WAI 1750 – NORTH EASTERN BAY OF PLENTY DISTRICT INQUIRY

JUDICIAL CONFERENCE

HELD AT WAITANGI TRIBUNAL OFFICE, WELLINGTON

FRIDAY 31 OCTOBER 2025

Tribunal:	Judge Michael Doogan Dr Grant Phillipson Prue Kapua Basil Morrison
Crown Counsel:	Mr Craig Linkhorn Mr Daniel Hunt
Claimant Counsel:	Ms Karen Feint KC Ms Jacki Cole Ms Raewyn Clark Ms Bobbi Walker Ms Carmen Mataira Ms Robyn Zwaan Ms Hannah Swedlund Ms Tammy Wana Mr Siaosi Loa Ms Chelsea Terei-Tipene Ms Ihipera Peters Mr Tony Sinclair Mr Brett Cunningham Mr Michael Sharp Ms Eve Rongo Ms Māia Te Hira Ms Annette Sykes Ms Tania Te Whenua Mr Matthew Kennelly
Interpreter:	Nil

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(10:01) JUDGE MICHAEL DOOGAN: (MIHI)

Tuatahi, ka tika, ka tū ki te tuku he mihi poto ki a koutou. Ahakoa taku mihi tuatahi ki te atua te orokohanga o ngā mea katoa mai i te rangi ki te whenua, mai te whenua ki te moana kia whakapainga tōna ingoa tapu. Nō reira, me inoi tātou.

KARAKIA TĪMATANGA (JUDGE DOOGAN)

Ki a koutou te hunga ora, ngā mahuetanga o rātou mā, tēnā tātou. Kei te mihi hoki ki te maru wehi o te rohe nei Te Ātiawa tae atu hoki ki Ngāti Toa Rangatira tēnā koutou. Ngā rōia mō te Karauna, ngā rōia kaimahi, koutou ngā rōia ki te ipurangi mōrena koutou.

Ka tū ahau nā te mea Ahorangi Tom Roa kei tāwāhi ināianei ki Tahiti. Lucky, Tom.

I'm just standing to open and to welcome you all. Thank you for being available. We'll get underway. I'll sit down and we'll start with appearances.

Mōrena koutou. As you can see, I have with me the panel. From the left, Mr Basil Morrison, Dr Grant Phillipson, Ms Prue Kapua, and Dr Robyn Anderson. Appearances Ms Feint tēnā koe.

(10:04) MS KARENT FEINT KC: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, otirā tēnā koutou katoa kua huihui mai i te ata ātaahua nei. Ko Karen Feint tōku ingoa. He rōia ahau i Ngāti Rua, Wai 1782. Tēnā rā tātou.

(10:04) MS RAEWYN CLARK: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, ngā mema o Te Rōpū Whakamana Te Tiriti o Waitangi, ngā rōia kia ora tātou. Counsel's name is Ms Clark appearing with my friend Ms Walker on behalf of the following claims and claimant groups:

Wai 1781 Ngāi Tamahaua, Wai 1795 Tāwhirimatea Williams and the hapū of Ngāti Rua, Wai 203 Te Whānau a Mokomoko, Wai 1827 the descendants of Rangihaerepo, and Wai 1920 Tania and Rachel Wolfgramm and others. Kia ora.

(10:05) MS CARMEN MATAIRA: (MIHI, APPEARANCE)

Tēnā tātou. Tēnā koe e te Kaiwhakawā, otirā ki a koutou ngā mema o Te Rōpū Whakamana i tō tātou nei Tiriti o Waitangi tēnā koutou. Anei au e tuku whakawhetai ana ki a koe e te Kaiwhakawā, anei au e tuku mihi ana ki a koe i tō mihi mai ki a mātou a ki a tātou i tēnei ata. Ko Ms Mataira ahau. Kei konei au hei rōia mō Te Whānau ā Mokomoko mō Karen Mokomoko, Wai 203. Kia ora rā.

(10:05) MS ROBYN ZWAAN: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā. Counsel's name is Zwaan appearing for Wai 758 the Roimata Marae claim. Tēnā koe.

(10:05) MS HANNAH SWEDLUND: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, anō hoki ki a koutou ngā mema o Te Rōpū Whakamana Te Tiriti o Waitangi. Ko Ms Swedlund ahau. Ka tū nei ahau mō Wai 1092 the Ūpokorehe claim, Wai 1787 the Rongopopoia hapū claim, Wai 3272 the Ūpokorehe Settlement claim. Tēnā koutou.

JUDGE DOOGAN ADDRESSES COUNSEL ONLINE – APPEARANCES (10:06:25)

(10:06) MS TAMMY WANA: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā me Te Rōpū Whakamana Te Tiriti o Waitangi. Ms Wana and Mr Loa on behalf of Tamaki Legal representing Wai 2743, a claim by Annette Hale on behalf of the late James Rohu Wikotu, for and on behalf of the Wikotu whānau, and Te Ūpokorehe. Tēnā koutou.

(10:07) MS CHELSEA TEREI-TIPENE: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, otirā tēnā koutou katoa. Ko Mrs Terei-Tipene tōku ingoa e whakakanohi ana mō te kerēme o Ngāti Ngahere Wai 1884. Nā reira, tēnei te mihi ki a koutou.

(10:07) MS IHIPERA PETERS: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā nāu i whakatuwhera ai tō tātou hui i runga i te tika me te pono. Ko Ms Peters tēnei nō te tari o Kaupare Law. Kei konei au hei whakakanohi i te kerēme nā John Hata rāua ko Russell Hollis rāua kua wheturangitia, otirā rātou ko Antoinette Hata rāua ko Te Ringahuia Hata mō te hapū o Ngāti Patumoana, ko Wai 1775 tā rātou nama. Tēnā koe. Tēnā tātou.

(10:08) MR TONY SINCLAIR: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā me Te Rōpū Whakamana Te Tiriti. Sinclair, Sir, appearing for Wai 87 Whakatōhea Raupatu claim, also appearing as agent for Mr Sharp, Wai 2160 Ngāti Muriwai hapū, also appearing Sir for Wai 1794 Tūrangapikitoi claim. Mr Sharp and Mr Cunningham, Sir, are involved in other court fixtures today. They put in their apologies. Thank you.

(10:08) MS EVE RONGO: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā. Ko Eve Rongo tēnei. He rōia mō Ngāi Tai Wai 78. Kia ora.

(10:09) MS MAIA TE HIRA: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, nāu te āio o te rangi i tuitui ki te ao o te whenua i tēnei ata, otirā, mōrena ki a tātou katoa. Ko Māia Te Hira ahau. Kei konei ahau ki te whakakanohi i ngā kerēme o te tari o Annette Sykes and Co, ko te kerēme Wai 558 tērā, te kerēme mō te hapū o Ngāi Ira o Waioweka, ko te kerēme Wai 2510 te kerēme a te whānau Kahika, ko te kerēme Wai 2728 tērā a te kerēme nā whaea Sharon Campbell mō tōna whānau ake, otirā ko te kerēme Wai 864 tērā, he kerēme tērā mō te hunga nā rātou ngā whenua o Whakapaupākihi 2. Ka tae tōmuri mai a Ms Sykes, kei tētahi atu kōti ia i tēnei ata, otirā ko Ms Cole hoki kei tētahi atu kōti. Ākene pea ka tae ā-tinana atu a Ms Cole akuanei engari mō tēnei wā tonu ko ahau. Tēnā tātou.

(10:10) MS TANIA TE WHENUA: (MIHI, APPEARANCE)

Āe, tēnā koe e Tā, nāu anō i tuku whakamoemiti ki te runga rawa kia huakina te kūaha ki a tātou i roto i te tika, te pono, te māramatanga, nā reira, ki a koe, otirā tō pae rangatira kei te mihi, kei te mihi. Huri noa tātou aku hoa rōia, te Karauna ka tautoko au i ngā mihi kua mihia. Ko Ms Te Whenua taku ingoa. Kei konei ahau mō Wai 1511 Ngāi Tamatea hapū. Tēnā koutou.

(10:11) MR MATTHEW KENNELLY: (MIHI, APPEARANCE)

Tēnā koe e te Kaiwhakawā, otirā tēnā koutou e Te Rōpū Whakamana Te Tiriti o Waitangi. E mihi ana au ki te Karauna, ki ngā rōia kua huihui mai nei hoki. Ko Mr Kennelly taku ingoa nō te tari o Te Mata Law. Kei konei au mō ngā kaikerēme e rua ko Wai 2066 nā Takaparae Papuni mō Ngāti Ruatakena me Whakatōhea me ko Wai 1789 nā Bella Savage mō ngā uri o Hineatua Savage. Tēnā koutou.

(10:11) MR CRAIG LINKHORN: (MIHI, APPEARANCE)

Kia ora Sir. E Te Rōpū Whakamana Te Tiriti o Waitangi tēnā koutou. Craig Linkhorn, Daniel Hunt for the Crown. Greetings everyone.

JUDGE DOOGAN TO MS SWEDLUND – JOINT MEMORANDUM OF COUNSEL

(10:12) JUDGE DOOGAN: (AGENDA: JOINT MEMO OF COUNSEL)

Just how we proceed, we'll just work through the agenda in the order that we've indicated. I'll commence where possible with counsel who are present in person and then go to those online.

We have read the submissions that have been filed. I'm sorry, with the exception of the submissions we've received this morning, Ms Te Whenua. We simply haven't had a chance to look at those so we'll come to that in due course.

Just with this first matter which is the application in the joint memorandum from September from yourselves and Mr Lyall. You don't need to rehearse the content because that's clear to us what's being sought and the background how

that's come about following the Supreme Court decision. What would be helpful is if you could address us in part in response to some of the issues raised by Crown counsel and Ms Sykes in opposition to the application and any other matters you would like us to consider and then we'll probably have some questions along the way. But if you're happy to proceed on that basis if we could start in that way please.

(10:14) MS SWEDLUND: (RESPONSE #3.1.217)

Tēnā koe e te Kaiwhakawā. Just to note that the submissions can be found at #3.2.217. As your Honour has indicated, I won't go word by word through the submissions but will mostly speak to the opposition articulated by my learned friends.

In terms of Te Ūpokorehe are aware that the joint memoranda filed at #3.2.224 notes that more hearing time will be required for the process. Counsel have already made the submission that they do not believe the current constraints on hearing time are realistic and will not lead to the ability to properly enquire into the claims of Te Ūpokorehe. This is supported by most claimants within the inquiry, the generic needing more time which I believe my friend will speak to later in more depth. But we would respectfully ask the Tribunal to reconsider this indication, particularly as the proposal for such a preliminary report is intended to allow a fuller inquiry into Te Ūpokorehe's claim.

I believe the crux of the opposition would be the Crown at 14 to 18 of their submissions at #3.2.223 and the joint memorandum at #3.2.224 which alleged that the Tribunal can reach findings on the asserted breaches of the Treaty in the Ūpokorehe statements of claim without needing to determine who holds customary title. In response, we would say that Te Ūpokorehe's claim, the centre of their claim is that the Crown has undermined their identity and therefore the mana of Ūpokorehe through its actions. This would necessitate and inquiry into the traditional customary rohe and the type of authority that was exercised by Te Ūpokorehe both prior to and during the Crown's actions throughout the inquiry period.

This has been articulated in the statements of claim:

- The Wai 1092 statement of claim at 1.1(i) at 18 articulates this very clearly.

- The Rongopopoia claim alleges that the Crown's identification of Ūpokorehe as one hapū runs counter to the centuries of complex whakapapa of Ūpokorehe which necessarily means looking into the rights that they have exercised within their rohe.

- The Wai 3272 claim asserts that mana, tikanga, and whakapapa of the five hapū of Te Ūpokorehe are not recognised. Instead, that the Te Ūpokorehe identity is invisibalised within the group as being treated as one hapū of Te Whakatōhea.

Te Ūpokorehe do intend to amend their statements of claim to further highlight and clarify these alleged breaches by the Crown. But essentially to properly assess the claims of Te Ūpokorehe, we would submit that the Tribunal must first decide who the tangata whenua of the Ūpokorehe rohe are and that this question of identity lies at the heart of their claims which challenged the Crown's mischaracterisation of their people and its consequences. Te Ūpokorehe will further advance evidence directly concerning these matters during the hearing set down for the claims. That would be my submission Sir on that.

(10:17) JUDGE DOOGAN TO MS SWEDLUND:

Q. Thank you. I follow what you're saying but the application made is for essentially a shifting of our hearing focus in order to produce what's called a preliminary report on customary rights or authority in and around Ōhiwa and also for commissioning of further research for that purpose. In part, the way the application is framed is in reliance on the comments from the Supreme Court that the decision of that court might be potentially revisited in the event something emerges out of this inquiry. As matters stand in terms of you were right to say that the issue of Ūpokorehe identity in and of itself and relative to Whakatōhea, to neighbouring hapū/iwi on all of the borders is clearly an issue in the statements of claim filed. It's

clearly matters that we were made aware of in the tuku iho stage. We understand and expect to hear further, and from a very quick look at Mr Husband's report, there is obviously quite a lot in there also that speaks to these issues and identity, and so far as that goes those are issues are squarely before us in our inquiry. What we are less sure about is the reasons to change the intended path of our inquiry in the way that's being sought. Why is it necessary for us for example issue a preliminary report or to commission further research?

A. Well, Sir, addressing this issue through a preliminary report will both urgently insist in determining matters that are central to the claims and it will enable Te Ūpokorehe to rely on the Tribunal's findings in seeking a legislative response or a recall should those findings cast real doubt on the conclusion of the Supreme Court in the timeframe available prior to orders being finalised.

Q. Yes, but the logic of that seems to be based upon a reading of the Supreme Court's comments which Crown counsel and Ms Sykes take issue with and I think there is some force in the submissions they make that the Supreme Court appears to be making an observation. It's not, as I see it, a direction to this Tribunal to do other than what we are charged by the Treaty of Waitangi Act to do which is to enquire into claims made by Māori claimants of Treaty breach against the Crown. What I'm taking from your submission and from the application itself is that you see something a little bit stronger in the Supreme Court's reasoning. If I'm right in that, can you elaborate?

A. Aroha mai, Sir, I'm just getting the reasons up. The Supreme Court says that: "Te Ūpokorehe has a claim in the Waitangi Tribunal as part of 1750 alleging breaches of the principles of the Treaty of Waitangi in relation to the Ōhiwa harbour and land abutting the harbour and the evidential issues discussed above can be more suitably addressed, if necessary, by the Tribunal as part of this claim." The court concluded that: "If the findings of the Tribunal casts real doubt on its conclusions, then this would warrant a legislative response or recall of the decision." We would submit that this a clear indication that the Supreme Court contemplates this Tribunal making findings of this nature within Te Ūpokorehe rohe.

