

IN THE WAITANGI TRIBUNAL

Wai 2662
Wai 1750

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Whakatōhea Deed of
Mandate Inquiry

AND

claims relating to the North-
Eastern Bay of Plenty inquiry
district

**DECISION OF THE CHAIRPERSON ON COMMENCING AN INQUIRY INTO
WHAKATŌHEA HISTORICAL CLAIMS**

4 June 2019

Introduction

1. This memorandum-directions sets out the Tribunal's decision in response to requests for a Waitangi Tribunal inquiry into the historical grievances of Whakatōhea.

Procedural history

2. On 16 November 2018, counsel for Wai 2160, on behalf of Ngāti Muriwai, and counsel for Wai 87, on behalf of Whakatōhea hapū, filed a joint memorandum requesting an inquiry into Whakatōhea's historical claims and that the inquiry be prioritised in the Tribunal's work programme (Wai 2662, #3.4.64). This memorandum followed a vote conducted with Whakatōhea hapū, where one of the questions asked was whether hapū supported the holding of a Waitangi Tribunal inquiry into these claims. Counsel proposed as a starting point that the Whakatōhea Mandate urgent inquiry Tribunal panel be reconvened to hear the claims; that four or five weeks of hearing would suffice; and that only gap-filling research is likely to be required.
3. On 13 December 2019, I directed all parties in the Wai 2662 inquiry to respond to the joint memorandum (Wai 2662, #2.7.23). The Tribunal has received memoranda from the following counsel in response:
 - (a) Bryce Lyall, for Wai 2066, a claim on behalf of Ngāti Papanui and Ngāti Rua (Wai 2662, #3.4.66);
 - (b) Dr Gilling and Ms Dawe, and Mr Sinclair, respectively for Wai 2160, a claim on behalf of Ngāti Muriwai, and Wai 87, a claim on behalf of Whakatōhea hapū (Wai 2662, #3.4.67);
 - (c) Te Kani Williams and Coral Linstead-Panoho, for Wai 2606, a claim on behalf of Ngāi Tamahaua (Wai 2662, #3.4.68);
 - (d) Te Kani Williams and Coral Linstead-Panoho, for Wai 2589, a claim for the benefit of Ngāti Ruatakena (Wai 2662, #3.4.70);
 - (e) Tom Bennion and Emma Whiley, for Wai 2593, a claim on behalf of Ngāti Patumoana (Wai 2662, #3.4.69);
 - (f) Chris Beaumont, dated 1 February 2019, for Wai 2605 and 2257, claims on behalf of the whānau of the hapū Te Whānau a Apanui and Whakatōhea (Wai 2662, #3.4.71);
 - (g) Robyn Zwaan, for Wai 2563, a claim on behalf of the Te Upokorehe Treaty Claims Trust (Wai 2662, #3.4.72);
 - (h) Darrell Naden and Stephanie Roughton, for Wai 1082, Wai 2049, Wai 2055, Wai 2097, Wai 2107 and Wai 2462 (Wai 2662, #3.4.73);
 - (i) Annette Sykes, Rebekah Jordan and Jordan Bartlett, for Wai 2591, Wai 2592 and Wai 2594, claims respectively on behalf of Ngāti Ira o Waioweka, the Moutohora Quarry owners, and Te Whānau o Te Kahika, Kahikatea, Kahikaroa and Wharekahika (Wai 2662, #3.4.74); and
 - (j) Craig Linkhorn and Estelle Prado, on behalf of the Crown (Wai 2662, #3.4.65).

Summary of the submissions

4. In their submissions counsel advance the views and preferences of their clients on a range of matters.

Continuation of Treaty negotiations

5. The Wai 2593, Wai 2160 and Wai 87 claimants consider that the voting results demonstrate insufficient support for the mandate of the Whakatōhea Pre-Settlement Claims Trust to continue. The Wai 2606 and Wai 2589 claimants argue that settlement negotiations should not be resumed until the Waitangi Tribunal has completed a full inquiry into their historical claims, a position supported by the Wai 2257 and Wai 2605 claimants.
6. Crown counsel submit that the Crown remains committed to engaging further with the Whakatōhea Pre-Settlement Claims Trust and the hapū of Whakatōhea about next steps in the settlement process.

