

**IN THE WAITANGI TRIBUNAL**

Wai 2358

**CONCERNING**

the Treaty of Waitangi Act 1975

**AND**

the National Fresh Water and  
Geothermal Resources Inquiry

---

**MEMORANDUM-DIRECTIONS OF PRESIDING OFFICER**  
**CONCERNING POST-HEARING WEEK 1 EXTENSION AND LEAVE REQUESTS,**  
**AND MEMORANDA REGARDING MANA WHAKAHONO A ROHE/ IWI**  
**PARTICIPATION ARRANGEMENTS**

19 December 2016

---

## Post-hearing week 1 filing

1. On 22 and 29 November 2016, I issued post-hearing week one memorandum-directions (Wai 2358, #2.6.3; #2.6.4). Amongst other matters, these directions set out filing dates for written questions of clarification and cross-examination, and for documents requested at the hearing week.

### *Answers to written questions filed by Bennion Law*

2. On 9 December 2016, the Tribunal received the following extension requests to file answers to the written questions of Bennion Law:
  - a) Claimant counsel Donna Hall requests an extension to 21 December 2016 to file answers for 15 of their tangata whenua witnesses to the written questions filed by Bennion Law. Counsel states that the Bennion Law questions relate to the Crown's consultation document 'Next Steps for Fresh Water', including the concept 'Te Mana o te Wai'. Counsel submits that none of the tangata whenua witnesses commented on 'Te Mana o te Wai' in their briefs of evidence, and more time is needed to respond to the questions; and
  - b) Counsel Darrell Naden, representing interested parties Wai 1477, Wai 892, Wai 2377, Wai 1480, Wai 762, Wai 1716 and Wai 1968, requests an extension to 22 December 2016 to file answers for his seven tangata whenua witnesses to the written questions filed by Bennion Law. Counsel submits that an extension is required due to 'the number of witnesses involved and the breadth of the topics that are enquired about'.
3. I grant an extension to the above counsel to file answers to the written questions of Bennion Law by **12pm, Friday 3 February 2017**.

### *Written questions of the Crown for Dr Adele Whyte*

4. As directed, on 16 December 2016 Crown counsel filed questions in writing for Dr Adele Whyte. Dr Whyte gave evidence in hearing week one for interested party Ngāti Kahungunu Incorporated.
5. I direct Dr Whyte to file answers to the written questions of the Crown by **12pm, Friday 3 February 2017**.

### *Documents requested at hearing from counsel Mr Hirschfeld and Mr Sinclair*

6. On 9 December 2016, counsel for the Wai 861 and Wai 914 interested parties, Charl Hirschfeld and Tony Sinclair, filed a memorandum requesting a further extension to 16 December 2016 to file the documents requested at and following hearing week 1.
7. On 16 December 2016, Mr Hirschfeld and Mr Sinclair filed a memorandum of counsel and the requested documents, with one report outstanding. Counsel seek to file the report 'Archaeological Survey South East Whangarei' once received from the Northland Regional Council.
8. I grant the leave sought for late filing. I direct Mr Hirschfeld and Mr Sinclair to file the 'Archaeological Survey South East Whangarei' report as soon as possible, but by **12pm, Friday 3 February 2017**.

### **Late evidence of Zodiac Holdings Limited**

9. On 1 December 2016, Paul Thompson of Zodiac Holdings Limited, an interested party in this inquiry, filed a brief of evidence and accompanying appendices. Mr Thompson sought leave to file late. Zodiac was granted interested party status on 4 October 2016 (Wai 2358, #2.5.68).
10. The leave sought is duly granted. I direct the Registrar to place the evidence of Zodiac Holdings Limited on the Wai 2358 Record of Inquiry.