Because to be able to have this kind of response that the Supreme Court contemplates, the Tribunal would necessarily need to make the findings in time for the decision to be recalled.

(10:23) DR GRANT PHILLIPSON TO MS SWEDLUND:

Q. Can I just ask, what is the timeframe for the recall of the decision?

A. Just a moment, Sir. It would be any time before the formal record of it. The orders would be drawn up and sealed. We would be able to seek a recall. It has gone back to the High Court for CMT1 so this would give us some time.

(10:24) JUDGE DOOGAN TO MS SWEDLUND: (CONTINUES)

Q. Your understanding of the procedure is that remittal of CMT1 back to the High Court also would have the effect of staying or holding off the drawing of orders with respect to CMT2, is it?

A. No, Sir. CMT2 would be finalised shortly I believe.

Q. That's Ōhiwa harbour, isn't it?

A. Yes, Sir.

Q. That's the particular focus that you want to advance in this inquiry.

A. Yes, Sir. The timeframe for that order being sealed is less clear but I would anticipate it would be shortly.

Q. All right. If that order is sealed recall becomes no longer an option, but parliamentary intervention, which was the other possibility raised, the Supreme Court is then the only remaining remedy.

A. Yes, Sir.

Q. All right. If you don't mind, just on this set of issues, I might just go to counsel for the Crown and for Ms Sykes just to get any submissions or response they wish to make on this matter. Thank you.

A. Thank you Sir.

(10:26) DR GRANT PHILLIPSON TO MS SWEDLUND: (CONTINUES)

Q. Just one, sorry. In the examples that you've given in your submissions of where the Tribunal has dealt with specific customary rights of different groups to areas, it has usually either been in the settlement process to

assist the settlement process and that's not applicable here, or there has been a Crown act, a specific Crown act or omission requiring it. For example, the Rena issue that led to the Motiti report, or in Te Tau Ihu, it was the large Crown purchases where the issue became: "Did the Crown buy from the correct people?" What is the specific Crown act or omission that would require us to determine the specific or make findings about who has customary rights in Ōhiwa harbour?

A. I think here sir there is not necessarily one specific Crown omission. But it's more a process by which the Crown has invisibalised Te Ūpokorehe's identity and therefore their mana within their rohe. So that would be those constitutive acts that we would be relying on.

Q. It's not clear to me what are the alleged acts or process. Because there is the trust board issue which is a particular issue where –

A. Yes.

Q. – the witnesses have said it was decided by Te Whakatōhea not the Crown as to who would be on that. What are the other? If you're not able to answer that right on the spot, you could include it in the submissions. But I think it's really important that there actually be a particular driver for this, other than the Supreme Court having said what it did.

A. Yes, sir. I think off the top of my head, I can say the Te Arawa Reserves being granted within the Ōhiwa rohe and the Ōpape and Hiwarau in Hiwarau C issues would be, but I can answer that more fully in writing.

Q. Yes.

A. And also we would intend to amend the statements of claim to make this more clear for the Tribunal.

Q. Okay that would be helpful if you could answer that in writing. Thank you.

A. Thank you sir.

JUDGE DOOGAN ADDRESSES MS FEINT KC – INTEND TO CROSS-EXAMINE (10:28:34)

MR SINCLAIR ADDRESSES JUDGE DOOGAN – INTEND TO CROSS-EXAMINE (10:28:47)

(10:29) MS FEINT KC: (RESPONSE)

Just to contextualise this, the first point is that what happened in the MACA proceedings in the High Court was that Te Ūpokorehe sought customary marine title to Ōhiwa harbour on an exclusive basis. They argued that no one else had customary title in the harbour and the hapū of Whakatōhea and Ngāti Awa also sought customary marine title.

There was a contested eight-week hearing with voluminous evidence. At the end of that eight-week hearing, the High Court granted customary marine title order in the Ōhiwa harbour to Te Ūpokorehe the hapū of Whakatōhea and on the western to Ngāti Awa.

The High Court specifically said they did not need to determine the issue of whether Te Ūpokorehe was a hapū or an iwi. Justice Churchman simply named the recipients of the CMT order in his judgment as Te Ūpokorehe, Ngāti Ira, Ngāti Rua, Ngāi Tama and so on.

Te Ūpokorehe appealed that finding. They lost in the Court of Appeal. They also lost in the Supreme Court. The Supreme Court reviewed the evidence, notably former Waitangi Tribunal chair, Sir Joe Williams was on the panel. Their conclusion was that because Ōhiwa harbour was a pātaka kai of regional significance there were many customary rights and interests and shared whakapapa which resulted in shared customary marine title rights within the harbour. Because there was also evidence that for instance Tūhoe also has rights to come through to Ōhiwa and that's referred to in the Supreme Court decision as well.

The Supreme Court made its decision and then it made these ambiguous observations. I would submit that they are obiter comments because, as I think Dr Phillipson has already noted and the Judge has as well, it doesn't appear that they were directing the Tribunal to change its inquiry based on its jurisdiction. But rather simply noting that if the Tribunal thought that something had gone badly wrong with those findings that it might say so and that might result in either a legislative remedy or the Supreme Court being persuaded to

recall its judgment. But I would submit that those observations are both obiter but also that that is a high bar to overturn findings that the Supreme Court has reached because the Supreme Court did dismiss Te Ūpokorehe's appeal.

Thirdly, if we think about the statutory jurisdictions, it is really important to be clear about that because under the MACA Act the Supreme Court considered the section 58 test and who had met that test. There are two lims, both that you hold customary title according to tikanga and also that you can show exclusive use and occupation from 1840 until present.

That is a very different jurisdiction to the Tribunal's which, as Dr Phillipson has already pointed out, is to enquire into the Crown's actions or omissions, legislation or policies in breach of the Treaty. Our submission is that the Tribunal does not need to make findings of customary title in Ōhiwa harbour in order to determine Te Ūpokorehe's claims in relation to Ōhiwa harbour.

Now I think there are two sets of claims that are relevant here. The first is as my friend has submitted the identity and mana of Te Ūpokorehe. The second is their claims to kaitiakitanga within the Ōhiwa harbour. In relation to that second claim, our submission is that the Tribunal can reach findings about whether the Crown has respected their kaitiakitanga without making detailed findings as to exactly who has customary rights within Ōhiwa. In relation to the first claim, the mana and identity of Te Ūpokorehe is a claim that can be assessed without making detailed customary title findings.

I think the important point is that the real issue is not whether Te Ūpokorehe has customary rights within Ōhiwa. I think everyone accepts that they do. The issue is whether those rights are exclusive or whether other Whakatōhea hapū have customary title rights there as well. The other I mean ironically Ngāti Rua is not claiming into Ōhiwa, even though some of the evidence was that they had constructed pā on the shores of the harbour. But Ngāti Ira, Ngāi Tama certainly did, and there was significant evidence brought by at least those two hapū from memory.

So determining the answer to that question is not the same question as whether the Crown has respected the mana and identity of Te Ūpokorehe. As I understand their claim, their claim is more about being subsumed within under the mana of Whakatōhea and they are asserting a distinct identity. But it seems to me that they can establish that they do have a distinct identity without needing to establish that they have exclusive rights in Ōhiwa harbour.

The next point is that the nature of the inquiry would have to change significantly in order for the Tribunal to proceed to reach findings on this point. My friend has suggested that Te Ūpokorehe will amend its statement of claim. Well, it will need leave to amend the statement of claim because we have already past the time for the final deadline for filing amended statements of claim and the other hapū would oppose that.

Secondly, because it would be a contested inquiry into who holds customary title rights within Ōhiwa, it would not only require further evidence from Te Ūpokorehe but also evidence from the other hapū that also assert that they have customary rights. That would require not only further evidence to be led but also contested cross-examination which this Tribunal is not allowing of tangata whenua witnesses. I submit that would need to change if there was going to be a contested inquiry into the customary rights.

I would make all those submissions in light of I suppose something the Supreme Court pointed out as well in which this Tribunal will be well familiar with that complex overlapping customary title rights are the norm rather than the exception. It is extremely unusual to have exclusive rights unless you are talking about the heartland of a particular hapū. But when you are talking about a harbour that is the most significant resource area in the entire Whakatōhea region, it is not surprising that there would be shared customary rights as the High Court, the Court of Appeal, and the Supreme Court have already found.

One of our submissions in the Supreme Court was that because it is such a significant resource area, Te Ūpokorehe needed the assistance of other hapū

to defend that from outside the region. That is why there are those shared whakapapa relationships.

Given the low likelihood that Te Ūpokorehe can establish that they do have exclusive rights and the very significant changes that would need to be made to the Tribunal's inquiry in order to exceed to this request, we submit that it would be both unnecessary but also prejudicial to the other claimants.

Finally, in relation to the submission that there needs to be a preliminary report, I would submit that there isn't any urgency. I don't understand that the CMT order too is going to be sealed any time soon because the mapping needs to be completed because of the resource constraints under the Crown's new funding regime. It is likely that all the mapping will be done together.

At the moment, we both need to have CMT Order 1 reheard in the High Court because that order, which is the coastal order, the order from the coast all the way to Whakaari, that needs to be reheard. But also there is stage two hearing in the Court of Appeal which is due to be set down for the second half of 2026 and that includes wāhi tapu issues relating to CMT Order 2. CMT Order 2 cannot be sealed until after that stage two hearing takes place.

There is a section in the MACA Act, which I'm just trying to remember what it says, but it says something to the effect that you can't seal the orders until all appeals have been disposed of. It's not until we get to the very end of the process that the orders can be sealed. I mean we're at the every least a whole year off concluding that process but probably more like two or possibly even more.

Those are my submissions in support of the opposition of Ms Sykes' clients Ngāti Ira and also the other hapū to the extended inquiry request.

QUESTIONS FROM TRIBUNAL PANEL – NIL

JUDGE DOOGAN ADDRESSES MS FEINT KC – MIHI, ACKNOWLEDGEMENT (10:42:32)

(10:42) MR SINCLAIR: (RESPONSE)

Sir, the issue regarding the Ūpokorehe/TUT application has to be seen Sir in the light of Ūpokorehe has three representative groups before the MACA and before this Tribunal. The three representative groups Sir are Wai 87 the Raupatu Whakatōhea Iwi in which Ūpokorehe are represented there, the Whakatōhea Trust Board is a Ūpokorehe hapū since 1952, and then we have of course the Te Ūpokorehe Treaty Claims Trust. Te Ūpokorehe Treaty Claims Trust matter has been heard several times, through the Tūhoe Mandate matters, the Whakatōhea Mandate matters and inquiry, through the High Court MACA, Court of Appeal, and Supreme Court.

Justice Churchman, as Ms Feint rightly pointed out, made the determination that whether Ūpokorehe is an iwi or a hapu will not be determined in the High Court. Sir, that matter went right through Court of Appeal and to the Supreme Court. The matter of not determining whether it's a hapū or an iwi, Sir, where does that fall? The Waitangi Tribunal is surely the most expert body to determine those matters.

As you have seen with the evidence my witnesses have put forward through the hearings including the last hearing is that this matter is a live issue. Who exercises the mana over Ūpokorehe is first and foremost the matter to be determined. I say it be determined by the Waitangi Tribunal.

Now just leaving aside the Crown grievances for now Sir and going back to the displacement and the bundling together and all of those issues. Sir, if this matter is not dealt with by the Tribunal, it is left to the Supreme Court to deal with it. The Supreme Court have clearly said that they are not going to make a determination on that and they have requested assistance from the Tribunal.

(10:45) JUDGE DOOGAN TO MR SINCLAIR:

Q. Mr Sinclair, you are saying that this Tribunal should be entering into and coming to some view upon is the status of Ūpokorehe as a hapū or an iwi? Is that the issue you're putting to us?

A. Yes, Sir.

Q. We need to decide or we need to pronounce upon that because?

A. Because, Sir, it does to the identity of Whakatōhea as an iwi. I mean if Ūpokorehe are an iwi in their own right, Sir, they have then therefore the right to establish separate boundaries as they have done in their evidence. They have filed exclusive boundary areas right through Ōhiwa harbour. They have the right then to engage in settlement negotiations quite separate to Whakatōhea.

The other effect which is going on right now is the issues around the Ōhiwa harbour which marae are aligned and which hapū are part of Te Ūpokorehe Treaty Claims Trust. They are claiming Rongopopoia, Kutarere Marae, Maromahue. Sir, none of those marae and none of those members of those hapū have been heard.

Q. In relation to the application that we are discussing this morning, are you therefore registering support for some form of priority or preliminary report on customary rights as argued for by Ms Swedlund and Mr Lyall?

A. Sir, yes. However, the proviso to that is the identity of the Ūpokorehe entity itself. In that regard, I think the Waitangi Tribunal is the most appropriate body to make that determination. Unfortunately, with all due respect, that determination hasn't been made through the number of inquiries and hearings that I've just quoted. There has been a lot of obiter made Sir. There has been a lot of commentary. But the matter on the Ūpokorehe iwi/hapū has not been conclusively dealt with.

Sir, just on the issue of whether further research is required, I don't see that as a substantive point. The evidence there is voluminous in regard to the Ūpokorehe iwi matter. It is simply a matter of compiling it and the Tribunal making a determination to assist the Supreme Court and the appeals, Sir.

Q. All right. I think my colleague Ms Kapua has just reminded me, as I am hearing what your identifying as an unresolved issue or an open issue, it

seems be at least in part a question of which contemporary entity properly represents or speaks for the customary collective of Ūpokorehe. If that's broadly correct, then isn't that more of a matter for the Māori Land Court under the section 30 jurisdiction?

A. I mean correct Sir that is a possibility. However, the Tribunal is appropriate body in terms of looking at the historical record and historical account. This matter is I believe too big for the Māori Land Court to deal with. The fact that the Whakatōhea Trust Board since 1952 has represented Ūpokorehe. Customary rights have remained with hapū of Ūpokorehe. There has never been an iwi matter Sir. The Tribunal are dealing with this matter live right before it right now, Sir.

Q. All right. But our jurisdiction is to respond to claims of Treaty breach against the Crown. We are not a standing commission with a particular responsibility or mandate to try to pronounce upon customary entitlements, rights, and all of that, unless it is relevant or necessary in order to properly respond to Treaty breach claims against the Crown. I'll leave it there but thank you.

