

IN THE WAITANGI TRIBUNAL

Wai 1040

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Te Paparahi o Te Raki
Inquiry

MEMORANDUM-DIRECTIONS OF JUDGE C T COXHEAD

28 July 2020

Hei tīmatanga kōrero - Introduction

1. This memorandum-directions considers a request made by the Wai 2024 claimants on behalf of the Whatatiri Māori Reserves Trustees and the New Zealand Māori Council. They seek an early report specific to the Whatitiri Māori Reserves Trustees (“the Poroti Springs Claim”).

Kōrero whānui - Background

2. In memorandum-directions dated 9 June 2020 I notified parties that the Tribunal had received a memorandum filed by counsel Donna Hall and Lyndon Rogers seeking a separate and early report on the Poroti Springs Claim (Wai 1040, #2.7.31). A redacted copy of the claimants’ memorandum, as per the request of the claimants, was distributed to all parties and added to the inquiry record (Wai 1040, #3.4.20).
3. I considered that if the request for a separate report was granted, this would come with implications for other Wai 1040 claimants and the Crown. In light of this, I provided the Crown and other parties the opportunity to respond to this memorandum by 22 June 2020.

Party submissions in response

4. The following claimant counsel filed submissions in response to the request made by the Wai 2024 claimants:
 - a) Season-Mary Downs, Chelsea Terei and Heather Jamieson (Tukau Law) for Wai 68, Wai 149, Wai 455, Wai 565, Wai 1440, Wai 1445, Wai 1518, Wai 1520, Wai 1551, Wai 1527, Wai 1710, Wai 1972, Wai 2128 (Wai 1040, #3.4.21);
 - b) Annette Sykes, Jordan Chaney, Camille Dougherty Ware (Annette Sykes & Co) for Wai 354, Wai 1151-1169, Wai 1514, Wai 1664 (Wai 1040, #3.4.22);
 - c) Charl Hirschfeld, Barney Tūpara, Te Atairehia Thompson (Ranfurly Chambers) for Wai 861 (Wai 1040, #3.4.23);
 - d) Bryce Lyall (Lyall & Thornton) for Wai 42, Wai 593, Wai 869, Wai 1247, Wai 1383, Wai 1890, Wai 2010 (Wai 1040, #3.4.24);
 - e) Daniel Watkins (Watkins Law) for Wai 1538 and Wai 1259 (Wai 1040, #3.4.25) and Wai 1526 (Wai 1040, #3.4.29; #3.4.30);
 - f) Bryan Gilling and Caylee Wood (Mahony Horner Lawyers) for 246 (Wai 1040, #3.4.26);
 - g) Darrell Naden (Tamaki Legal) for Wai 2376, Wai 2377, Wai 2382 (Wai 1040, #3.4.27); and
 - h) Gerald Sharrock (Right Law) for Wai 230.
5. The majority of submissions received are opposed to the request. There is a clear concern from the claimants that any such prioritisation will divert Tribunal resources away from finalising the Tribunal’s inquiry report and so delay its publication.

6. I also acknowledge some support for a separate and early report made by counsel from Annette Sykes & Co (Wai 1040, #3.4.22) and Mahony Horner Lawyer (Wai 1040, #3.4.26).
7. On 22 June 2020, the Crown filed a memorandum in response (Wai 1040, #3.4.28). Counsel for the Crown, Mr Irwin, raised concerns with the provision of a redacted-only version of the claimants' memorandum to the parties, submitting that parties would not have the ability to respond fully without being privy to the full contents. The Crown proposed either of the two pathways moving forward:
 - a) if this request were to be granted by the Tribunal then the Wai 2024 claimants should make an unredacted version available for all parties to consider and respond to; or
 - b) the Tribunal should decline the request on the basis that other parties to the inquiry cannot fairly comment on the request.

Submissions filed on behalf of Wai 2024 in response

8. On 26 June 2020, the Tribunal received submissions on behalf of Wai 2024 filed in response to claimant and Crown submissions (Wai 1040, #3.4.32). Counsel submits that the special and exceptional purpose of this request for a separate and early report is not made on the grounds of urgency, but of expedience and public interest. Further, the request is made to create legal precedent for the benefit of the waterways named in the submissions that face serious ill-health, alongside all other waterways where Māori claim rights.
9. Further to the above, counsel submissions also respond to Crown and some claimants' criticism that a separate and early report will disadvantage other claimants. To this, the Wai 2024 claimants submit that the likely extent of the prejudice should be measured proportionally to the overall time taken in the preparation of the full and extended Te Paparahi o te Raki Stage two report. Further, Wai 2024 claimants submit that while some additional resources would need to go into the production of a separate and early report on the Poroti Springs claims, matters relating to Poroti Springs would have to be determined and reported on anyway before the release of a full report. To support these points, counsel identified the following as benefits that will come from a separate and early report into the Poroti Springs claims:
 - a) A widely supported Māori freshwater rights case running in the superior courts in 2021;
 - b) The resultant economic development benefits to all Māori from the accelerated development of water rights at common law; and
 - c) An early report articulating Treaty principles benefiting all northern water claimants prior to the release of the full report.

