

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

Wai 3325

E PĀ ANA KI
CONCERNING

the Treaty of Waitangi Act 1975

Ā,
AND

the Climate Change Priority
Inquiry

MEMORANDUM-DIRECTIONS OF JUDGE STEPHANIE MILROY FOLLOWING
17 FEBRUARY 2025 JUDICIAL CONFERENCE

26 February 2025

Background

1. In memorandum-directions dated 22 January 2025, I outlined my preliminary views on the next steps for this inquiry including the timing of hearing two and three, proposed filing dates and what evidence should be heard at these hearings (Wai 3325, #2.6.3).
2. Parties were, in the same memorandum-directions, invited to file submissions in response to these preliminary views. On 10 and 11 February 2025, the Tribunal received submissions from the following parties:
 - a) Crown counsel (Wai 3325, #3.2.12);
 - b) claimant coordinating counsel (Wai 3325, #3.2.13); and
 - c) Annette Sykes & Co on behalf of the Racism Against Māori (Wai 2494) claim (Wai 3325, #3.2.14).
3. Claimant coordinating counsel also filed an indicative list of witnesses (Wai 3325, #3.2.13(a)).
4. On 17 February 2025, I convened a judicial conference to discuss the next steps in the inquiry. I now confirm the following next steps in light of these discussions.

Confirmation of hearing two and three

5. I confirm that:
 - a) hearing two will be held via AVL on 7 – 11 April 2025; and
 - b) hearing three will be held via AVL on 26 – 30 May 2025.
6. **Appended as Appendix A** is the hearing two filing timetable.
7. When preparing the draft hearing timetable, counsel will please include time for Tribunal questioning alongside time allocations for claimant and Crown counsel cross-examination. Counsel should also include allowances for potential delays due to AVL disruptions.
8. I understand some claimants may lack proper internet connection to enable their participation via AVL. As with hearing one, I encourage claimant counsel whose clients may lack proper internet connection to contact claimantfunding@mfe.govt.nz to discuss what funding might be made available to assist their remote participation.

Evidence to be heard at hearing two and three

Claimant and Crown evidence filing dates

9. Hearing two and three will continue to hear claimant evidence. I remind parties that claimant evidence to be presented at the following hearings must be filed no later than:
 - a) Hearing two evidence filed by **5pm, Monday 7 March 2025**.
 - b) Hearing three evidence filed by **5pm, Monday 28 April 2025**.

10. The Crown has maintained that a 9-week gap between the filing of claimant evidence and Crown evidence is necessary to allow the Crown sufficient time to prepare its own evidence in response to claimant evidence (Wai 3325, #3.2.5).
11. Accordingly, Crown evidence is due to be filed in one tranche by **5pm, Monday 30 June 2025**. I confirm that the Tribunal will not hear Crown evidence until August 2025 at the earliest.
12. I stress that it is imperative that counsel adhere to the timeframes above as any postponement in the filing of evidence will delay the progression of the inquiry overall.

Nature of evidence to be heard

13. In memorandum-directions dated 22 January 2025, I introduced four broad categories for the nature of witness evidence that is likely to be heard in this inquiry (Wai 3325, #2.6.3). The purpose of the categories was to clarify what parties intended when referring to 'expert' evidence.
14. At the judicial conference, I canvassed whether 'expert' evidence should be heard at hearings two and three.
15. The Crown's position is that the upcoming hearings should exclude the hearing of expert evidence on the basis that all claimant and Crown expert evidence should be filed prior to the hearing of any expert evidence. As I understand, this is to allow the Crown to effectively prepare and cross-examine claimant expert witnesses and provide an opportunity for a possible conference of experts to occur prior to expert evidence being presented.
16. Claimant coordinating counsel's position is that hearings two and three should include the hearing of expert witnesses because:
 - a) some witnesses may present both expert and non-expert evidence and to separate these elements of the evidence would be artificial;
 - b) expert evidence will provide essential background and context to non-expert evidence;
 - c) the availability of some expert witnesses is limited to the upcoming hearing weeks; and
 - d) the conferencing of experts should not dictate when witnesses are heard as current issues regarding funding create uncertainty as to whether conferencing can occur at all.
17. I agree with claimant coordinating counsel's views that attempting to separate a witness' evidence for the purpose of hearing it separately would be artificial and inefficient.
18. Following the discussion at the judicial conference, a more helpful categorisation for the purposes of this inquiry may be:
 - a) **Tangata whenua evidence**. This is evidence of tangata whenua and may cover:
 - i. experiential evidence;

- ii. tikanga or mātauranga Māori evidence; and/or
- iii. western academic evidence.

b) **Non-tangata whenua evidence.** This is the evidence of non-Māori and will provide western academic evidence or technical evidence of a scientific and/or policy nature.