MS CLARK ADDRESSES JUDGE DOOGAN – ORAL SUBMISSION (10:51:56)

(10:52) MS CLARK: (#3.2.221)

Sir, as coordinating counsel I filed a memorandum, memorandum #3.2.221 and this particular matter was addressed at paragraphs 9 and 10. I will be very brief but the purpose of my submission is to note the interface between this issue and the hearing planning issues.

Sir, the nub of the submissions that we made in relation to hearing planning was that we advocate for a 10-week timetable. This Tribunal has proposed a six-week timetable. Sir, as claimant counsel, we would note that the outcome of this particular request could significantly impact on inquiry timeframes and we would strongly suggest that additional hearing time would be required to accommodate this request.

It would be sensible for this question to be determined in advance of any determination about the inquiry timeframes. Certainly, we would say potentially additional time to the 10-weeks would be required and most certainly, additional time to the six-weeks were this request to be accommodated, Sir. Those are my submissions. Thank you.

(10:53) JUDGE DOOGAN TO MS CLARK:

Q. Thank you Ms Clark. When you're 'sensible to determine this issue' you're meaning the application for a priority report and a change of procedure?

A. That is correct, Sir.

Q. All right.

A. Thank you.

Q. Thank you. That's clear.

(10:53) MR LINKHORN: (RESPONSE)

Thank you your Honour. The Crown memorandum you have. It says in there the Crown abides the Tribunal's decision on this. Can I just make three quick points and then one further half a point we'll say in response to Mr Sinclair.

The three points that I take from the exchanges today are that the need for a separate and distinct process by the Tribunal doesn't really sound like it's made out and you would expect this Supreme Court judgment to have said something quite clear about that. That is what the Supreme Court itself had in mind that the Tribunal's inquiry programme would be caused for this issue or it would become a parallel track, or something with, I think as my learned friend Ms Feint made the point, Sir Joe Williams on the Supreme Court and in his own experience of this body, you can expect something to have been said if it was other than the Tribunal's usual inquiry process.

That brings me to the second point that people have identified which is the provision in the MACA legislation, which is section 113 about the sealing of orders, whereas there might be general procedural opportunity to seal orders as the final outcome of a court case. Here it is specifically provided for in the

legislation and it cannot be done until appeal periods have expired or appeals have been determined. Ms Feint's pointed out there is an appeal about the CMT2 area. She has also pointed out the practicality may well be that no sealing of any aspect of this occurs until all of the CMT covered by this litigation is finally resolved and there are mechanical things that need to occur in terms of mapping and survey and so on. But perhaps there is one further point to make on this which is that the legislation doesn't appear to prescribe a strict timeframe in which an order must be sealed. It would be open to parties to leave it if they were waiting on a Tribunal report and thought that might make some difference or open to parties to sort of wave it around in front of you as a Tribunal to urge your faster deliberations perhaps to put it another way.

And then the third point on this issue of the application by Te Ūpokorehe is to recall that the test for CMT itself has the Senior Courts exploring claims of exclusivity. They have got a statutory job to do there. Ms Feint has given you an account of how they have done it in this case. It is not as if the courts here, and the Supreme Court judgment in particular, has identified something that's sort of lacking from their jurisdiction that they are exercising and they think to themselves: "Oh, well, the Tribunal will have something to say because of its broad jurisdiction and we might learn something from that, therefore, we'll plug some sort of gap." No, this was exactly the task that they had in front of them to determine the applications for CMT.

The point in response to Mr Sinclair's submissions this morning is really I suppose to say that it sounds like Mr Sinclair has spotted a sort of collateral purpose. That the Te Ūpokorehe we'll call it the MACA application to the Tribunal could be put too which is that Mr Sinclair has spotted that: "Maybe this could turn into *also* a determination of status." I think that's problematic and want to submit why very briefly.

As your Honour identified, the jurisdiction you're exercising under the Treaty of Waitangi Act 1975 is principally about interaction with the State and the Crown. And in the course of which you might say 'who was interacting and who was this group', but that's not the principal focus which is on the impact of

the State on groups. But we can see how things are contextually relevant as to who the group was.

Even then, it's very, very unlikely, isn't it, that the Tribunal would determine the status of a group or determine the status of a group at any point in time. It might make findings about what it perceives the status of the group to be but it's not exercising a determinative jurisdiction.

In my submission, nor is the Māori Land Court under section 30 ancillary provisions adjacent to that of Te Ture Whenua Māori Act 1993. Under that section 30 representation jurisdiction that the court is tasked in quite specific circumstances with deciding who it is that are the contemporary representatives of a group. Without wanting these to sound like distinctions that are overly fine, can we think of it perhaps as determination of a status group happening in the customary jural space and questions of who represents a group at any particular point in time might fall to be determined under section 30 of Te Ture Whenua Māori Act 1993 under State law. In other words, another jural space.

Those would be my submissions in response to the points made orally. Unless members of the Tribunal have questions, I can sit down.

(11:01) JUDGE DOOGAN TO MR LINKHORN:

Q. Thank you Mr Linkhorn. It's just an observation really and a possible pātai. In the memorandum filed at paragraph 9 you submit that: "It would make sense the Court had in mind (and talking about the Supreme Court's observations) that the Tribunal maintain its current inquiry process. The determination of customary marine title is exclusively governed by the Takutai Moana Act." And then you go on to talk about the tests under that legislation. One of the issues that I think arises in light of this application for some form of priority report on customary title, customary rights, or however it is expressed in relation to Ūpokorehe and Ōhiwa comes to this question that you noted in relation to Mr Sinclair's point which is collateral objectives or the extent to which this Tribunal is being invited into what is essentially a collateral challenge

to the MACA outcomes. Yes, so I don't know whether that's a fair characterisation of some of the points you're raising in the submission or the oral submissions you've just made. If you want to comment on that. I will ask Ms Swedlund to come to this in response to any of the other points counsel have made as well. But it is one of the issues that I'm giving some thought to as to the appropriate respect this Tribunal needs to show to a statutory jurisdiction set up for resolution of MACA matters and they are now quite jurisdiction. I'll leave it there but if you wanted to make any response to that.

A. Well, I mean this touches on the third point I make about – yes, I agree that this Tribunal is not setting out to redetermine the test for CMT. It may be that this is a further indication that Supreme Court was acting out of an abundance of caution in making these observation or to put it even sort of more strongly was being polite that courts should be alive to the issue that something might come along out of left field or semi-left field or the adjacent field of another body that might cause some revision to the understanding. But I think we can submit with a very higher degree of certainty that this is not an invitation to determine CMT and the tests for it or to second guess what the courts have done in determining the exclusivity part of the test for CMT in relation to this particular area of Ōhiwa.

Q. Thank you that's helpful.

(11:05) MS SWEDLUND: (RESPONSE)

Tēnā koe Sir. Just a few points to make in response. The first point in relation to my friends contention that the Tribunal can determine essentially the issue relating to Te Ūpokorehe identity without enquiring into who holds the primacy of mana within the Ōhiwa harbour, I would make two points.

For the identity issue is that the central plank of their identity is that they have the mana and therefore the primacy of rights within the Ōhiwa harbour and within their rohe. Secondly, just to note in relation to the kaitiakitanga claim that kaitiakitanga is inseparable from rangatiratanga and whether or not the Crown

has therefore respected Te Ūpokorehe's kaitiakitanga necessarily requires determination of the weight of rights and interests within the harbour.

Secondly, the point my friend has made about there being a low likelihood of exclusive rights, Te Ūpokorehe would say this would be decided on the evidence. Moreover, they are asserting primacy of rights rather than complete exclusivity. They accept others have used the harbour but they say that they have the mana in that situation.

In relation to the point made by my friend that changes would be required to the inquiry to make it more adversarial, we would agree with this, however, we say that it can be determined in a way that is respectful. We touch on this in our submissions at 40 to 45 where we suggest that a hybrid approach be adopted for questions concerning customary rights and interests. So the guide to practice and procedure of the Waitangi Tribunal states that: "Where there is a disagreement, it may be appropriate for counsel to avoid direct questioning of kaumātua and instead make a statement of possible position and then invite the kaumātua to respond. And then any difficulties associated can be addressed in subsequent legal submissions on the weight to be given to that evidence." Te Ūpokorehe would say that approach could be adopted and it is respectful while allowing contested issues to be tested.

Lastly, my apologies about the CMT Order 2 misinformation. But the suggestion that it would require mapping and a stage two hearing and wouldn't be sealed until the appeals are filed would support the indication for a preliminary report as that would allow a time for the Tribunal to consider these issues.

(11:08) JUDGE DOOGAN TO MS SWEDLUND:

Q. I'm sorry to interrupt you. Just on the points you've made so far –

A. Yes Sir.

Q. – on primacy of mana and kaitiakitanga being inseparable from the rangatiratanga, I understand. But we can still in our current planning of this inquiry which would see Ūpokorehe hearings towards the end of our

inquiry timetable. We would still, as I understand it, be able to hear whatever evidence Ūpokorehe wish to bring forward in support of their conception of identity, status in these places. The issue is whether there is some valid or important reason to suddenly adjust our timetable, adjust our process in order just to do a preliminary report of the kind you've described. The only reason, as I understand it, is based on the observations from the Supreme Court and the link that that gives rise to the ultimate outcomes of those proceedings. That's right, isn't it?

A. Yes, Sir. But just to note on the timetabling, Te Ūpokorehe don't believe that any huge adjustment would need to be made to the process of the hearing.

Q. All right.

A. With the research being commissioned and things, it would all align with Te Ūpokorehe presenting in 2027.

Q. Right.

A. It wouldn't necessarily be: "Let's go now," approach. It would be still in line with the current timetable.

Q. All right, thank you.

A. Secondly, yes, the Supreme Court's comments would be the basis on which we rely on seeking a preliminary report in their contemplation that the judgment may be recalled. Just to comment on the point that the Supreme Court would have said something more clearly if it wanted the Tribunal to enquire into it, we would say that it is not unheard of that obiter comments do end up carrying significant weight. Essentially, if the Supreme Court didn't think that the Tribunal would be an appropriate forum in which to make these enquiries and didn't think that the Tribunal's opinions were relevant to its decision, it simply wouldn't have said anything is essentially that point.

Q. All right. Just briefly on the application or the wish for further evidence, why do you say further evidence is needed?

A. Sir, what we propose is further research.

Q. Sorry, research not evidence.

A. Yes, Sir. So that would be essentially a report to be commissioned with a specific focus on the rohe moana of Te Ūpokorehe. We believe this

report would be able to be carried out quite quickly, as it would be able to build off the reports of Dr Husband and Dr Spinks. It wouldn't be a starting from scratch approach. So that would enable it to be produced on a timetable alongside the evidence of Te Ūpokorehe. But we believe it's necessary, as Te Ūpokorehe do not have access to the Crown Forestry Rental Trust funding and therefore can't commission a report themselves and further, it would be able to support their claims to be able to be determined.

Q. Again the prompt for this seems to be again the Supreme Court's observation rather than – I mean this is a new suggestion for research. By the 'rohe moana' you're referring to Ōhiwa and out into CMT 1 as well.

A. Yes, Sir, and the Waiotahe. But the particular focus would be on Ōhiwa and Waiotahe.

Q. A number of other parties have already filed on our record evidence that was placed before I think predominantly the High Court in the original MACA hearings. Have you clients done so?

A. No we have not yet, Sir.

Q. Do you intend to?

A. I would have to seek instructions on that point. But we will be bringing evidence in some form on the customary rights and interests of Ūpokorehe within Ōhiwa and out to sea.

Q. The reason I'm asking is simply to get an understanding of the extent to which there is already available evidence around the customary or the coastal marine area from the MACA proceedings that may be of relevance –

A. Yes.

Q. – in our inquiry and we've expressed before a willingness to receive relevant evidence on to our record. The related question I guess is the last point I just raised with Mr Linkhorn which was the extent to which it would be – or an issue arises for this Tribunal about the appropriate boundaries between the jurisdiction of the other courts under the MACA legislation and our proper role under the Treaty of Waitangi Act. Do you have any submissions you want to make on where the appropriate boundary lies?

A. Just essentially that we are not asking for the test for CMT as in the specific statutory framework to be relitigated but the task of this Tribunal is to enquire into the claims against the Crown before it. Te Ūpokorehe would assert that the Crown's actions have undermined their primacy of mana in and around the Ōhiwa harbour and so would want the inquiry to be focused on that aspect. Looking at the Crown's actions rather than just a generic question of who holds mana.

Q. Yes. All right thank you.

A. Thank you Sir. Those are all my submissions.

Q. All right. There is obviously an overlap in some of these matters with the matter we're going to discuss a bit later which is the forward hearing programme and the number of weeks we have available, so we'll come back to some of those issues to the extent we need to a bit later in the agenda.

A. Yes, Sir.

MATTERS ARISING FROM TRIBUNAL, COUNSEL – NIL

(11:16) MS SYKES: (RESPONSE)

Sir, it's Ms Sykes here. Sorry, I'm late. I had another call that prevented me. I got the submissions from Ms Feint. I don't know if she wishes to respond. But I think my position more aligns with Mr Linkhorn with respect to the section 30 issues and jurisdiction than others. On the questions of jurisdiction, I think those matters have been adequately traversed in our submission.

I do not accept Mr Sinclair's proposition either that that was what was in the mind of the Supreme Court in the reference that he made.

(11:17) MS TE WHENUA: (RESPONSE)

Tēnā koe Sir. Ms Te Whenua speaking. If I may just add one point in response to Ms Swedlund also. This is a matter that was raised where I was instructed on very recently. Just to note on the part of Wai 1511 Ngāi Tamatea who of course exercise mana over Maromahue Marae which is considered by Te Ūpokorehe to be in their claim a marae of Te Ūpokorehe. And also noting

that Te Waru Tamatea negotiated for the grant of land, he also negotiated for access to Te Ahiaua and was indeed granted land near Te Ahiaua. They would want to contribute specific evidence and be heard around that. So that would require additional evidence on their part and also the allocation or consideration of the time allocation with respect to our hearing planning, Sir. I wish to note that.

(11:18) JUDGE DOOGAN: (AGENDA: JURISDICTIONAL ISSUES)

All right, thank you counsel. We might take a little break around half past 11 for a coffee. There's quite a shopping list of jurisdictional issues starting with the Rongopopoia hapū matters. Ms Swedlund are you speaking to this as well?

