the NTB Deed of Mandate to claimant counsel, but seek a

direction that the documents will only be used for the purposes of this inquiry and will not form part of the Wai 2561 record of inquiry unless leave is sought and granted (see Crown memorandum dated 8 July 2016 (Wai 2561, #3.1.103, para 5)).

Decision

19. I stated at the judicial teleconference that I would not make a decision on discovery until the Statement of Issues is finalised. Given this has now occurred I direct the claimants and Crown to review their positions, and to provide an update on whether the above directions are still sought from the Tribunal no later than **midday, Tuesday 26 July 2016**.
20. The Tribunal recognises that submissions made on the NTB mandate are likely to be highly relevant to this inquiry. I acknowledge Crown counsel's concerns regarding the privacy of those who made the submissions, however I consider that information relating to whether submitters were individuals, whanau, hapū or other groups, will be a relevant matter for inquiry.

Hearing and inquiry timetable

21. The hearing is scheduled to be heard on **Tuesday 4 – Thursday 6 October 2016**, at Toll Stadium in Whangarei.
22. If these dates present insurmountable difficulties, counsel are to file a memorandum on the reasons why they consider the dates should be changed by **midday, Tuesday 26 July 2016**.
23. I have asked counsel to work together to prepare a draft timetable for the filing of evidence and other documents in the lead up to hearings. Counsel are to file a draft inquiry timetable by **midday, Tuesday 26 July 2016**.
24. I have also asked counsel to prepare a draft hearing timetable. In doing so, counsel will need to ensure that the presentation and testing of evidence, as well as Tribunal Panel questioning, are able to be completed within the three hearing days allocated. Closing submissions are to be filed in writing only. If time allows, I will consider giving each party an opportunity to present a closing statement on the final day of hearings.

Wai 2548 (Te Kapotai) claimants' participation in inquiry

25. Counsel for the Wai 2548 (Te Kapotai) claimants filed a memorandum on 30 June 2016 informing the Tribunal that the Crown and the NTB confirmed that Te Kapotai hapū and associated Wai claims have been removed from the NTB Deed of Mandate (Wai 2561, #3.1.94). On the same day, counsel for the NTB filed an amended NTB Deed of Mandate, together with an explanatory note (Wai 2561, #A62; #A62(a)).
26. Claimant counsel sought leave for Te Kapotai to be an interested party in this inquiry, and to withdraw their application for an urgent hearing.
27. I have granted the leave sought.

Update on the NTB and Crown Treaty settlement negotiations

28. I note that counsel for NTB have already confirmed that the selection of negotiators will be put on hold pending determination of this inquiry (Wai 2561, #3.1.95) I direct counsel for the NTB to confirm whether the NTB intend to take any other steps in the Treaty settlement process prior to the Tribunal reporting on these claims such as progressing the terms of negotiations. Counsel are to file a memorandum clarifying their position by **midday, Tuesday 26 July 2016.**

Mediation

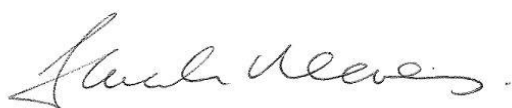
29. Recent developments in respect of the Wai 2548 (Te Kapotai) claimants' removal from the NTB deed of mandate indicate that parties to this inquiry are willing to show a degree of flexibility in regards to resolving issues of contention. With these matters in mind, I seek parties' submissions on whether some form of mediation process would be appropriate or practical at this stage in this inquiry. Counsel for the claimants and the Crown are to file memoranda outlining their views by **midday, Tuesday 26 July 2016.**

Other matters

30. I note that the version of the NTB Trust Deed appended to the affidavit of Emily Owen (Wai 2561, #A2(a)) does not appear to be complete. Schedule 2 to the Trust Deed is not attached. Counsel is directed to file a complete copy of the NTB Trust Deed.

The Registrar is to send this direction to all those on the notification list for Wai 2561, the Ngātiwai Mandate Inquiry.

DATED at Wellington this 19th day of July 2016



Judge S F Reeves
Presiding Officer

WAITANGI TRIBUNAL