

IN THE WAITANGI TRIBUNAL

Wai 2561

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Ngātiwai Mandate Inquiry

**MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER
ADDRESSING FURTHER EVIDENCE, CROSS-EXAMINATION OF
CONFIDENTIAL DOCUMENTS AND HEARING PLANNING**

20 October 2016

Introduction

1. In post-hearing week memorandum-directions dated 10 October 2016 (Wai 2561, #2.6.1), I directed parties to make submissions on the following matters by Friday 14 October 2016:
 - a. How much further hearing time will be required for the cross-examination of two Ngātiwai Trust Board (NTB) witnesses;
 - b. Whether the Tribunal should hear any further evidence; and if so, identify the nature of that evidence; and
 - c. Outline the agreed approach to the cross-examination of confidential material on the Wai 2561 Record of Inquiry.
2. I advised that I would make a decision as to how much further hearing time will be allocated to complete the evidential hearings and whether the Tribunal will require any further evidence. I noted that any further hearing time would be convened at the Waitangi Tribunal Offices in Wellington.

Submissions regarding further evidence and allocation of hearing time

Gregory McDonald

3. On 12 October 2016, interested party Gregory McDonald, of Ngāti Manuhiri, filed a memorandum seeking 30 minutes of hearing time for the presentation of evidence. Mr McDonald is currently unrepresented by counsel.

Joint memorandum of counsel regarding cross-examination and hearing planning

4. On 14 October 2016, claimant counsel Chelsea Terei filed a joint memorandum of counsel on behalf of:
 - a. The Crown;
 - b. The NTB;
 - a. Oriwa Block claim (Wai 156);
 - b. Patuharakeke Hapū Lands and Resources claim (Wai 1308 and 745);
 - c. Te Uri o Makinui (Beazley and Kapea) claim (Wai 2181);
 - d. Hapū o Whangarei Terena Paraoa (Norris and Fletcher) claim (Wai 2337);
 - e. The Ngātiwai Trust Board Deed of Mandate claim (Wai 2544);
 - f. The Ngātiwai Trust Board Deed of Mandate (Nehua) claim (Wai 2545);
 - g. The Ngātiwai Trust Board Deed of Mandate (George and others) claim (Wai 2546);
 - h. Te Waiariki, Ngāti Korora and Ngāti Taka Pari claim (Wai 2549);

- i. The Ngātiwai Trust Board Deed of Mandate (Mahanga and others) claim (Wai 2550); and
 - j. The Ngātiwai Trust Board Deed of Mandate (Reti) claim (Wai 2557).
5. Counsel have provided the following time indications for the cross-examination of the outstanding NTB witnesses:
 - a. Kris MacDonald
 - i. Moana Tuwhare (Wai 156 and Wai 2337), 45 minutes;
 - ii. Linda Thornton (Wai 2181), 2 hours;
 - iii. John Kahukiwa (Wai 2549), 1 hour;
 - iv. Kelly Dixon, Alisha Castle (Wai 745/1308), 30 minutes;
 - v. Neuton Lambert (Wai 2546), 15 minutes; and
 - vi. Chelsea Terei (Wai 2544), 15 minutes.
 - b. Tania McPherson
 - i. Chris Beaumont (Wai 2545), 15 minutes;
 - ii. Kelly Dixon (Wai 745/1308), 40 minutes;
 - iii. Bryce Lyall (Wai 2181), 30 minutes;
 - iv. Moana Tuwhare (Wai 156 and Wai 2337), 15 minutes;
 - v. Winston McCarthy (Wai 2546), 15 minutes; and
 - vi. Chelsea Terei (Wai 2544), 15 minutes.
6. The total time requested amounts to 4 hours and 45 minutes for the cross-examination of Mr MacDonald, and 2 hours and 10 minutes for the cross-examination of Ms McPherson.
7. In their joint submission, counsel advise that it is the claimants' preference for the cross-examination of the NTB to take place at a hearing held in Whangarei.
8. They further submit that the filing date for closing submissions should be set as soon as the date of the additional hearing time is confirmed.
9. Counsel for the Crown note that they will abide by the Tribunal's decision regarding the cross-examination of confidential documents.