(11:18) MS SWEDLUND: (RESPONSE)

Kia ora anō Sir. I can speak to both the 3272 and the 1787 matters together. Our points are very brief.

For Wai 3272, the Crown's issue is that it recorded in its statement of position that the Wai 3272 statement of claim addresses the Whakatōhea settlement and the preceding settlement negotiation process. They say that the Crown's jurisdiction is barred by section 15 of the Whakatōhea Claims Settlement Act.

In relation to Wai 1787, the Crown in its statement of response identified paragraph 46 of Wai 1787 amended statement of claim raised issues relating to settlement which is again beyond the Tribunal's jurisdiction. Those are the only indications we've had so far from the Crown as to challenges to this Tribunal's jurisdiction.

Te Ūpokorehe would submit in response that the Tribunal would have jurisdiction to enquire into the processes that led to settlement and that the Whakatōhea Claims Settlement Act bars the Tribunal from enquiring into historical claims, the deed of settlement, the Act or redress. However, the process by which the settlement was reached, we would say, is a contemporary claim and would still remain live.

Te Ūpokorehe acknowledge that the Tribunal is not able to make findings into the settlement itself and would request leave to amend their statements of claim to reflect this. Sir, those are our submissions on jurisdiction.

(11:20) JUDGE DOOGAN TO MS SWEDLUND:

Q. All right. Just in relation to the process leading to settlement.

A. Yes.

Q. This Tribunal has I think two reports that respond to the first one essentially to mandate challenges and issues –

A. Yes.

Q. – and the second a priority report to aspects of the proposed settlement. In respect to those matters covered by those two reports, I understand the Crown's argument to be that this Tribunal we are functus; we no longer have jurisdiction.

A. Yes.

Q. Are you saying there are still issues that fall outside of what was dealt with in those two previous reports?

A. Yes, Sir, we are. The Wai 3272 claim covers those which would essentially be looking into the ratification vote and the processes around that in short.

Q. What's that number again?

A. Wai 3272, Sir.

Q. All right. You're saying that that claim is to be further particularised.

A. Yes, Sir.

Q. I don't know if you know and I can't recall the extent to which the Tribunal has reserved leave for further particularisation. In general terms, I understand we set a final date sometime ago and that there were one or two – and this is just from memory – parties who indicated that they wanted to await research still pending before finalising claims. I think your clients were awaiting Mr Husband's report, as I recall. As you are aware or as you understand it, there is still leave available to further amend or particularise a claim.

A. Speaking from memory as well, Sir. I believe that we have requested various extensions. We were given 20 working days after the Husband's report was filed to amend statements of claim –

Q. Right, yes.

A. – and we have requested various extensions. However, I believe it has sort of been consumed within the jurisdictional issues submissions –

Q. All right.

A. – and the status is we're not currently clear as to whether there is leave available.

Q. All right. In terms of the timing to do what you're proposing, assuming that it is all fine, when would the further particulars or amended claim be available?

A. We could do that within the month, Sir, if that's acceptable to the Tribunal.

Q. I will need to just come up to speed on exactly where we are in terms of the leave that may have been given.

(11:24) JUDGE DOOGAN TO MR HUNT:

Q. Mr Hunt, do you know the position?

A. I think I can hopefully help, Sir.

Q. Thank you.

A. Your directions #2.6.001 following the April judicial conference of last year reserved leave for four claims to file amended statements of claim following the completion of the casebook. That was the Wai 1758 Ūpokorehe claim, the 1920 Economic Losses, Wolfgramm claim, Wai 2743 the Wikotu claim, and then the 3272 Te Ūpokorehe Whakatōhea Settlement claim, if I can call it that.

Q. That was until after the close of the casebook, was it?

A. I'm not looking at the direction right now –

Q. All right.

A. – but I'm looking at my notes.

Q. All right. Thank you that's helpful.

A. But that's correct, yes.

(11:25) MS SWEDLUND TO JUDGE DOOGAN:

Q. Would I be able to answer this in writing, Sir, so I can traverse the directions and figure out where exactly we're at?

A. I'll do the same.

(11:25) JUDGE DOOGAN: (CONTINUES JURISDICTIONAL ISSUES)

If I can just briefly check as to whether any of the claimant counsel – I'll come to you Mr Linkhorn – but Mr Hunt's identified four claims where I had reserved leave and there may possibly be others in terms of the various filings that have happened since that time in relation to these jurisdictional issues we are still discussing. But in principle and subject to the discussion we're going to have today around the various claims about which there are some jurisdictional questions, does anybody have a major objection in principle to the Tribunal now setting a final date for the remaining matters? Either because of recent availability of evidence or because there are some jurisdictional matters about which we need to clarify the scope of a claim that we set from today's conference a final date which may include leave to some of the parties that may not have previously had leave to file further particulars. If there is no violent objection to that idea, that is what I would propose to explore with parties today and then try to set a date, hopefully one date, by which all remaining particularised claims can be filed. No violent objection in principle. We'll work on that basis. I will need to do a stocktake of just where we are with our previous directions. If counsel could bear that in mind and also give some thought to what is a realistic timeframe from now for whatever mahi is required to finalise some of the remaining claims.

(11:27) MS SYKES TO JUDGE DOOGAN:

Q. Sir, Ms Sykes here. Can I just say that there is a question of eligibility because of jurisdiction and then there is a question of finalising statement of claims because of evidence yet to come. We have commissioned evidence from Mr Bruce Stirling for example about pardons after the evidence of Mr Crosby which won't be available on current timelines until February. We have eligibility for those claims that have pleaded this but we would be seeking an extension to finalise statement of claims –

A. All right.

Q. – rather than a final cut-off date –

A. Yes.

Q. – once that evidence was available. I think there are a couple of others in the same position.

A. Yes, that's a good point. They are quite distinct issues. One is the narrow question of jurisdiction, either we do or don't have jurisdiction and some of those matters we will discuss today. The second is, as you point out Ms Sykes, the availability of pending research. That's a different matter and we'll treat them differently and set dates for that latter category based probably around the idea of say a month or so from the availability or filing on the record of the research which I think is what we've done in the past. Thank you.

Q. I'm grateful for that intimation Sir. We do have one in the eligibility issues that we've made submissions on, the claim by Ms Sharon Campbell. But I'm content to let our submission and await your further direction in writing speak for itself, if that's helpful to timing today.

A. Thank you. Yes, that's the last of the matters on the jurisdiction that we have on the agenda. I was going to work through the remaining ones –

Q. Okay, I'm sorry.

A. – and then come to that one as well. Just to get a brief update from parties.

JUDGE DOOGAN ADDRESSES ALL COUNSEL – ADJOURN (11:29:42)

HEARING ADJOURNS: 11.29 AM

HEARING RESUMES: 11.51 AM

JUDGE DOOGAN:

Kia ora koutou. Welcome back.

(11:51) JUDGE DOOGAN TO MR HUNT:

Q. Mr Linkhorn or Mr Hunt, do you have any points to raise on the Rongopopoia matter we were discussing just before the break?

A. Wai 1758, Sir.

Q. Yes, Wai 1787 and 3272 I think.

A. We did which I can address those now or subsequently, and the points relate to the Tribunal's jurisdiction in respect of the process leading to the Whakatōhea Settlement Deed and legislation.

Q. All right. Could you just put the microphone just a bit closer please? Thank you. Yes, if you we could just deal with it now and then we'll go on to the next matter.

A. Okay. I'm sorry we've been standing so I'll stand your Honour.

Q. Whatever is comfortable.

A. Thank you. I guess if I could contextualise our submissions generally on the jurisdictional issue, there are essentially two categories of claims that we're talking about, we being the Crown. The first are claims like those of Wai 203 that we discussed at the last hearing where the Tribunal will need to receive evidence and hear material and come to determine the jurisdictional issues following closing submissions. And then the second category of claims-

Q. Just remind me what 203?

A. The Mokomoko whānau claim.

Q. All right, thank you.

A. I'm sorry, your Honour.

Q. All right.

A. And then the second category of claims are those which the Crown says your jurisdiction is clearly excluded and in which you should not, also for reasons of efficiency, embark on the process of inquiry or receiving evidence. The Rongopopoia and Te Ūpokorehe Settlement claim, if I can call it that, 3272 fall into that category.

I should also note, there's two reasons or there's two sub-categories within that second category. We have claims where your jurisdiction is excluded by section 15 of the Whakatōhea Settlement Claims Act which is the finality clause. It says: "The Tribunal and Courts do not have the

jurisdiction to inquire into the claims, the redress, the deed of settlement," and I'll come on to why we say that that also covers the settlement process and then the second sub-category are claims in relation to which you are functus.

On that first sub-category and these are claims where the Crown says the Tribunal does not have jurisdiction to inquire into the settlement process. During the break, I emailed a High Court judgment that I wanted to take you through which will help illuminate or show you where the Crown's coming from. I also have hard copies which might be helpful.

Q. Certainly, I haven't seen that or the email hasn't come through to me or probably to the panel.

A. I'll take you through the relevant passages of the judgment.

Q. Okay.

A. My learned tuakana Mr Linkhorn is going to hand them up.

Q. Thank you.

A. While that's being done your Honour, if I could address my learned friend Ms Swedlund's submission. I think she said or how I heard her on the functus point was that the Tribunal is not functus in relation to the ratification process. I wonder if that's not entirely clear cut given that your priority report did make findings in relation to ratification process. Obviously, at that point the process hadn't been gone through but there were claims and findings and recommendations about the process itself. I think that that issue would require a bit of interrogation but I just wanted to note that now.

If I could then address you on this the High Court judgment that has been circulated. The reason I have given you this is it is essentially the latest word from the High Court on the interpretation of the finality clause or section 15 of the Whakatōhea Settlement Claims Act. What this judgment addresses is a claim by Ngāti-

Q. I'm sorry, just for the benefit of other counsel. This is Te Ringahuia Hata and Mr Rakuraku against the Attorney-General. The hearing was August 2024. The decision is 14 March 2025, decision of Isaa J, CIV-2023-485203. Has that been sent to counsel on email?

A. I've emailed it out to the distribution list.

Q. Thank you. All right.

A. Thank you and apologies your Honour, I should have just given the basic details of the judgment, yes. The judgment name is Hata, or the proceeding was *Hata v Attorney-General*. This is Isaac J substantive judgment in the proceeding. What the claim concerned was Ngāti Ira was seeking forward looking declarations as to their tikanga. I'll just direct you to paragraph 76 of the judgment which sets out the declarations that were sought as against the Crown. This is just to provide context for the ultimate point I'll come to about the interpretation of the finality clause. The declarations are set out there and they were essentially declarations that the Crown could not include Ngāti Ira in any agreement or compact and described in those terms without their consent and other related declarations. The basis on which these declarations were sought was that the Crown had committed or had breached Ngāti Ira's tikanga in the past and for that ground the claimants pointed to the settlement process. That is referred to a paragraph 72 just on the proceeding page. It says there: "Counsel for Ngāti Ira also point to the actions of the Crown that the Crown breached the Treaty and Ngāti Ira tikanga through the settlement process." So that's just to give you the claim and what awas being sought against the Crown.

If I could then ask you to jump to paragraph 153. This is where Justice Isaac deals with the claim against the Crown. I should say, it was a claim against the Crown because the other respondents were the Whakatōhea Post-Settlement Governance Entity, Te Tāwharau o Te Whakatōhea and the PSGE but we're not concerned with the claims against them, Sir.

Q. Paragraph 153 was it?

A. 153 is where that's the beginning of his consideration of the claim against the Crown. But if you can look at 155 Justice Isaac says there: "To the extent the claims against the Crown depend on an inquiry into the circumstances leading to the deed of settlement and the Act, section 15(4), which is the finality clause I've mentioned, removes the court's jurisdiction to hear the claim." The inquiry that the claim depended on, which Justice Isaac is referring to, and that the claimants said

constituted breaches of their tikanga through the settlement process, were allegations that the Crown had failed to ensure that this Tribunal's priority report findings were implemented, that the Crown had initialled the Whakatōhea Deed of Settlement, and that on the basis of the ratification results, the Crown had decided it was appropriate to sign the deed of settlement. Those were all matters, or the latter in particular is the matter that my learned friend Ms Swedlund said you would have jurisdiction to inquire into. This is the judgment of the High Court saying it's the latest word on the interpretation of the finality clause saying that jurisdiction on those matters is excluded.

Q. All right. Where I had left the discussion with Ms Swedlund was that her clients were proposing a further particularisation. As I understand the point you're making or perhaps you can just clarify, do you see any merit in allowing a further particularisation in order to finally assess this issue or is the primary submission that the legal position is sufficiently clear as far as the matter can be determined without further process or further particularisation of the claim itself?

A. I think it's the latter, your Honour.

Q. All right.

A. To the extent the claimants would be seeking to particularise allegations relating to the settlement process, we'd say the law as it stands is clear and there is no jurisdiction for those matters.

Q. All right.

A. I will note that Justice Isaac's judgment is under appeal which my learned friend Ms Sykes made a plan to note for you. No hearing has been set down for that appeal at this stage –

Q. All right.

A. – but it is with the Court of Appeal.

Q. All right, thank you and thank you for the decision. I hadn't noticed that one in the normal run of decisions that normally come to our attention so thank you.

A. Thank you Sir. I can address the other jurisdictional points as they arise.

Q. All right.

A. I'm sorry, I think I may have one further point. It's not just the point of law that the Crown's necessarily interested in terms of its position that the Tribunal doesn't have jurisdiction on these matters but also necessarily what we will need to address in evidence and efficiencies that can be made by not needing to address matters that the Tribunal won't be determining for those jurisdictional reasons.

Q. All right. Do you have section 15(4) of the Settlement Act in front of you?

A. I do have it up on my laptop.

Q. If you do have it handy, could you just read out the operative part, please?

A. Section 15(4) of the Whakatōhea Claims Settlement Act reads: "Despite any other enactment or rule of law, on and from the settlement date, no court, tribunal, or other judicial body has jurisdiction (including the jurisdiction to inquire or further inquire, or to make a finding or recommendation) in respect of—(a) the historical claims; or (b) the deed of settlement; or (c) this Act; or (d) the redress provided under the deed of settlement or this Act." That's the end of that section. Also, I understand where my learned friend Ms Swedlund is coming from is that the section doesn't explicitly say process leading up the deed of settlement –

Q. Right.

A. – or the Act.

Q. We also have the provision and I forget which section that does preserve our jurisdiction to carry on and complete this inquiry and make findings but not recommendations. So essentially to simplify it somewhat that would seem to preserve a contemporary claim jurisdiction, at least to some extent, in terms of which we could make findings and recommendations and a limited jurisdiction with respect to the historical claims where we can inquire and make findings but not recommendations. Was that qualification in terms of the retention of our jurisdiction for inquiry discussed in Justice Isaac's decision?