19. I can confirm that the Tribunal's preference is for hearings two and three to hear only tangata whenua evidence. This will limit the need to recall or put questions in writing to witnesses. Claimant counsel should organise the hearing timetable with this in mind.

20. I do however note that a pragmatic approach must be taken where non-tangata whenua witnesses can only appear at hearings two and three due to limited availability. In these cases, such witnesses may appear at hearings two and three.

21. I confirm, that following the filing of Crown evidence, Crown counsel may seek leave to re-examine or file questions in writing to any of the hearing two or three witnesses if new lines of inquiry are identified following the preparation of Crown evidence.

Conferencing of experts

22. I maintain that it would be beneficial to the Tribunal if the conferencing of experts, with a view of producing an agreed statement of facts were to occur. This would reduce the amount of evidence required to be heard.

23. As noted above, claimant counsel raised concerns about the feasibility of conferencing of experts. It appears this conferencing is unlikely to occur unless:

- a) an expert is funded by legal aid;
- b) an expert agrees to engage in the process at their own cost; or
- c) the process is funded by the Crown.

24. Crown counsel indicated that they would seek instructions on the extent to which the Crown could fund the conferencing of experts. I thank counsel for their efforts and seek that the Crown provide the Tribunal with an update as soon as practicable.

Other matters

Smith v Attorney General

25. Claimant coordinating counsel's submissions dated 10 February 2025, referred to the recent decision of the Court of Appeal in *Smith v Attorney-General*¹ to this inquiry (Wai 3325, #3.2.12 at [19] – [22]).

26. Counsel advised that in *Smith v Attorney-General*, a cause of action concerning a breach of Te Tiriti o Waitangi was found untenable in part because a claim could be made to the Waitangi Tribunal which the decision noted is conducting a priority kaupapa inquiry into the Crown's climate change policy.

¹ *Smith v Attorney* [2024] NZCA 692.

27. Counsel submit that this decision affirms the Tribunal's jurisdiction over Treaty claims concerning climate change and highlights its unique constitutional function in holding the Crown to account.

Possible priority issues

28. Claimant counsel co-ordinating counsel highlighted the following policy settings under the Climate Change Response Act 2002 as those which may benefit from some priority within the inquiry (Wai 3325, #3.2.12 at [23] – [25]):

- a) New Zealand's Second Emissions Reduction Plan.
- b) New Zealand's Second Nationally Determined Contribution under Art 4 of the Paris Agreement for the period 2031 to 2035.
- c) New Zealand's National Adaptation Plan, including the platform for Māori climate action.

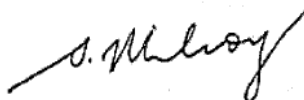
29. Claimant counsel submit that each issue presents an opportunity within the broader inquiry to deliver targeted findings and recommendations that will directly inform ongoing policy development and implementation.

30. At the judicial conference Crown counsel offered to file a timeline of the upcoming steps and actions relating to the above issues to assist claimants in determining which issues they may seek prioritisation on.

31. Accordingly, I direct Crown counsel to file a memorandum on the above no later than **5pm, Friday 14 March 2025**.

Following receipt, claimant coordinating counsel and Crown counsel are to liaise and discuss possible ways to prioritise these issues and refine the scope of the inquiry accordingly. This will be subject to discussion at a judicial conference I will convene during hearing week two. The Registrar is to send this direction to all those on the notification list for Wai 3325, the Climate Change Priority inquiry.

DATED at Hamilton this 26th day of February 2025



Judge Stephanie Milroy
Presiding Officer

WAITANGI TRIBUNAL