Support for a Tribunal inquiry

7. All claimants who have made submissions support a Tribunal inquiry into Whakatōhea's historical claims or North-Eastern Bay of Plenty claims generally. The Wai 2066 claimants submit that the results of the vote on the Whakatōhea Deed of Mandate indicate a general desire for a Waitangi Tribunal inquiry into Whakatōhea's historical grievances. The Wai 2593, 2160 and Wai 87 claimants conclude that all hapū support a Tribunal inquiry.

Type of inquiry

8. The Wai 2066 claimants (Wai 2662, #3.4.66) support the Wai 2160 and Wai 87 claimants' proposal for a prioritised inquiry into the historical claims of Whakatōhea. Most other claimants are either neutral or opposed. The Wai 2257 and Wai 2605 claimants do not as yet have a preference between a prioritised or a district inquiry but would prefer an inquiry to commence as soon as possible. The Wai 2066 claimants caution that any inquiry into Whakatōhea claims should not be unnecessarily truncated or rushed and that the standard district inquiry interlocutory process should be followed.
9. The Wai 2606 and Wai 2589 claimants do not support an expedited or truncated inquiry for Whakatōhea and submit that a district inquiry is more appropriate. Most other claimants call for a full or comprehensive inquiry into their historical claims, usually within a district inquiry setting.
10. Crown counsel indicate that the Crown does not have developed views on the optimal form of any inquiry.

Inquiry process

11. Most claimants oppose the initial suggestion by the Wai 2160 and Wai 87 claimants that 4-5 weeks of hearings in a prioritised inquiry would suffice. The Wai 2606 and Wai 2589 claimants' expectation that at least 11 hearing weeks would be required is widely shared. The Wai 2066 claimants have no set view and consider that a decision at this stage would be premature. Responding in their second memorandum, the Wai 2160 and Wai 87 claimants agree that the form of any inquiry into the Whakatōhea claims would be determined through the usual interlocutory processes.

Research

12. The Wai 2591, Wai 2592 and Wai 2594 claimants reject the initial suggestion by the Wai 2160 and Wai 87 claimants that minimal further research is likely to be required and call for historical research into the claim issues. Most claimants take a similar position.
13. The Wai 2606 claimants suggest that any existing research that has been prepared for settlement negotiations purposes may not be suitable for the purposes of a Waitangi

Tribunal inquiry. The Wai 2066 claimants note further that such evidence may not be made available and have asked for clarification from the Crown regarding research, including Crown funding of research for claimants.

Summary

14. All the claimant submissions support a Tribunal inquiry into Whakatōhea's historical claims or North-Eastern Bay of Plenty claims generally, but there is some disagreement over whether and how this inquiry should be prioritised and the extent of the research required for an inquiry into historical claims.

Discussion

The extent of support for a Tribunal inquiry

15. All the claimant submissions advocate a Tribunal inquiry into the historical claims of Whakatōhea. Several submissions point to the results of the vote in October 2018 as evidence of broad support amongst Whakatōhea for a Tribunal inquiry.
16. The vote was held in response to the recommendation of the Whakatōhea Mandate Tribunal that all adult members of Whakatōhea be enabled to express their views on whether to proceed with negotiations with the Crown for a settlement of Whakatōhea's historical Treaty grievances or alternatively to have them heard by the Tribunal.
17. The voting results are capable of varying interpretations. Although the questions were posed as alternative options, the total votes recorded for each question indicate that a number of respondents voted in more than one category. The questions asked also did not contemplate the option of Treaty settlement negotiations proceeding in parallel with a Tribunal inquiry. There appears to be general agreement, nonetheless, that the voting results indicate widespread interest in holding a Tribunal inquiry across all hapū, ranging from a third to two-thirds of votes cast by members of six hapū and 86 per cent for the seventh.
18. In determining whether an inquiry should ensue, it is not for the Tribunal to say whether, when or in what manner those claimants who wish to pursue Treaty settlement negotiations with the Crown should proceed. Whether they engage in settlement negotiations alongside or instead of participation in a Tribunal inquiry is a matter for them to decide. The Tribunal's concern is whether there is sufficient claimant support for the proposed inquiry. If there is, it is, as Crown counsel notes, for the Tribunal to schedule its inquiry into claims filed on behalf of Whakatōhea groups.
19. On the basis of a comparatively high turnout of a third of eligible Whakatōhea voters and the voting results, there appears to be substantial support for a Tribunal inquiry into the historical claims of Whakatōhea at both the iwi and hapū levels. Further, the applicants and all the claimants responding to the call for submissions support such an inquiry and say that their claims are made on behalf of most Whakatōhea hapū or of Whakatōhea hapū generally. The Crown does not oppose. On this basis, I am satisfied that there is substantial support for a Tribunal inquiry into the historical claims of Whakatōhea.