A. It wasn't your Honour. But I think the reason for that is the qualification on your jurisdiction and concerns of the historical claims.

Q. Right.

A. Whereas when we're talking about settlement process we're in the contemporary claims jurisdiction.

Q. All right.

A. Just for the record, the preservation provision is subsection (6) of 15.

Q. All right. Could you read that out please?

A. Subsection (6) reads: "The Waitangi Tribunal, despite subsection (4)(a)…," so (4)(a) was removing jurisdiction in relation to the historical claims: "…has jurisdiction to complete its inquiry, and release a report, on Wai 1750 the North-Eastern Bay of Plenty District inquiry…," and then it goes on to say: "…including jurisdiction to make any findings in respect of the historical claims but excluding jurisdiction to make any recommendations in respect of the historical claims.

Q. All right, thank you.

A. Sorry, your Honour, I should say, subsection (6)(b) then clarifies: "To avoid doubt, the Tribunal does not have jurisdiction in respect of the matters in subsection (4)(b) to (d) in relation to that inquiry and report." So, (4)(b) to (d) were the deed of settlement, the Act, or the redress provided under the deed of settlement.

Q. Yes, all right. Okay, thank you that's helpful. I think the other point you had made in terms of the categories is there is also a functus problem with respect to claims that relate to the process leading to the settlement which I understand that you say also limits or removes our jurisdiction to further inquire. For this one, for the Rongopopoia claims we're discussing, you say both aspects apply here, section 15(4) limitation plus the effect of the Tribunal being functus with respect to the settlement process.

A. That's right your Honour. Another way of putting it would be, if the Tribunal hadn't conducted its previous inquiries and reporting, the 2018 and the 2021 reports, it would nevertheless have no jurisdiction as a result of section 15(4).

Q. All right, thank you.

A. There was another point I wanted to make in relation to the jurisdictional question but that doesn't relate to Rongopopoia or 3272.

Q. Go ahead.

A. The other one, I'm sorry your Honour, was in relation to Wai 2728. Ms Sykes had said she didn't want to address that further but there was a little point of clarification we wanted to raise in relation to that. That's Ms Campbell's claim.

Q. Ms Campbell's claim.

A. This also does engage the section 15 question but also its interaction with –

Q. All right.

A. – your 1975 Act.

Q. We might come back to that because I was going to work through just the various –

A. Sure.

Q. – ones. The Campbell claim was the last of the ones on the list so we'll come back to that. Thank you for the generous submissions and the framework that's helpful.

JUDGE DOOGAN:

Ms Swedlund, I won't seek your response straight away. But what I propose is that in directions following today we seek probably a combined response. So that we could have your response to the legal issues that are being raised by the Crown and the extent to which you argue that we do have jurisdiction, notwithstanding the points made by Mr Hunt. If that is the view and we do have a jurisdiction, at the same time, if you could include in the memorandum or attached to the memorandum the formulation of the claim or the modified formulation of the claim that you say is within our jurisdiction that would be helpful in order for us to come to a view on the position.

MS SWEDLUND:

As your Honour pleases.

JUDGE DOOGAN:

Thank you. Mr Hunt, we'll deal with and any other similar issues in that kind of way, hopefully to get to clarity fairly soon. Thank you.

MR HUNT:

Thank you Sir.

(12:12) JUDGE DOOGAN TO MS BOBBI WALKER:

Q. I just want to then come to the Mokomoko claims, Wai 203, Ms Clark and Ms Mataira tēnā kōrua. Ms Walker.

A. Yes, tēnā e te Kaiwhakawā. I'll be addressing the Wai 203 jurisdictional matters today. But Ms Mataira is present to answer any questions should that be required.

Q. All right, thank you.

A. As you've mentioned, your Honour, we are aware the Tribunal has read and are familiar with the filings on the Wai 203 jurisdictional issues. We wish to note that our position has developed and refined to the current iteration that you have before you. That's comprised in the joint memorandum of counsel filed on 22 August with the appellation #3.2.191 and the amended statement of claim for Wai 203 filed on 27 August now with the appellation #1.1(f).

The August memorandum also comprises our final response to the jurisdictional issues raised by the Crown. And in particular, Sir, the argument raised in the Crown's 4 March memorandum that the Wai 203 allegations in the post-1992 period, or the contemporary period, are ousted by section 15 of the Settlement Act. To that end, I thought I could summarise our submissions on these issues, as they remain a point that the Crown and claimant counsel are diverging on and to be sure that your Honour is clear on why we consider the Tribunal has jurisdiction to make findings and recommendations in regard to the contemporary Wai 203 claim.

Briefly, before moving to the outstanding issue, I also thought it would be helpful to confirm where we and counsel for the Crown are agreed that the Tribunal is functus with respect to Wai 203 claims inquired into and reported on in the Wai 2662 and 894 inquiries. We also wish to note that the contemporary Wai 203 claims as they have now been articulated in the amended statement of claim do not concern those issues inquired into in the Wai 2662 and Wai 894 inquiries.

Q. Just remind me, 2662 is.

A. Whakatōhea Mandate.

Q. The first one the mandate and then the other is the Urewera.

A. Te Urewera.

Q. Yes.

A. Te Urewera came first and then.

Q. Thank you.

A. Sir, with regard to the third jurisdictional issue, which is exactly what matters are ousted by section 15 of the Whakatōhea Settlement Act, and I know you've just gone through this with my friend Mr Hunt, counsel acknowledge and agree that the Tribunal's jurisdiction to inquire into the Whakatōhea Deed of Settlement, the Whakatōhea Settlement Act, and the redress provided under the deed of settlement or the Act is ousted by subsection 15(4) of the Settlement Act. We also note that pursuant to sections 15(5) and 15(6) the Tribunal retains jurisdiction to consider the interpretation and implementation of the deed of settlement and the Act and to complete its inquiry into and release a report on this Wai 1750 District Inquiry that includes findings on the historical claims but excludes making recommendations in respect of them. Importantly, what these provisions mean is that the Tribunal retains jurisdiction to inquire into and make findings and recommendations on all contemporary claims, provided they do not relate to the settlement of historical claims or the redress provided for historic claims under the deed of settlement or the Act.

This is the position of Te Whānau a Mokomoko and the essence of our submissions today that the Wai 203 claimants have contemporary claims that are not ousted by section 15 of the Act. Accordingly, the Tribunal can and should make findings and recommendations in respect of these claims.

In particular, the claimants have alleged separate and distinct Crown breaches in the post-September 1992 period that centre on the Crown's failure to declare Mokomoko's innocence. This is despite having information supporting his innocence and knowing that this is of great significance to the Mokomoko whānau and the Crown's failure to follow

through with the process it commenced with the claimants to establish a tangible tribute for Mokomoko.

The Crown's omissions in this regard constitute a contemporary breach of te Tiriti and have caused and continue to cause the claimants prejudice. The Crown has, however, argued that the Wai 203 allegations regarding the post-1992 period are ousted by section 15 of the Settlement Act on the basis they related to or cannot be separated from claims about the settlement of the Wai 203 historic claims or that they relate to the redress provided in respect of the historic claims.

We submit this was the incorrect characterisation of the claimants contemporary claims and while the latest amended statement of claim has gone some way to respond to this by particularising and articulating the contemporary claims, we can address why these claims are not ousted by section 15. Counsel submit the alleged contemporary breaches occurred in a period of Crown engagement with the Mokomoko whānau that followed the 1992 Pardon through to the enactment of the Mokomoko Restoration of Character, Mana, and Reputation Act 2013 and beyond. We submit the Crown's engagement with the whānau in regards to these matters have been separate and distinct to the process of settling Whakatōhea settlement claims. In other words, the 1992 Pardon process and the Crown's commitment to the Mokomoko whānau regarding the establishment of a tribute sat outside of the Whakatōhea settlement process.

We have also noted where the Crown has expressly acknowledged this distinction and separation between the processes, including the formal statement issued by the Honourable Pita Sharples on the signing of the 2011 agreement in a quote that: "This agreement to provide statutory recognition of the Pardon does not affect your historical Treaty claims." The 2013 Mokomoko Act also expressly states in section 3 that the Act does not prevent Te Whānau a Mokomoko from seeking through the Treaty process a settlement of their historic claims."

Q. Yes.

A. Yes.

Q. Those submissions are clear and I didn't have any pātai. I just acknowledge that the amended statement of claim was received by the Tribunal some time ago but unfortunately has only just got on to the record in the last couple of days. I'm just going to check-in with Crown counsel about where they are at on some of these matters if that's all right.

A. Āe.

Q. Thank you Ms Walker.

(12:21) JUDGE DOOGAN TO MR HUNT:

Q. Mr Hunt, I am assuming you wouldn't have received the amended statement of claim until the last day or so when I think it went on to the record and you may not have seen it yet.

A. I may have received it when it was filed by Ms Walker but for whatever reason I hadn't engaged with it, your Honour, until yesterday when it was placed on the record. The short answer is yes to your question.

Q. All right. Just in relation to the submissions made now which are essentially that there two contemporary claims which are said to be still within our jurisdiction which is the claim that the whānau can and should be able to argue for a declaration of innocence or similar and the tangible tribute. Is the Crown's position that those aspects are still outside our jurisdiction or is it accepted they are or potentially are within our jurisdiction?

A. Unfortunately, I think I'm going to have to give you a fudge response which has a couple of components. One of which is we'd like the opportunity to review the claim and the contemporary claims that have now been added.

Q. All right.

A. Just to be clear those were added after, I think it's clear from the chronology, the submissions we did make back in March –

Q. In March, yes.

A. – in relation to the claim which didn't have these allegations about there being a separate process. We would like the opportunity to do that and

possibly file an amended Crown response or at least a response to the new section.

Q. All right.

A. And then in terms of whether these are in or out, I think the Crown's position will come out of that process. But it might be that these claims fall into the category of you will need to hear the evidence and look at the extent of, you know, it's a factual question that are these the same.

Q. All right. Yes, that was occurring to me that it may be in that class of cases where final precision around jurisdiction might have to await some of the hearing process itself. But I think it's fair to give you a chance to review the latest amended statement of claim and file a further response. In that response, it would be helpful if you could confirm a view one way or the other on the most efficient procedure from the Crown's point of view going forward. If it is that you still have questions about jurisdiction but that they are better resolved following testing or hearing some of the evidence, then say so and we can take that into account also.

(12:24) DR GRANT PHILLIPSON TO MS MATAIRA:

Q. I thought we had already heard the evidence. Is the te whānau o Mokomoko planning to present further evidence on these issues in addition to what we heard at that hearing?

A. Tēnā koe. Tēnā tātou. Just in response to your question, we are intending to file further evidence to support the newer contemporary claims that we have added to our amended statement of claim filed in August. We were unsure of what that looks like at the moment but I think we were going to get our clients, our witnesses to file some further evidence to support those contemporary claims as this we have amended our statement of claim as you will know post our hearing in March.

(12:25) MS MATAIRA TO JUDGE DOOGAN:

Q. Your Honour, just to go back to one thing you noted and probably not material, but the Crown was in our filing email where we filed the amended statement of claim in August so just to note that. Kia ora.

A. Kia ora. Thank you Ms Mataira.

(12:25) DR GRANT PHILLIPSON TO MS CLARK:

Q. Is that in the timetable Ms Clark for further evidence on that?

A. No, Sir. But we have in our minds where it could fit in the current timetable as filed in the joint coordinating counsel memorandum on hearing planning. Thank you.

(12:25) JUDGE DOOGAN TO MS WALKER:

Q. Just to be clear, I think it follows from the latest submission that I'm assuming this evidence will be specifically focused on the 2011 or 2013 Act and the commitments or communications from various Crown officials or Ministers around that time about the tangible tribute and also the distinction. We heard some submissions already about the distinctions between various forms of pardon and what a declaration of innocence as distinct from those matters are, so I'm assuming that these are issues and that that would be the focus of any further evidence.

A. Yes, that's correct Sir. It is from the 1992 Pardon onwards which goes through to the enactment of the 2013 Mokomoko Act and beyond. It's the commitment and the commencement of the tangible tribute work with the whānau occurred. I mean we're going to bring evidence on this but not until 2020 as we understand it. So that's the time period and the sort of topics of the evidence that we bring.

Q. All right. Thank you Ms Walker.

(12:27) MS MATAIRA TO JUDGE DOOGAN:

Q. Your Honour, if I may add that it was Ms Karen Mokomoko and her whānau at the time that were involved in those discussions. It will be Karen Mokomoko that brings forth that evidence. To your earlier point, it will definitely be focused on our two now contemporary claims in the timeframe which my friend has given you.

A. All right. Thank you.

(12:27) JUDGE DOOGAN TO MR HUNT:

Q. Mr Hunt anything arising from that?

A. No, your Honour.

Q. Just in terms of time for a response how long? I mean this will probably be relevant to any other matters as well.

A. Cards on the table I think my learned friend Ms Mataira is right that we would have received the claim so I just want to be upfront about that but it passed me by due to other work. I would say a month so 20 working days if that will be suitable from the Tribunal's perspective.

Q. All right. We'll work with that for now. I'm conscious we have a hearing in another week or so as well which we'll all be involved in.

A. Also conscious of that Sir.

Q. I probably need to record this in directions. But I may have raised this before some time ago. Just briefly, again when I was in practice as a barrister, and I can't remember exactly when, sometime in the lead-up to the 2013 Act, I was briefed by TPK to give some advice or to review some of the policy work going in to consideration of whether a revisiting or a further form of statutory pardon or the like could be available. I don't recall in a great detail.

I know that I had an involvement for a short period, as they were developing advice to government about whether that pathway was open. Yes, I will try to find a little bit more particulars as to exactly when I had some involvement and what the nature of it was. But I need to just make it clear that I have had that involvement in the past.

If we resolve these jurisdictional matters, to the effect that the Tribunal believes we do have a jurisdiction to hear these all or some of these contemporary aspects, it might need to be on the basis that I recuse myself from panel discussions around any of those matters that remain live before us. But I just wanted to flag it. As I said, I will try to be a little more specific about the time period and a little bit more specific about the nature of my role but I just want parties to be aware of that. Thank you.

A. If I can put our hand up in a sense, your Honour, we'll go away and we can dig into the files and if there are any issues from our perspective we can bring those to you or the Tribunal's attention.