Counsel for the NTB regarding claimant counsel requests for further evidence

10. In memorandum-directions dated 18 October 2016 (Wai 2561, #2.6.2), I granted leave for counsel for the NTB to file a response to the following matters:

- a. The 14 October 2016 joint memorandum of counsel on behalf of the claimants of Wai 745, Wai 1308 and Wai 2546 proposing that the Tribunal should hear evidence from Ms Nicola Gibbs, of Fathom Consulting Ltd; and
 - b. The 14 October 2016 memorandum of counsel on behalf of the Wai 2181 claimants seeking the production of various written communications.
11. On 19 October 2016, counsel for the NTB responded. Counsel says that the NTB does not agree with the submissions of the Wai 745, Wai 1308 and Wai 2546 claimants that evidence from Ms Gibbs would be relevant to this inquiry. However, counsel is willing to call Ms Gibbs as a witness if the Tribunal agrees with the claimants on this point. Counsel submits that if Ms Gibbs is to be called, leave should be given for her to file a brief of evidence two weeks prior to hearings. Counsel note that the 'fourth Fathom report' would be annexed to the brief.
12. Counsel for the NTB opposes the directions sought by the Wai 2181 claimants for all written communication over the past seven years with historian Mr Murdoch to be produced as evidence. Counsel submits the Wai 2181 claim falls outside the limited scope for which urgency was granted, as Te Uri o Maki-nui is not a hapū referred to in the Deed of Mandate. Counsel says the Wai 2181 claimants have not explained how the correspondence sought relates to the central theme or the Statement of Issues.

Counsel for Wai 2181 reply to NTB on request for the production of various written communications with Mr Graeme Murdoch

13. Also on 19 October 2016, counsel for the Wai 2181 claimants, Ms Thornton and Mr Lyall, filed a memorandum in reply. Counsel say that the NTB are attempting to litigate the issue of participation of Wai 2181 in this inquiry, which they say should be more properly left to closing submissions. Counsel submit the requested material is directly relevant to the central issue for Wai 2181, that of claimant identity, and to the Statement of Issues. Furthermore, counsel submit that the request equates to a narrow search and should not be unduly burdensome.

Decision: further evidence and allocation of hearing time

14. I grant the leave sought for the cross-examination of NTB witnesses Mr MacDonald and Ms McPherson.
15. I agree with counsel for Wai 745, Wai 1308 and Wai 2546 that the cross-examination of Nicola Gibbs, of Fathom Consulting Ltd, would be appropriate and beneficial to our inquiry. I note counsel for the NTB's willingness to call Ms Gibbs as a witness.
16. I grant leave for Ms Gibbs to file a brief of evidence by **midday, Friday 4 November 2016**. I direct claimant counsel to file any evidence in reply by **midday, Friday 18 November 2016**.
17. I do not agree with counsel on the potential relevance of all written correspondence between Mr Murdoch and Mr MacDonald and Ms McPherson to the key issues in this inquiry.

18. I grant leave for Wai 2181 counsel to file a brief of evidence on behalf of Graeme Murdoch responding to the documents contained in sections of the confidential claimant definition research documents (Wai 2561, #A90) by **midday, Friday 4 November 2016**.
19. I decline to grant interested party Mr Gregory McDonald 30 minutes of hearing time for the presentation of his evidence. Other parties have only been allocated 10 minutes to summarise opening submissions prior to cross examination of their witness(es). To maintain a fair and consistent approach, Mr McDonald is entitled to 10 minutes of hearing time to present a summary of his claim and outline his key evidence.