Form and scope of inquiry

20. As noted above, claimant preferences differ as to the form of inquiry. All, however, support an inquiry into Whakatōhea's historical claims, with most calling for a full or comprehensive inquiry. The Tribunal's long-established approach has been to hold district inquiries into claims that relate to a particular area, iwi or hapū, enabling it to gain a full understanding of claimant communities' shared experience of Crown policies and actions alleged to have breached the Treaty.

21. With minor exceptions, Whakatōhea claimants have not participated in the Ngāti Awa, Te Urewera and Gisborne district inquiries adjacent to their rohe. A district inquiry, as proposed in several claimant submissions, is the mode of inquiry best suited to the hearing of Whakatōhea's historical claims.
22. The rohe of Whakatōhea hapū falls mainly within southern part of the Tribunal's previously established North-Eastern Bay of Plenty district. To the north, the leadership of Te Whānau a Apanui notified the Tribunal in November 2016 that on being consulted, their hapū were unanimous in preferring direct settlement negotiations with the Crown to a Tribunal inquiry into their claims (Wai 1198, #2.4 & 2.4(a)). It is therefore appropriate to limit the North-Eastern Bay of Plenty district to its southern section, with a northern boundary extending inland from the coast near Torere to the Gisborne district inquiry boundary. The redefined district would include most of the area within which Whakatōhea's claims arise (see map at **Appendix A**).
23. As all parties will be aware, raupatu is a principal Whakatōhea grievance. The Bay of Plenty confiscation area extends northward beyond Torere as far as Omaio Bay. It may be appropriate for claimants with raupatu claims that relate to that northern extension also to be heard in a North-Eastern Bay of Plenty inquiry. However, the extent to which those claimants wish to have their raupatu grievances heard in a district inquiry remains to be determined and is a matter for consultation with the claimants concerned and other parties when the inquiry commences.
24. Parties should note that in a district inquiry the Tribunal hears all claims with grievances that arise within the district and wish to be heard. It also hears contemporary as well as historical claims. While Whakatōhea's historical claims would take centre stage, a North-Eastern Bay of Plenty district inquiry would thus also hear Whakatōhea claimants' contemporary grievances and the claims of any claimants within the inquiry district not affiliated to Whakatōhea who wish to bring them before the Tribunal.

Priority setting

25. Several claimants have called for a prioritised form of inquiry able to progress rapidly or for an inquiry to commence as soon as possible. The Crown has stated its intention to continue its settlement process by engaging with the Whakatōhea Pre-Settlement Claims Trust and Whakatōhea hapū. Should a negotiated settlement be reached, the Tribunal's ability to complete an inquiry into some of the Whakatōhea claims may be terminated or limited.
26. The applicants' request that an inquiry proceed without delay therefore has merit. However, a district inquiry focusing mainly on historical claims cannot be unduly hurried: sufficient time must be provided for evidential requirements to be assessed, necessary additional research to be undertaken, parties to prepare their cases and evidence, all claimants and the Crown to be heard and the Tribunal to prepare its report.
27. The Tribunal is committed to assisting claimants and the Crown to resolve Treaty claims and thereby to restore and sustain the partnership promised by the Treaty. To that end, the Tribunal has prioritised its inquiries into historical claims, principally through the district inquiry programme. A district inquiry into Whakatōhea and other claims would be accorded prioritised status within the Tribunal's work programme alongside the other district inquiries now under way.
28. It would also be open to claimants and the Crown to propose particular issues for early hearing and reporting by the Tribunal appointed to hear the claims.