Q. Thank you. That may be the most straight forward way because you may be able to ask TPK for the timing of the policy advice leading up to Cabinet decisions that they would progress with a statutory process. My

recollection is that what I was asked to assist with or advise on was whether that option a further statutory pathway would be available in light of the fact that there had been the 1992 Pardon. So that's my recollection and it would have been a year or two before the Act came to fruition. Yes, thank you.

A. We'll look into that. Thank you.

Q. Thank you. All right. I think we'll work with one month Mr Hunt for further response from the Crown on the issues as you see them in relation to the Mokomoko amended claim and the arguments put forward in the memorandum Ms Walker has just been speaking to. Thank you.

A. Thank you.

JUDGE DOOGAN ADDRESSES MS SWEDLUND – WAI 3272 ISSUES RESOLVED (12:32:28)

(12:32) JUDGE DOOGAN TO MS TE WHENUA: (AGENDA: NGĀI TAMATEA)

Q. Ngāi Tamatea, Ms Te Whenua kia ora.

A. Āe, kia ora.

Q. Yes, as I said, we've received the submissions you filed but had no opportunity to review them.

A. I'm prepared to take you through them Sir. At a high level and recognise that was my intention with filing that. Actually, my intention was to make oral submissions as per your direction we received by email but that the written submissions have been filed for the benefit of the Tribunal and the Crown also.

Q. All right. Well, I hoped I had made it clear and most counsel were aware of dates for filing ahead of today. I think I had given extensions to the end of the last week to a number of counsel for the obvious reason that we need to, especially on jurisdictional matters. It is helpful to have submissions in advance in writing so that we can hear them.

I am also conscious that Mr Lyall had asked for a further extension after last Friday and I had said, through the registry, if he could file by I think 2 o'clock on Wednesday that would be helpful. But if not, just in terms of

the logistics of getting submissions to the panel and a chance to read, it's not a good idea to file them much later than that, and I denied leave then. It's just not an efficient use of our time to go through a lengthy submission which we haven't had the chance to see. I know from talking to my panel members that we have looked at some of the issues in relation to your client's position and we will, as time allows, have a chance to look at the submissions you have now made. We obviously also need to have the Crown's view on these matters.

What I would note is that, and this is without referring to your current submission and the supporting documents, we do acknowledge there is something of a unique or an unusual position here and quite a complex situation where your clients are caught between two settlement processes and with a particular history in our inquiry district but also obviously with the whakapapa and connection back to Wairoa. We have already been giving some thought to this and we were going to seek further guidance from yourself and from Crown counsel.

(12:35) JUDGE DOOGAN TO MR HUNT:

Q. If you don't mind Ms Te Whenua, can I just get a quick indication from Crown counsel as to what your current thinking was about this particular situation.

A. If I can go back to the language of categories Sir.

Q. Yes.

A. I think it falls into the category 1 the category in which you will need to –

Q. Hear evidence.

A. – receive evidence and submissions and income to determine the issues raised as to jurisdiction.

Q. All right. Thank you that's helpful. That was initial thought too.

(12:36) JUDGE DOOGAN TO MS TE WHENUA:

Q. Ms Te Whenua, did you hear what Mr Hunt said? He felt that it was in the category where the Tribunal would need to hear evidence of your client's claim essentially before the Tribunal could properly come to any final view on whether there were jurisdictional bars arising from the

Whakatōhea and the Kahungunu or Te Wairoa settlement. If that is the case, then the task really would be finalising – yes, perhaps I just get your response to that initially.

A. Yes, thank you Sir and thank you also for acknowledging the proper reasons for timely filing. I just wish to note that I filed submissions on the 9th of March this year covering the jurisdiction response for Ngāi Tamatea. That was appellation #3.2.127. These are submissions which I was prepared to talk to orally really just supplement those.

Q. Yes. We have looked at all of the previous filings in terms of these jurisdictional issues.

A. Ka pai, kia ora. In terms of hearing the evidence and then coming to a determination on jurisdiction, we wouldn't object to that. That seems like a thorough approach, considering that we would like the opportunity or Ngāi Tamatea would like the opportunity to demonstrate to the Tribunal the whakapapa connections in particular to Waiotahe and the matrix of whakapapa connections, the unique nature of the identity for Ngāi Tamatea as a broader group. But essentially the point that I'm instructed to make regarding jurisdiction is that the hapū is so distinct that the claim is brought on behalf of Te Waru Tamatea as the tipuna upon which they rely regarding their interests in the inquiry district.

Te Waru Tamatea and the hapū encompasses his people, including others who may not necessarily carry the same whakapapa as Te Waru Tamatea. Those people who surrendered alongside him in 1870 at Galatea who may not necessarily be directly related to but, in any case, had the same views as Te Waru Tamatea in Te Wairoa regarding Crown alienation of land and most likely shared the same religious persuasions as well.

Ngāi Tamatea, therefore, we advance is best suited to lay a claim under the authority of Te Waru Tamatea who negotiated for the grant of land and that enables them to therefore encapsulate all others who came with him but may have distinct whakapapa. And then the evolution of the hapū since then under the whakatauki gifted by Te Kooti: "Manaakitia te iwi haere hei iwi mā koutou. To create a space, a marae and a hapū for others who may have been displaced moving forward." So because of

that particular nature, all encompassing nature of their whakapapa and Te Waru's additional overlays of whakapapa to Ngāti Kahungunu, to Tūhoe, and through Ngāti Kahungunu to Tamure and Whakatōhea, there are a number of different interest factors that need to be taken into account for the customary interest issue.

Sir, regardless of that, we're of the view that either way, neither the Whakatōhea Claim Settlement Act or its equivalent in Wairoa the iwi and rohe of Te Wairoa Settlement Act exclude the Tribunal's jurisdiction to inquire and to make findings and make recommendations on Ngāi Tamatea for reasons which I would be prepared to happily point out now.

Q. All right. both historical and contemporary claims.

A. Yes, including historical.

Q. All right.

(12:41) JUDGE DOOGAN TO MR HUNT:

Q. Again, I'll just check with Mr Hunt so I'm clear about the Crown's current view. So you would accept that with respect to our jurisdiction for historical and contemporary the best approach is to hear evidence and then determine jurisdiction in the way we discussed previously?

A. Yes, your Honour.

Q. All right.

A. I think the points my learned friend Ms Te Whenua has just laid out, I just go to reinforce that that might be the best approach or that will be the best approach.

Q. All right. Thank you.

(12:42) JUDGE DOOGAN TO MS TE WHENUA:

Q. Ms Te Whenua I think you heard Mr Hunt. I think that seems the most practical or proper way to approach the matter. In terms of Ms Gillingham's report, I think you've got some of that with your filing today. When we last discussed this at the previous JC, I think the report was near final. I can't recall. It hasn't currently been filed on the record, has it? No.

A. No Sir. Aspects of the report are with Ngāi Tamatea in draft for their feedback. Given that Ngāi Tamatea has now been shifted to present in the March hearing, –

Q. Yes.

A. – the filing date we expect to be in January, so we expect that the feedback can occur in sufficient time to finalise and file by the January date. It is not yet filed.

Q. All right. Thank you.

(12:44) DR GRANT PHILLIPSON TO MS TE WHENUA:

Q. Yes, it's not a jurisdictional issue per say but more just clarifying. I hadn't appreciated until I saw the list that Ms Gillingham's report is classified as an oral and traditional history report. Does it cover or will it cover the history of what occurred to the land and any issues relevant to that after the grant of land here in this inquiry district? Because Ms Luiten does deal with it briefly in her raupatu report, but it's really not been a focus for the technical evidence that we've had or we're getting in this inquiry. So we need that and I'm just checking whether that is actually what is going to be covered in Ms Gillingham's report.

A. Yes, thank you for that question. The substance of Ms Gillingham's report is on Crown acts and omissions post relocation to the North Eastern Bay of Plenty District Inquiry from 1874. So in detail, she goes into the land that was granted in the North Eastern Bay of Plenty District Inquiry as opposed to Wairoa lands.

Q. Thank you that's helpful. As part of the historical issues, are there other issues like Public Works Taking or environment historical issues as well that are going to be raised in the claim?

A. Yes. The short answer is yes. Though, certainly not the same degree as some of the other claimant groups within the inquiry. Ngāi Tamatea has been affected by the same acts and omissions to a lesser degree. Ms Gillingham, to the extent that she could on the limited commission that she was on, has gone into those matters. We expect, to the extent that it's known to our claimant community, for them to also speak to some of those matters.

Q. Okay. Thank you very much.

QUESTIONS ARISING FROM MR HUNT – NIL

(12:46) JUDGE DOOGAN TO MS TE WHENUA:

Q. All right. Ms Te Whenua I think it's clear we'll proceed and have the hearing in March. We can discuss with counsel at that time the extent to which we either leave any remaining or jurisdictional issues to closing submissions time which might be the most efficient way to deal with it. But we'll also put on to the record the submissions you filed this morning.

(12:47) JUDGE DOOGAN TO MR HUNT:

Q. Crown counsel, if anything arises from those submissions that you want to be heard on, I just ask that you file within the month and just raise any matter that you consider might be needed to be raised. Otherwise, we'll simply proceed with the hearing programme as we have outlined or as outlined by coordinating counsel.

JUDGE DOOGAN ADDRESSES MS TE WHENUA – MIHI, ACKNOWLEDGEMENT (12:47:55)

(12:48) JUDGE DOOGAN TO MR KENNELLY: (AGENDA: HINEATUA SAVAGE)

Q. All right. I think the next was descendants of Hineatua Savage which is Mr Stone or Mr Kennelly. I'm sorry Mr Kennelly.

A. Yes Sir.

Q. Kia ora.

A. Tēnā koe Sir. Yes, so Wai 1789 is Ms Bella Savage. She whakapapas not only to Ngāi Tamahaua, Te Whakatōhea, but of Te Whānau a Harawaka which is the hapū of Te Whānau a Apanui. They have interest in Tinopahore which is on their border of the inquiry line at Torere.

Q. Yes.

A. We filed an MOC back on the 11th of April seeking Tribunal directions on whether Ms Savage could present evidence on behalf of Tinopahore.

Currently, their settlement is in a stalemate with the government at the moment. It was initialled back in September 2023. But we did get a response from the Crown, which they may want to speak to in more depth, but they also confirmed that currently there is no jurisdictional bar. But it does say once legislation is enacted Ms Savage could still appear as an interested party to provide contextual evidence on the Tinopahore land block. We're just seeking clarification on the Tribunal's position in regards to that. We have filed evidence for Ms Savage in October. I believe it was #E039 which contains her evidence on Tinopahore, Sir.

Q. Thank you.

(12:50) JUDGE DOOGAN TO MR HUNT:

Q. Can I just check with Crown counsel. Mr Hunt in terms of your position on this claim?

A. The Crown's position your Honour essentially is you have the claim in front of you. Your jurisdiction applies at the moment, your ordinary section 6 jurisdiction. There is the settlement process happening in the background. If and when settlement legislation were enacted, there would be a finality clause and at that point your jurisdiction would be obviously subject to parliament doing its thing with the legislation and passing it.

Q. So the Wai 1789 claim is amongst those to be settled in the Apanui settlement if it finalises.

A. That's a good point. It is but my recall is it's included to the extent it relates to Whānau a Apanui and it is also included in the Whakatōhea to the extent it relates to Whakatōhea list.

Q. All right. The only issue really then from the Crown perspective is one of timing and the effect of any Whānau Apanui settlement once the parliamentary process concludes. In the meantime, this claim is settled by the Whakatōhea settlement to the extent that it relates to Whakatōhea.

A. Whakatōhea.

(12:52) JUDGE DOOGAN TO MR KENNELLY:

Q. Mr Kennelly, I understand Te Whānau a Harawaka what's your client's position with regard to the effect of the Whakatōhea settlement?

A. Sir, the purpose behind wanting to give evidence in Tinopahore is with the inclusion of Ngāi Tai in this inquiry.

Q. All right.

A. Sir, I understand in the statement of claim they also raise issues with regard to Tinopahore as well. Our claimants, I guess, in anticipation that Ngāi Tai did give evidence on Tinopahore, they also want to be given that opportunity as well. The Crown response, sorry, of the MOC at #3.2.152, they did say that if this settlement legislation were to come through to pass, the evidence could still be used to provide contextual evidence for other interested parties. If it were to come through, our claimant would seek leave as an interested party.

Q. All right. In terms of the projected timetable for this inquiry, your client's participation would logically align at the time that we'll be hearing from Ngāi Tai.

A. Our claimant is presenting at the next hearing, Sir, –

Q. All right.

A. – alongside Bruce Stirling which, as part of his report, he also has a chapter on Tinopahore as well.

Q. All right. Is there also a wish to be heard in response to or alongside Ngāti Tai? Are the interests of your client essentially overlapped with Ngāi Tai?

A. Yes, Sir, there are some overlaps with Ngāi Tai in regard to Tinopahore.

Q. All right. I think what you've sought clarification of in terms of the memorandum filed in April whether your client may file or present evidence concerning their interests in the Tinopahore block prior to Te Whānau a Apanui settlement and that is now scheduled to happen. Once the Apanui settlement legislation is enacted, which doesn't seem a prospect before the next hearing in any event. And then the final question was whether the Tribunal can make findings.

(12:55) JUDGE DOOGAN TO MR HUNT:

Q. I think from Mr Hunt's indication, there is certainly no bar currently in terms of the Apanui settlement but there may be some limitation arising from the Whakatōhea settlement. Is that a reasonable summary?

A. I think so. I'd only just add-in a little clarification there that, and it might just be a matter of timing in the end your Honour for when you come to write up your report, the findings for the Whakatōhea settlement will be in relation to claims that are based on the claimant's Whakatōhea whakapapa. So to the extent that we're talking about claims to Tinopahore, if they are based on the claimant's Whānau Apanui whakapapa and we have Whānau Apanui settlement legislation at that point, you won't be able to make findings or recommendations –

Q. All right.

A. – obviously presuming or parliament does its thing with the legislation, Sir. All of which is to say, you'll just come to look at those nuances when you write up your report.

Q. All right. Thank you.

(12:57) JUDGE DOOGAN TO MR KENNELLY:

Q. Mr Kennelly, sorry.

A. You're right there Sir.

Q. I think that's clear and I think we can simply at this stage proceed with the hearing as scheduled. As Mr Hunt says, there might be matters we need to turn our minds to depending on the progress of the Apanui settlement, but in terms of submissions in due course, particularly closing submissions that may be the appropriate time when we can get clarity from yourself and from the Crown counsel the extent to which there are some jurisdictional issues arising from the Whakatōhea settlement and if relevant at the time, the Apanui settlement also. I think that's where we can leave the matter.

