IN THE WAITANGI TRIBUNAL

Wai 2358

CONCERNING the Treaty of Waitangi Act 1975

AND the National Freshwater and Geothermal Resources Inquiry

MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER CONCERNING HEARING ONE AND ARRANGEMENTS FOR CONFIDENTIAL EVIDENCE

15 August 2024

Purpose

1. This memorandum-directions addresses submissions received on:

    (a) planning for hearing one of stage three of the National Freshwater and Geothermal Resources Inquiry (Wai 2358) (the stage three inquiry); and

    (b) arrangements for the hearing of confidential evidence filed by counsel for Te Kotahitanga o Ngāti Tūwharetoa (TKNT).

2. An updated inquiry timetable is **attached** as **Appendix A**.

3. I confirm that I will address further hearing two planning matters by way of separate memorandum-directions in due course.

Hearing one arrangements

Background

4. Hearing one of the stage three inquiry will be held at the Waitangi Tribunal's offices, in Wellington, from 9 to 13 September 2024 (Wai 2538, #2.6.98 & #2.6.101).

5. In my directions dated 17 July 2024, I indicated it would be useful to receive a confirmed list of witnesses who will appear at hearing one, along with confirmation of who will act as co-ordinating counsel for the hearing. I therefore directed counsel for the New Zealand Māori Council (NZMC) to file an update regarding these matters by 29 July 2024 (Wai 2358, #2.6.107 at [22]).

6. On 30 July 2024, Richard Fowler KC and Matthew Smith filed an update on these matters as directed (Wai 2358, #3.2.609).

Coordinating counsel for hearing one

7. Counsel for the NZMC confirms that they will act as co-ordinating counsel for hearing one (Wai 2358, #3.2.609 at [3]).

8. I thank counsel for this indication, which is duly noted.

Witnesses and hearing time for hearing one

9. In regard to witnesses and anticipated hearing time at hearing one, counsel advise (Wai 2358, #3.2.609 at [4]–[5]):

    (a) The NZMC intend to present their opening submissions and the evidence of all ten of their witnesses. While not specified in their memorandum, I note that counsel for the NZMC have previously advised that these arrangements would likely require between two and two-and-a-half hearing days (Wai 2358, #2.6.107 at [18]).

    (b) Phoenix Law have indicated they can present opening submissions alongside 'some of its evidence' (comprising five witnesses, or three briefs of evidence) subject to their clients' preferences which, co-ordinating counsel understand, are yet to be confirmed. Subject to that qualification, Phoenix Law anticipate they will require half a hearing day.

    (c) Tāmaki Legal have indicated they can present opening submissions alongside the evidence of three witnesses. Tāmaki Legal have advised co-ordinating counsel that they anticipate that they will require approximately half a hearing day.

(d) Annette Sykes has indicated that she may be in a position to present opening submissions for the Tai Tokerau Land (Wai 354) claimants and, subject to finalising instructions, to also present evidence. Ms Sykes has provisionally advised co-ordinating counsel that she anticipates needing approximately one quarter of a hearing day for these purposes.

10. Counsel for the NZMC advise that they will be able to confirm as coordinating counsel the time required by all hearing one participants before the draft hearing timetable is filed on 26 August 2024 (Wai 2358, #3.2.609 at [6]).

Discussion

11. I note that, on the basis of the above, hearing one currently appears to be undersubscribed, with at least one hearing day currently not utilised. This is somewhat surprising given the preliminary indications at the 8 July 2024 judicial conference that further hearing time may be required for stage three (Wai 2358, #2.6.107 at [54]).

12. It is imperative that all available hearing time be appropriately and efficiently utilised, particularly given the Tribunal's current resourcing constraints. It is also important that we have early and appropriate confirmation of the specific witnesses who will appear – so that inquiry parties, and the Tribunal panel, are able to adequately prepare and engage with the relevant evidential material in advance of the hearing.

13. With this in mind, I direct that counsel for the NZMC should confer further with claimant and interested party counsel and file a further update on hearing one arrangements by **5 pm, Monday 19 August 2024.**

14. Counsel should ensure that all available hearing time has been appropriately used and accounted for. Counsel should also include in their update a finalised list of the specific witnesses who will appear at hearing one.

Arrangements for the hearing of confidential evidence

Background

15. On 17 June 2024, I granted leave for the briefs of evidence of Paranapa Otimi, Herea Winitana and Te Ngaehe Wanikau for TKNT to be placed on the Wai 2358 confidential record of inquiry, and directed that this evidence (Wai 2358, #2.6.103):

    (a) is not to be made publicly available;

    (b) would be distributed to the Crown, Tribunal and parties to the Freshwater inquiry only;

    (c) is not to be copied or distributed beyond parties to the inquiry; and

    (d) may only be used for the purpose of the Freshwater inquiry.

16. Arrangements regarding the hearing of this confidential evidence were scheduled to be discussed at the 8 July 2024 judicial conference (Wai 2358, #2.6.105 & 2.6.105(a)). However, that discussion did not take place due to the number of other inquiry planning matters that arose on the day.

17. In a memorandum filed on 23 July 2024, counsel for TKNT accordingly advised that the claimants seek leave for the confidential evidence to be heard in a closed session attended only by the Tribunal, the Crown and other inquiry parties. Counsel request that

there be no livestream or media reporting during the closed session and that the transcript of this session be kept confidential (Wai 2358, #3.2.607 at [7]).

18. Counsel submit that the evidence contains mātauranga that the kaikōrero consider to be tapu and some of the information provided has never been shared publicly before (Wai 2358, #3.2.607 at [6]–[7]).

Discussion

19. Parties may request closed sessions during Tribunal hearings where they have witness evidence which is particularly sensitive, pursuant to the Tribunal's *Guide to Practice and Procedure.*[1] Accordingly, if I consider the evidence to be sensitive, access to the evidence will be restricted as is necessary to meet this sensitivity.

20. Whether I grant a closed session in consideration of the privacy interests of the witnesses, I must also consider the requirements of natural justice and the need for openness and transparency of the Tribunal's processes.

21. As set out in the memorandum of TKNT, the evidence of Mr Otimi, Mr Winitana and Mr Wanikau contains mātauranga of Ngāti Tūwharetoa that the kaikōrero consider to be tapu and which has never been shared publicly before. I do not consider that granting a closed session will impact the public's interests in the wider inquiry or the principles of natural justice. Having regard to these factors, this evidence is considered sensitive.

22. I therefore grant leave for the confidential evidence of Paranapa Otimi, Herea Winitana and Te Ngaehe Wanikau to be heard in a closed session where only the Tribunal, the Crown and parties to this inquiry may be present.

23. In accordance with the Tribunal's *Guide to Practice and Procedure*, I confirm that public coverage or any other recording of this session will be prohibited, including live-streaming, personal recordings and media reporting.

24. The transcript for the closed session will be placed on confidential record of inquiry and there will be no disclosure outside of the session of any information or documentation disclosed or heard during the closed session.

25. Co-ordinating counsel are to provide for this closed session in the corresponding draft hearing timetable.The Registrar is to send this direction to all those on the notification list for Wai 2358, the National Freshwater and Geothermal Resources inquiry.

DATED at Gisborne this 15th day of August 2024

Judge W W Isaac
Presiding Officer
WAITANGI TRIBUNAL

[1] Waitangi Tribunal, *Guide to the Practice and Procedure of the Waitangi Tribunal* (2023) at [6.21] – [6.22].