### **Request to transfer transcript of cross-examination to the Wai 2358 Record of Inquiry**

11. In my memorandum-directions of 22 November 2016 (Wai 2358, #2.6.3), I noted that two counsel had previously raised with me at a judicial teleconference that some evidence in this inquiry has already been tested before a different Tribunal. Counsel had stated that they may seek to file transcripts of cross-examination of this evidence on the Wai 2358 Record of Inquiry. I directed counsel to file any requests to file transcripts of cross-examination of evidence from other records of inquiry by 9 December 2016.
12. On 9 December 2016, the Crown filed a memorandum seeking to file the transcript for hearing week 21 of the Te Paparahi o te Raki (Wai 1040) inquiry to the extent that it contains Crown cross-examination of the following witnesses:
  - a) P Hamer, regarding his report 'Poroti Springs and the Resource Management Act' (Wai 1040, #A55, Wai 2358, #D3); and
  - b) P Gilkison, M Cunningham, R Webb, J Maynard, regarding their report 'Northland Rural Rivers: Environmental Management, Pollution, and Kaitiakitanga since 1991' (Wai 1040, #A60, Wai 2358, #D47).
13. The Crown notes that this transcript is currently in draft form. Crown counsel reserve the right to seek leave to add further transcript material to the Wai 2358 Record of Inquiry once it has reviewed all potentially relevant material.
14. I grant the leave sought by the Crown. Once the relevant Wai 1040 transcript is placed on the Wai 1040 Record of Inquiry, the Crown is to file the relevant parts concerning Crown cross-examination of the above witnesses and reports (in paragraph 11) so that it can be added to the Wai 2358 Record of Inquiry. The Crown may seek leave to file other relevant transcripts of cross-examination by **12pm, Friday 3 February 2017**.

### **Memoranda regarding 'Mana Whakahono a Rohe/ Iwi Participation Arrangement'**

15. On 13 December 2016, Crown counsel, Jason Gough and Damen Ward, filed a memorandum regarding the government's proposal for a 'Mana Whakahono a Rohe/ Iwi Participation Arrangement' (the MW-IPA). Counsel informed the Tribunal that the MW-IPA was included in amendments proposed in the departmental report to the select committee considering the Resource Legislation Amendment Bill.
16. The Crown submits that '[b]ecause the MW-IPA is before the House, it should not be the subject of evidence, questions, statements or comments from any party or the Tribunal in the Stage Two inquiry, until Parliament has decided whether or not to enact the proposal'. The Crown argues that 'the departmental report is a proceeding in Parliament. Any Tribunal consideration of a proceeding in Parliament would be contrary to the constitutional principle of comity between the branches of government, and in breach of s11 of the Parliamentary

Privilege Act 2014'. Crown counsel submit that the Tribunal should not inquiry any further into the mana whakahono proposals contained in the 'Next Steps for Freshwater' document, because a form of that proposal is being considered by a committee of the House.

17. Counsel state that the Tribunal will have jurisdiction over the Treaty-consistency of any Bill that Parliament chooses to enact. There is 'some prospect that Parliament will have completed its consideration of the Bill before the Crown hearing week in June 2017'.
18. On 14 December 2016, counsel for the Wai 2358 claimants, Richard Fowler QC and Matthew Smith, filed a memorandum in response. Counsel submit that the Crown's position appears to extend to the Tribunal not being permitted to consider parts of documents discovered by the Crown and written evidence filed by the claimants prior to 1 November 2016 – the date the departmental report was provided to the Select Committee.
19. Claimant counsel submit that the issues the Crown raise are 'novel and important', and therefore it would assist parties for the Tribunal to clarify 'the impact of the Act in the circumstances in which its impact is raised'. Counsel seek timetabling directions from the Tribunal, on the basis that the Tribunal will be assisted by legal submissions of the affected parties. Claimant counsel suggest staggered filing dates for the claimants and interested parties to respond to the Crown's memorandum in January and February 2017, with the Crown's submissions in response to those of the claimants and interested parties by 10 February 2017.

#### *Directions*

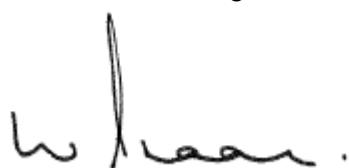
20. The Tribunal wishes to hear from parties on the matters raised by the Crown in its memorandum dated 13 December 2016. I direct parties to file their legal submissions in accordance with the following filing dates:

- a) Claimants file legal submissions in response to the Crown's memorandum (dated 13 December 2016) by **12pm, Friday 27 January 2017**.
- b) Interested parties file legal submissions in response to the Crown by **12pm, Thursday 2 February 2017**.
- c) Crown file submissions in response to those of the claimants and interested parties by **12pm, Thursday 9 February 2017**.

21. If the Tribunal considers it necessary, a short judicial conference may be held to hear oral submissions.

The Registrar is directed to send a copy of this direction to counsel for the claimants, Crown counsel and all those on the distribution list for Wai 2358, the National Fresh Water and Geothermal Resources Inquiry.

**DATED** at Wellington this 19<sup>th</sup> day of December 2016.



Chief Judge W W Isaac  
Presiding Officer

**WAITANGI TRIBUNAL**