A. Sir.

Q. All right.

(12:58) MS RONGO TO JUDGE DOOGAN:

Q. Sir, Ms Rongo here. If I'm able to speak on this matter?

A. Kia ora Ms Rongo. I was going to ask for an update from you about your client's position and also the research progress or framework or timeframes.

Q. Okay, yes, I'll definitely be able to update on that. But just on the Tinopahore matter, our clients don't oppose the application by Te Whānau a Harawaka. They are happy to abide the decision of the court but they would like to have a bit of certainty on whether this will affect the inquiry boundary on whether that will be adjusted to include Tinopahore in its entirety or just some certainty around that Sir.

A. All right. That's a good question. The general approach we have taken to date, once the current inquiry boundaries were confirmed, was that they're essentially administrative in character and don't prevent us hearing evidence that overlaps into adjacent lands. Although, with confirmation as our inquiry has progressed that Ngāi Tai does wish to be part of the inquiry and now with this particular land, it might be pertinent to have a look at the question of whether we formalise the boundary a little more clearly. I won't express a final view on that.

I think I just need some advice from our registry staff. We will have a look at what is the best way to make clear how we deal with this. But for present purposes I can certainly indicate that we don't see any bar to hearing evidence about the Tinopahore land or indeed the Ngāi Tai interests in the lands adjacent to our boundary and overlapping towards Whānau a Apanui. The question of whether we actually need to adjust the boundary I think I'll take some advice as to whether that would be the better approach.

While you're there Ms Rongo, what's the timing around research?

Q. I think we're playing a waiting game at the moment, Sir. We can't apply for the Crown Forestry Rental Trust until our change of named claimant application has been approved by the Tribunal and we have confirmed who the claimants and then we'll be able to move forward with that application.

A. All right.

Q. So we're waiting on that Sir.

A. My recollection from a month or two back when there was argument filed around the changing of the named claimants was that there were some issues being raised which essentially appeared to be internal matters for Ngāi Tai and not properly matters that the Tribunal should be ruling upon for the purposes of determining named claimants or change or substitution of named claimants. Is there still a need for a decision on that point?

Q. Yes Sir we're still needing to have the paperwork confirmed on who the named claimants are before we can move forward.

A. All right.

Q. We know that there will continue to be ongoing discussions within Ngāi Tai on matters that need to be resolved and that is an ongoing discussion as different matters arise. However, with the named claimant situation, we have submitted to the Tribunal that we would like that to be confirmed –

A. All right.

Q. – and then to make a decision as well, Sir.

A. Thank you. Sorry, just give me one moment. Sorry, Ms Rongo, I was just checking where things were at in our process and I'll confirm that. I've just seen the time too so we might just break for lunch very shortly and when we resume I'll just confirm with you where this matter is at in terms of the named claimants.

JUDGE DOOGAN:

Just before we break, Dr Phillipson just wanted to make another observation in relation to the boundary matters more generally.

(13:05) DR GRANT PHILLIPSON: (OBSERVATION)

It's just that it reminded me that Ngāti Ira indicated earlier that they were not interested in pursuing matters with regard to Tahora 2, but I noted that Te Ūpokorehe have included Tahora 2 issues in their claim, and similarly that Tahora 2 is outside the boundary, so a decision may need to be made about that. I mean historically Whakatōhea and Te Ūpokorehe did make a claim there

and they were granted land in Tahora 2, so logically it is something we could look at. I don't know whether that was included in the historical claims that are settled but I presume so. A boundary issue may need to be decided there too and I just thought I'd raise it while we were considering on the other side of the inquiry district.

JUDGE DOOGAN ADDRESSES ALL COUNSEL – ADJOURN (13:06:23)

HEARING ADJOURNS: 1.06 PM

HEARING RESUMES: 2.03 PM

(14:03) JUDGE DOOGAN: (UPDATE)

Kia ora anō koutou. Just to let you know Ms Kapua has had to depart so we are down the musketeers and D'Artagnan, thank you.

Just in relation to the matters we discussed just before lunch, Ms Rongo, we will look to have a direction out next week on the claimants and the change of claimants. So that should be dealt with soon next week.

Also, just in a discussion with the panel over lunch, where we have circumstances where it's agreed that we should hear evidence before coming to final views on any jurisdictional matters, and Ms Te Whenua's Ngāi Tamatea clients are one illustration in the near term or the hearing after this one, it would I think be helpful if as soon as reasonably possible after the hearing of that evidence, we could get clarity from Crown counsel as to whether there are indeed jurisdictional issues that have arisen so that we can address them at that time, rather than leaving it hanging and until well down the line when we're dealing with closing submissions. Just to give you a heads up that we'd like to deal with it while it's still reasonably clear in our respective minds as to what the evidence shows or goes to and then we can set out a process to deal with any issues that might arise at that time.

(14:05) JUDGE DOOGAN TO MS TE HIRA: (AGENDA: SHARON CAMPBELL CLAIM)

Q. I think Ms Sykes we're now on to the mental health services Campbell claim. Is Ms Sykes still online?

A. Kia ora Sir, Ms Te Hira here.

Q. Tēnā koe Ms Te Hira.

A. I will be making our submissions in relation to the jurisdictional issues related to the Campbell claim.

Q. All right.

A. They will be brief. Our memorandum filed on the 23rd of October outlines the submissions. But listening to what the Crown have proposed, I think that this particular claim also falls into category 1 whereby for the evidence will need to be heard. I can indicate now that the Campbell whānau or the Wai 2728 claimants are preparing to present evidence at the upcoming February hearing held at Ōmarumutu. A briefing of that evidence is underway.

In terms of I guess the legal submissions, ours adopt those that were presented by the Mokomoko related parties and the submissions they made about what's ousted and what's not. But in essence what we're submitting is that this Tribunal has jurisdiction to make findings on the historical aspects of the claim and it has jurisdiction to make findings and recommendations on the contemporary aspects of this claim. This claim we say is contemporary in the main but it has to draw upon the historical context in order for those contemporary claims to be made sense of which is why you would see from the latest amended statement of claim there is quite a lot of historic material in there that is covered and why the Crown has responded the way they have by saying that they won't be responding to anything of that nature. Hopefully that's clear Sir. Those are my submissions.

Q. Yes, that's clear. Thank you.

(14:07) JUDGE DOOGAN TO MR HUNT:

Q. Mr Hunt.

A. Thank you Sir. This one's a little bit different. It's a different issue to the issues arising for the Wai 203 Mokomoko claim. The reason for that is this claim was originally filed in 2018 so that's after the 2008 cut-off for historical claims to be filed. The Crown's position is not about the application of the Whakatōhea settlement legislation and the Tribunal's jurisdiction to still make findings. The Crown's position is about the application of your jurisdiction under the 1975 legislation. Essentially that it's clear that the Tribunal does not have jurisdiction in respect of the historical claims under the 1975 legislation.

Q. I follow I think but I just want to check. Are you saying we have to have a historical claim lodged prior to the cut-off date or a claim lodged prior that date in order to ground our jurisdiction limited as it is to the contemporary aspects following the settlement? Is that the point?

A. Historical claims are out and contemporary claims are in.

Q. Yes.

A. The point is that they have had jurisdiction on the historical claims as it's preserved under the settlement legislation.

Q. All right. Yes, you've first got to have the-

A. Yes.

Q. All right. The particular point then with this claim is that you would accept in principle we would have a jurisdiction to claims that are properly regarded as contemporary, but no jurisdiction to inquire into or make findings in respect of historical aspects because of the fact that there wasn't a claim lodged prior to the cut-off date for historical claims.

A. That's right.

Q. All right.

(14:10) JUDGE DOOGAN TO MS TE HIRA:

Q. Ms Te Hira, can I just get your response to that point?

A. In regard to the lack of jurisdiction of this Tribunal, Sir, I think that we acknowledge that, yes, I guess there is a statutory bar. But in terms of the Whakatōhea settlement and what that also bars in terms of the historical claims not being allowed to be made or had recommendations made, yes, that too is accepted which the memorandum outlines. I think

the point we would then raise is that there would be further particularisation needed of what elements of the claim are contemporary and what elements are not. If I recall much of the amended statement of claim as is outlines the historical background that the claim draws upon which in the main repeats what the Ngāti Rua claim has already presented, given that the Campbell whānau are of Ngāti Rua and the Wai 1782 claim covers much of the historical content that that particular claims draws from. We take the Crown's point on that. What we then would present further would have to do with the contemporary issues.

Q. All right.

(14:12) JUDGE DOOGAN TO MR HUNT:

Q. I think there is reasonably clear and I just want to check with Mr Hunt that I accept what the Crown's arguing here in terms of we wouldn't have a jurisdiction to make findings in respect of historical claims to the extent that they are articulated in the statement of claim. We would be able to hear evidence that might touch upon or refer to historical matters for context but our jurisdiction is limited to what are properly contemporary matters in this claim and I think that's common ground. Is that fair?

A. Yes, I think you've captured it very well Sir.

Q. All right.

(14:13) JUDGE DOOGAN TO MS TE HIRA:

Q. Ms Te Hira.

A. Yes, Sir, that's correct and that's our position as well.

Q. All right. So I think we can simply note that and proceed on that basis. As always, if something arises during the hearing or in the course of the evidence, we can address it at that time. Thank you Ms Te Hira.

(14:13) DR GRANT PHILLIPSON TO MS TE HIRA:

Q. Ms Te Hira, you've offered or said that you will particularise your claim on those contemporary aspects in paragraph 16 of your memo. You've said in 17: "If the Crown requires further particularisation of these issues," I think it would be useful to have it and to then have the Crown's response

to it, but it comes under that issue of about whether people can particularise claims yet still. Yes, so it would be helpful to have that and to have the Crown's response to it.

A. Yes, and I note Ms Sykes' earlier submissions around a final date for ASOCs being filed by this particular claim's ASOC would hopefully fall within that. Alternatively, we have proposed the date of the 30th of November. I don't anticipate that further particularisation to even need that long. If it would aid the Crown, we could limit the particularisation to those issues listed there at paragraph 16 and provide that sooner than the 30th of November so that they have perhaps more time to respond.

(14:15) JUDGE DOOGAN TO MS TE HIRA:

Q. All right, thank you. What was the dates that Ms Sykes had proposed?

A. I'm not sure if she proposed an official date. But our memo proposed 30th of November this year –

Q. Yes.

A. – which would then give I guess the Crown time afterwards to respond.

Q. All right.

(14:15) JUDGE DOOGAN TO MR HUNT:

Q. I think Mr Hunt if it's by 30th of November or earlier, if in fact that's possible, from the discussion we've just had I'm not anticipating that there are likely to be particular legal points or issues that need to be resolved prior to the hearing. It would more be a particularisation of the claim and the focus of the evidence to come. So that date if we stick with 30th of November would be all right.

A. That works for us, Sir.

Q. All right. Do you wish to file or have leave to file in response to the particularised claim?

A. Yes, would be my starting point.

Q. And how long for?

A. Well, I guess it would be subject to seeing the amended claim. But I've just been given word, let's say 10 working days.

Q. Okay, that's very reasonable.

A. Yes, I would agree.

Q. Thank you.

A. Thank you.

(14:16) JUDGE DOOGAN TO MS TE HIRA:

Q. All right. Ms Te Hira, on or before 30th of November and then the Crown to respond within 10 working days. Thank you.

A. Noted. Thank you Sir.

(14:17) JUDGE DOOGAN: (AGENDA: FORWARD HEARING PROGRAMME)

All right. Just coming now to the forward hearing programme and thank you coordinating counsel and others who have submitted on this general point. Just a couple of preliminary comments. This revised forward hearing programme has been developed by the Tribunal's strategy and policy committee across all of the current inquiries as had the parties to the inquiry, this particular panel has been proceeding on the basis that you had all been proceeding which was that we had I think it's from this point about 10 further weeks of hearing scheduled in the forward calendar. As I advised in the previous directions that what we were notified of, after the process of adjustment across all current enquiries including remaining historical current kaupapa inquiries and others, was essentially a rationalisation of resources across all of those inquiries and we were notified of a remaining six-weeks of hearing time. So that's what we've been told.

We have already asked for an additional week in the current financial year. Typically, that kind of time becomes available on occasion because of the adjustments to other inquiries for various reasons when they can't proceed with hearing. It's not uncommon to get extra hearing time, depending on the shape of the progress with other inquiries in a given year. Because this is one of the very few remaining historical inquiries, we are on the higher priority in terms of the categorisation of resources across the Tribunal's inquiry programme. The completion of the remaining historical inquiries is either that it's the highest or amongst the highest of priorities so there is a reasonable prospect that we will

be able to bid for and likely incrementally get some additional hearing time as the next two financial years roll around.

Unfortunately for our purposes and for counsel, at this point in time, we simply can't give a clear confirmation that that definitely is the case, which then of course is something where you just need to be aware of. I'm just reflecting that to counsel so that you understand the internal process that we currently operate under. There's a few issues that come from that. One is just the sheer difficulty that can arise in timing. If we don't know until a reasonable way into next year, like if we don't know until March or April that some time might become available in say May or June, it gets quite difficult to organise at short notice a hearing week. Less of a problem further out. But that's just one of the matters we have to be conscious of. The other matter I was just going to mention was I understand Crown counsel have confirmed that you would be looking for a week of Crown evidence.

(14:21) MR HUNT: (RESPONSE)

Yes, Sir. We don't want to sound selfish about this because our planning is still quite contingent but if I just outline the thinking behind it, you might see why we think it adds up to a week of hearing time. What we've noticed is that with the detailed technical reports is a day to a day and a half generally taken over those and we tend to assume at this stage that we might be calling three such reports. Now even if they weren't having to cover all of the ground that the existing technical reports have covered, let's work on the basis for argument's sake that they're still a day's hearing time each, and that is in part an assumption based on claimant counsel all needing some time with those witnesses, even with a degree of coordination of questioning that we see and have seen so far, we expect that when it comes to the technical evidence called by the Crown each claimant group might need to have a sufficient block of time. So that's the thinking behind that.

That would then leave two hearing days for brief opening submissions, we'll be really brief on that, and evidence on contemporary issues in particular. At this point, we just don't have a firm sort of grasp of how much the contemporary

issues will require a Crown evidential response and how detailed that would be. But this far out, it seems like a safe assumption to suggest that two hearing days for that is not crazy.