Other matters

29. A number of other issues concerning research, inquiry process and hearings have been raised in claimant submissions. These are matters for the Tribunal panel appointed to conduct the inquiry to address.

Decision

30. The Tribunal will initiate a district inquiry into claims relating to the southern portion of the north-eastern Bay of Plenty area where the Tribunal has not previously held a district inquiry. The inquiry will commence as the North-Eastern Bay of Plenty district inquiry.
31. The district's boundary is broadly defined by the boundaries of the adjacent Te Urewera and Gisborne district inquiries and from the latter's northernmost point by a straight line to the coast just north of Torere (see map at **Appendix A**). Claimants who also have grievances arising in areas adjacent to the district will be able to apply to have them heard in the inquiry.
32. Any claimants who wish the Tribunal to hear their raupatu grievances that relate to the northern section of the Bay of Plenty confiscation area between Torere and Omiao Bay will, together with other parties to the inquiry, be consulted when the inquiry commences.
33. The Tribunal will inquire into claims arising within the district that claimants wish to bring for inquiry, both historical and contemporary, that have not previously been heard and that are not being heard in other inquiries, and have not been settled or otherwise disposed of. This includes all Whakatōhea claims that the claimants wish to have heard.

Appointment of presiding officer and Tribunal members

34. Pursuant to clause 5(1)(a)(ii) of the Second Schedule of the Treaty of Waitangi Act 1975, I appoint Judge Michael Doogan, a judge of the Māori Land Court, as presiding officer of the Tribunal panel for the North-Eastern Bay of Plenty district inquiry.
35. Pursuant to clause 5(1)(b) of the Second Schedule of the Treaty of Waitangi Act 1975, I appoint Mr Basil Morrison, Dr Robyn Anderson and Associate Professor Tom Roa as members of the Tribunal panel for the North-Eastern Bay of Plenty district inquiry.

Next steps

36. The Registrar is compiling a preliminary list of all claims registered with the Tribunal that may fall within the scope of the North-Eastern Bay of Plenty district inquiry. The list will be referred to the presiding officer for the North-Eastern Bay of Plenty district inquiry. Any claimants who wish to have their claims heard in this inquiry should notify the Registrar of their intention to participate.
37. To assist preparations for the district inquiry, Tribunal staff are undertaking a preliminary scoping assessment of existing evidential material. The submissions refer to research reports prepared under the auspices of the Whakatōhea Pre-Settlement Claims Trust and the Crown. It would be helpful for those research reports to be made available to assist the staff evidential assessment. I invite the Crown and the Trust to do so.

The Registrar is directed to establish a new combined record of inquiry, to be referred to as 'the North-Eastern Bay of Plenty district inquiry' with the reference number Wai 1750. All written materials previously filed on the claims that are admitted into the inquiry will form part of the Wai 1750 record of inquiry. All future documents filed by parties in relation to the matters subject to this inquiry should refer to Wai 1750.

The Registrar is to send a copy of this memorandum-directions to Judge Doogan, Mr Basil Morrison, Dr Robyn Anderson, Associate Professor Tom Roa, Crown counsel, all those on the notification list for the Whakatōhea Deed of Mandate Inquiry (Wai 2662) and to all other claimants whose claims relate to the North-Eastern Bay of Plenty district as specified in this decision, and also to the northern part of the former North-Eastern Bay of Plenty district..

DATED at Gisborne this 4th day of June 2019

A handwritten signature in black ink, appearing to read 'W W Isaac', with a period at the end. The signature is written in a cursive, flowing style.

Chief Judge W W Isaac
Chairperson

WAITANGI TRIBUNAL