Whakataunga – Decision

10. The Tribunal has, in the past, determined requests for separate and early reports. Where interim reports have been issued by past Tribunals, there must be special circumstances which would prioritise the reporting of a claim or claims over the reporting of other claims within an inquiry.

11. There is no set criteria when determining whether to grant a request for a preliminary report. I have previously indicated to parties that such requests require points of consideration. In my memorandum-directions dated 26 February 2016, I outlined the considerations leading to the release of an interim/preliminary report as follows (Wai 1040, #2.6.173, at 7):
 - a) If the conclusions are final (i.e. can parties rely on it as being the Tribunal's final recommendation);
 - b) If it can be easily separated from the rest of the report and will not undermine what the Tribunal may say on related issues; and
 - c) If the interim report will later be incorporated into the main report or will remain separate (as there may be cost implications).
12. In response to this, counsel for Wai 2024 have proposed that an interim report on this case could be relied on as final, could easily be separate out from the rest of the report and would not undermine what the Tribunal may say on other issues, and need to be incorporated into the main report.
13. There are a number of examples of when the Tribunal has released preliminary and interim reports, most commonly to assist parties with settlement negotiations. In my memorandum-directions dated 26 February 2016, I outlined in detail eight instances of interim reports released by the Tribunal since 1993 and referred to the rationale provided for why an early report was granted in each instance (Wai 1040, #2.6.173). Most of these examples involved early report requests being granted due to an impending Crown action that justified the Tribunal's response. Those include:
 - a) Te Arawa Geothermal Resources Inquiry (Wai 153): a preliminary report on the Te Arawa representative geothermal recourse claim was issued because the Bay of Plenty Council was due to release their regional plan and the claimants had an interest in the geothermal issues being determined.
 - b) Central North Island Inquiry (Wai 1200): it was decided that the Tribunal would issue an early report into the Haane Manahi Victoria Cross Claim before ANZAC Day celebrations and the 60th anniversary of the end of WWII. The issue was easily separated from other historical issues and the Tribunal called for early, specific closing submissions on the claim.
 - c) Whanganui Lands Inquiry (Wai 903): the Tribunal provided an early report on aspects of the Ngā Wairiki claim (Wai 655) with the Tribunal's view on their evidence before the passing of the Ngāti Apa Settlement Bill (then before Parliament). In this instance, the Tribunal acknowledged that the Wai 655 party was also involved in the Ngāti Apa Settlement Bill.
14. Without going through each example to the extent that I have previously, I do refer to these interim/preliminary reports for the purposes of determining whether to grant the request for an early and separate (or preliminary) report into the Poroti Springs Claims.
15. Applying these considerations to Ms Hall's request, the matter falls short of being one that justifies the production of a preliminary report. There are no exceptional reasons as to why

the Tribunal should divert resources away from the Wai 1040 Inquiry so that the panel can focus on issuing a preliminary report with regards to the Wai 2024 claim.

16. I also refer to the memorandum of counsel filed by counsel Season-Mary Downs and Chelsea Terei on 19 June 2020 (Wai 1040, #3.4.21). Counsel propose that if the Tribunal are minded to grant prioritisation to the Poroti Springs claim then a submissions process should be afforded to the other claims that have also sought early reporting so that they may restate their case for the Tribunal's consideration. I am not minded to grant such a request, nor afford further time to parties to restate their case for consideration. Such cases were heard during the hearing phase and closing submissions and the Tribunal's time is best focused on the publication of the stage two report.
17. Further to my consideration above, I decline to provide an early report with regards to this matter given:
 - a) I am not satisfied that this interim report would have the effect as submitted by the claimants and referred to at paragraph 9 above; and
 - b) The matter of a diversion of resources away from the stage two report writing phase is of serious concern. I am unwilling to divert resources away to produce an early report for the Wai 2024 claimants for the purpose of creating legal precedent in relation to the waterways in question.
18. Accordingly, the request is declined.

The Registrar is to send this direction to all those on the notification list for Wai 1040, the Te Paparahi o Te Raki Inquiry.

DATED at Kirikiriroa on this 28th day of July 2020



Judge C T Coxhead
Presiding Officer

WAITANGI TRIBUNAL