Tribunal request for records from Te Puni Kōkiri

20. The Tribunal is interested in the analysis and advice Te Puni Kōkiri (TPK) provided to the Minister for Māori Development in relation to the Crown's decision to recognise the mandate of the NTB. This information is potentially pertinent to this inquiry; specifically to issues 2 and 3 of the Statement of Issues.
21. I direct the Crown to file with the Tribunal all records that relate to advice and analysis provided by TPK to the Minister for Māori Development in relation to the NTB's mandate by **midday, Friday 4 November 2016**.
22. This includes records relating to TPK's separate review of, and determination in relation to, the Deed of Mandate that is referred to on page 9 of the document #A91(a), and all other records relating to the preliminary assessment and further assessment that are referred to on page 11 of document #A91(a). This also includes records relating to requests for additional information and subsequent analysis and advice resulting in four versions of the OTS and TPK joint memorandum to Ministers at #A73(a), page 5, page 34, page 48, page 61 and Appendix 6 at #A91(a) pages 124 and 156.
23. In order to test these records, the attendance of an appropriate representative from TPK at the hearing may be necessary.
24. I direct Crown counsel to file a submission identifying who they consider an appropriate representative may be and whether they will be seeking to file a brief of evidence by **midday, Friday 4 November 2016**.

Submissions regarding agreed approach to cross-examination of confidential documents

Joint memorandum of counsel regarding the agreed approach to cross-examination of confidential documents

25. On 14 October 2016, Justine Inns filed a memorandum on behalf of the NTB, the Crown, and counsel for Wai 156, Wai 2337 and Wai 2181 regarding the agreed approach to the cross-examination of confidential documents.
26. The memorandum notes that counsel for Wai 156 and Wai 2337, Moana Tuwhare, and counsel for Wai 2181, Bryce Lyall and Linda Thornton, were the only parties who sought leave to cross-examine NTB witnesses on confidential material during the hearing week.
27. Counsel propose that the cross-examination be dealt with *viva voce*.

28. Regarding the status of confidentiality, counsel advise that the confidential status of 'Doc #2' of #A90: *Questions for the Ngātiwai Trust Board re: the draft mandate strategy, 31 May 2013*, can be withdrawn and the document entered separately onto the Wai 2561 Record of Inquiry. The NTB decline to waive or withdraw the confidential status of any other documents.

29. Counsels' agreed position is therefore as follows:

- a. Counsel for Wai 156 and Wai 2337 to conduct cross-examination of Kris MacDonald on pages 1-86 of #A88 in a closed session.
- b. Counsel for Wai 2181 to conduct cross-examination of Kris MacDonald on pages 97-116 of #A90, insofar as they are general questions of context, in a public session. Cross-examination relating to the substance of the document will be conducted in a closed session.

30. Counsel propose to confer further on logistical and timing arrangements once hearing dates have been set.

Decision: cross-examination of confidential documents

31. I agree with the approach to the cross-examination of confidential documents outlined in the joint memorandum of counsel.

32. I direct the Registrar to file document 'Doc #2' of #A90: *Questions for the Ngātiwai Trust Board re: the draft mandate strategy, 31 May 2013*, on the Wai 2561 Record of Inquiry in order that it can be made available for public distribution.

Revised hearing timetable

33. While some scheduling issues are yet to be resolved, it is clear that more than 1 additional hearing day will be required for the cross-examination of outstanding NTB witnesses, Nicola Gibbs and, potentially, a representative from TPK.

34. The additional hearing time is scheduled for **Thursday 1 and Friday 2 December 2016**, at the Waitangi Tribunal Offices, Wellington.

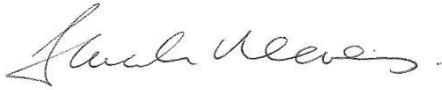
35. I will ask counsel to again work together to prepare a draft hearing timetable once any additional witnesses have been confirmed. The filing date for this will be set in due course, however I wish to note at this stage that:

- a. 30 minutes of Tribunal questioning must be scheduled for each witness;
- b. The timing and length of the closed session must be clearly indicated;
- c. 15 minutes of Tribunal questioning of confidential documents must be scheduled within the closed session; and
- d. 10 minutes of hearing must be allocated to interested party Mr Gregory McDonald, subject to his confirmation.

36. Closing submissions are due to be filed by **midday, Tuesday 20 December 2016**.

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 20th day of October 2016

A handwritten signature in black ink, appearing to read 'S F Reeves', with a stylized flourish at the end.

Judge S F Reeves
Presiding Officer

WAITANGI TRIBUNAL