Thanks for allowing me to pop-up at this point and just sort of expose the thinking, including to criticism. If you can see a better way please say so. But that's the thinking behind us saying how about a week.

(14:23) JUDGE DOOGAN TO MR HUNT:

Q. Thank you that's helpful. I take it from that that the technical evidence is likely to focus on the historical issues predominantly.

A. Yes, predominantly.

Q. All right.

A. Yes.

Q. Thank you.

(14:23) JUDGE DOOGAN:

The other possibility too is that when we look at the stage of say closing submissions as to whether we do some of that by filing in advance and then having either electronic type hearings, these are all possibilities for thinking about in the longer term if we continue to be up against constraints for the allocation of actual hearing time. I just note that the holding of an electronic hearing is basically for say submissions. If we're just receiving submissions based on papers filed it is less costly than convening the entire panel at a venue in the rohe, although that's always preferable particularly in the context of an inquiry such as this that has been running for some time and would allow claimants to be part of the concluding phase.

I simply leave that as amongst the things we can discuss further once we have a clearer idea of what our next two years of hearing programme shakes out to be. I guess the basic message we wanted to convey is the need for some hard thinking and discipline to ensure that when we are able to allocate the hearing weeks that they are used to good effect and efficiently and that we continue to try to plan on that basis for the time we definitely do have allocated.

(14:25) JUDGE DOOGAN TO MS CLARK:

Q. Ms Clark, if I could start with you please as coordinating counsel. Thank you.

A. Thank you Sir. For the record, the memorandum of counsel that has been filed is #3.2.221. Sir, I'm very aware that you've had that memorandum and have no doubt read it, so I will not spend a significant amount of time going over the arguments that we make there. But in essence, we do believe the 10 weeks that we continue to favour is justifiable and needed. At paragraph 8 of the memorandum, I set out a number of points that we consider support the inquiry remaining at 10 further hearing weeks. But perhaps if I zero in on paragraph 6, we have done our thinking around the hearing that is required. If it was only to be six, those are largely accounted for already, in the case of the November hearing week being one, February and March being two and three, and then of course the Crown that we have just heard from the fourth hearing week, a week for closings; and there is certainly support to present the closings. I haven't canvassed around electronic closings but there is certainly support that our closing submissions be presented. I can canvass support for electronic but it may be that needs must. Sir, so that's putting us up at five, with Ngāi Tai, Ūpokorehe, and a number of other claimant groups still to be heard as we've set out at appendix B there, Sir.

Sir, November planning is already well under way, likewise February and March. Those have been set out for you there.

Sir, you did mention the difficulties around knowing in this current financial year whether or not a week in May or June could go ahead. Sir, I suggest that we could plan as though it will from a claimant counsel perspective and then if it has to be pushed into the subsequent financial year that that could very much happen. But as I've set out at paragraph 6, we have looked at hard at whether we could truncate and we do think that the time estimates we've provided are needed for a full and worthwhile inquiry and for the Tribunal to have the information that they need, especially on contemporary matters for example that just being one of the points.

Sir, I'm happy to discuss with you appendix B if you have any reflections there that you would like us to take account of. Sir, otherwise, we would continue to advocate for the 10 weeks.

Q. Thank you Ms Clark that's clear and thank you for the schedule as well. I think the idea that counsel plan as a contingency for a possible May/June hearing is a good one and would encourage dialogue about that and also about the date or dates that would work for the particular counsel and claimant communities. Once that's known, it would be helpful to have some indication back through the registry as to the windows that appear suitable for claimants and counsel and then we can try to arrange our planning along the same basis. If we can link-up some of that contingency planning as soon as reasonably possible that would be helpful.

In terms of the forward programme outlined and the reasons for it that's clear.

QUESTIONS FROM REMAINING TRIBUNAL PANEL – NIL

I think one aspect arising from today's earlier discussion with Ms Swedlund is of course we need to respond to the application made. That's prompted a question from Dr Phillipson.

(14:30) DR GRANT PHILLIPSON TO MS RONGO:

Q. Sorry, I forgot. I did wonder whether one week was going to be sufficient for Ngāi Tai, given that we're hearing their entire claim on historical land issue plus any environmental, public works, you know, all those other issues and they're not giving any evidence on those issues as we go through with all the technical reports, although of course counsel has the opportunity to cross-examine. It did seem to me that one week would not be sufficient but I don't know why that's all Ms Rongo asked for. So that question is for you Ms Rongo.

A. Thank you. Yes, we know that we will be pushed for timing because not only is it just that week that Ngāi Tai are addressing the historical claims, they're hoping to fit in as well as a pōwhiri, a site visit, and talk about some contemporary matters. But when we had our discussion with first the counsel and our 10 weeks is not looking like 10 weeks anymore, we were

even more resolved to fit it all within a week. We are working to that because we know that there are limited resources. We have had opportunity to cross-examine and we are definitely looking at making sure that our written evidence is fulsome and what we actually use our presentation time for would be efficiently organised.

Yes, we understand that concern. We have that too but we're resolved to try and fit it all within a week and have the best presentation possible.

Q. Okay. Thank you Ms Rongo and that sacrifice from Ngāi Tai is appreciated. Thank you.

(14:33) JUDGE DOOGAN TO MS TE HIRA:

Q. All right. So can I just check with other counsel. I recall Ms Sykes had raised a potential question as to the assumption about the amount of time remaining. Ms Te Hira, do you wish to speak to that, or Ms Feint?

A. I can begin the submission. If Ms Feint would like to add anything, I'd be more than happy for her to do so. But our submission also outlined in the joint memorandum of counsel filed on the 22nd of October, the one that Ms Feint spoke to earlier in the judicial conference, has in it that essentially we do not want a prolonged inquiry timetable. The sooner we can get a report for our clients the better. Therefore, less hearing time is what we are seeking, especially in the absence of I'd say concrete information that the evidence that will be brought before the Tribunal will be of material relevance. And yes, there won't be an extended inquiry process.

Q. All right. So, a plea for efficient completion.

A. Correct, Sir. We were very mindful of the indication you had provided in your directions that you only have resourcing for a further six hearing and we are also aware of the strategic direction which outlines that the Tribunal in its entirety only has set resourcing for a particular number of hearings across the various inquiries, even those that have been prioritised to be completed by 2030. So that's the basis of our submission around the forward hearing plan being limited possibly not to six because we are aware of everybody else's constraints in terms of timing and needing time to present their evidence. But we thought that if we could

have an efficient process applied for the remainder of the inquiry that seven or possibly even eight hearings would be sufficient for us to cover all the issues.

Q. All right, thank you.

(14:36) JUDGE DOOGAN TO MS FEINT KC:

Q. Ms Feint, anything to add?

A. Yes, tautoko those submissions Sir. For the February hear week that's going to be at Ōmarumutu, Ngāti Rua and Ngāti Patumoana are both being heard in that hearing week along with the rating report. We have confirmation that the Walter's archaeological reports will be heard that week and Ms Campbell's claim as well. We anticipate that that will be the end of the evidence for Ngāti Rua. The Tribunal will be aware that you've heard from matua Te Riaki Amoamo a number of times who has already given significant evidence for Ngāti Rua.

Q. All right.

A. As Ms Te Hira said, our clients are very much favouring an efficient completion to the inquiry process because it seems to become quite prolonged what with if you go back to the Kōrero Tuku Iho hearings until now.

Q. Āe, thank you.

(14:37) JUDGE DOOGAN TO MS CLARK:

Q. Ms Clark, do you want to respond to any matters?

A. Yes, Sir. In terms of being able to progress forward efficiently as possible, I have heard from your Honour, this is my understanding, that you would be supportive of planning for that June week as though it may proceed. So that in case we do get a late notice that we can; that we would be able to fulfil that spot.

Q. Yes.

A. Sir, you will notice that we've set in a preliminary way hearing week 10 in the second half of 2026. I think that would be reasonable to plan with that as a broad timeframe.

My friends for Te Ūpokorehe are advocating for two weeks. That's a matter for them to consider so I will leave that with them. But beyond that Sir it is quite hard to see how we could reduce from Ngāi Tai, the Crown hearing, the closing hearing down or what Ms Sykes and co are advocating for. Sir, I suggest it's somewhere above that. Maybe not full 10 weeks but I would suggest somewhere above what Sykes' and co are advocating for. Thank you Sir.

Q. Thank you.

(14:39) MS FEINT KAC: (RESPONSE)

I'm sorry Sir, I think Ms Clark said this already but I think these submissions would need to be revisited if the Tribunal is minded the Te Ūpokorehe application because I really do think that actually starts a whole fresh subset of an inquiry within an inquiry. It would require not only the two weeks that Te Ūpokorehe are seeking but also for reply evidence from Ngāti Ira, Ngāti Patu, and Ngāi Tamahaua which means perhaps another week after that.

JUDGE DOOGAN:

Yes, I appreciate.

(14:40) DR GRANT PHILLIPSON: (RESPONSE)

There is also the issue that if the Crown is going to produce three technical historical reports in its hearing week, there may be a need for reply evidence from the claimants. It would be helpful to have an indication about what the topics are for those reports. But that's another possible matter that we've faced in the veterans inquiry so I thought I should raise it here.

JUDGE DOOGAN:

I need to lie down now. Mr Linkhorn, do you have any indication at this stage as to the likely focus of the technical evidence?

(14:41) MR LINKHORN: (RESPONSE)

Yes, I don't think it's beyond going at the sort of very high level. I don't think it can really sort of descend into more detail at this stage. But at that high level,

we have the lands inside the confiscation district, or let's start with the application of confiscation policy through to the Compensation Court, then the treatment of the lands inside the confiscation district, including the reserve treatment, and then we have the lands outside 19th and 20th century dimensions to all of this. Yes, my sense is that there is still some stuff to come as well that we haven't grappled with yet that might need technical evidence. So that's where I've sort of nominally suggested it could well be three of those.

We want to acknowledge all the groundwork laid by the people who go first on a technical report. It's not like all of that is repeated, is it? Obviously, not. But we're assuming that even with the sharpest possible focus, there will still be quite a lot of engagement with that material. As to whether or not it's so surprising that it leads to reply evidence, I suppose we'll have to cross that bridge when we come to it.

Perhaps what that raises for me though is to sort of start to get a feel for the timeframes in which that evidence should be finalised to file it. The working assumption that we've shared with coordinating counsel so far is that it wouldn't be due for filing before sometime in the second half of 2026. So the sooner we get to sort of mapping out what that looks like the better probably for everyone.

(14:43) DR GRANT PHILLIPSON: (RESPONSE)

Yes. And in veterans the Crown did share the drafts of its research reports with the claimants for comment which might also short-circuit some need for reply evidence, I'm not sure. But they did do that in veterans and it was a helpful process I think.

MR LINKHORN:

Yes, thank you.

JUDGE DOOGAN:

Thank you Mr Linkhorn.

(14:44) JUDGE DOOGAN TO MS SWEDLUND:

Q. Ms Swedlund, and assuming for the moment we're just staying on our conventional inquiry path, the indications are for the two weeks, four days of Ūpokorehe claimant evidence on each of the weeks and then the technical reports for a day. Have you given consideration at this point or in light of the indications of our current constraints about what scope there is for compressing or shortening some of those expectations?

A. Yes, Sir. But I'd have to take instructions on that point. We haven't discussed this yet with our claimants.

Q. All right.

A. But it has been their very strong view that all the time is necessary to traverse the historical and contemporary record.

Q. All right, I understand the current position. Can you remind please me because I've forgotten from this morning, we had a discussion about the general issue of leave reserved for further particularisation of claims. I think you were correct to recall there was a 20 working day from the filing of the Husband's report. Where did we leave that? I think you had said you hadn't yet finalised this further particularisation of the claims and were going to do so. Just remind me where we left that please. I can't read my own notes, I'm sorry.

A. I think Sir within a month we have said.

Q. All right. Okay, that's right.

Notwithstanding that process, as a panel, we still need to deal with the application for the prioritisation of the customary interests and we'll consider that and try to respond as soon as possible so all parties are clear as soon as we can give a considered response to that matter. Thank you.

JUDGE DOOGAN TO OTHER COUNSEL – NIL RESPONSE

All right. We'll follow-up with some directions as early as possible next week just confirming the various dates we have discussed. Ms Rongo probably separately we'll issue directions in relation to the substitution of named claimants. Again, separately we will try to respond as soon as possible to the Ūpokorehe application as well. Look forward to seeing you all in about two weeks' time in Kutarere.

There is no other matters any counsel needs to raise. Thank you.

(14:48) MS TE WHENUA TO JUDGE DOOGAN:

Q. Excuse me, Sir, Ms Te Whenua speaking.

A. Kia ora.

Q. Kia ora. I just wish to note with respect to the further particularisation of claims, if your direction is generic, then of course Wai 1511 will be caught within that. But if not, can I note that we also sought leave and would be requesting to be included. That leave be granted.

A. Yes. Again, my recollection was that for your clients, along with a number of others who were awaiting research, that leave was granted either generically within 20 working days of the filing of the research. I can't recall whether I specifically included your clients in that. But I think you indicated earlier that you were expecting Ms Gillingham's report to be ready in January, was that right?

Q. Yes.

A. And you are to be heard in the –

Q. March.

A. – in the March hearing. Do you know when in January Ms Gillingham is likely to file?

Q. I think it was the 10th or early January.

A. How long do you need to particularise following that report?

Q. By the conclusion potentially of January.

A. All right.

Q. Mid-February.

A. The March hearing date is 23rd to 27th of March.

(14:50) JUDGE DOOGAN TO MR HUNT:

Q. Mr Hunt in terms of the timing that we're just discussing with Ms Te Whenua that's workable from your point of view if it's available by mid-February.

A. Yes, your Honour.

Q. All right.

(14:51) JUDGE DOOGAN TO MS TE WHENUA:

Q. At the moment, Ms Te Whenua, we will work on the basis that we expect Ms Gillingham's report on or before 10th of January. Any further particularised claim for Ngāi Tamatea on or before at this point we'll say 10th of February or thereabouts, I'm not sure if that falls on a weekend, and then Crown to respond.

(14:51) JUDGE DOOGAN TO MR HUNT:

Q. Are you staying with the 10 working days?

A. I think that's the plan, your Honour.

Q. Ka pai, all right. Excellent, thank you.

(14:51) JUDGE DOOGAN: (MIHI)

Hopefully that will also make its way into the directions. Thank you again counsel for your availability today.

All right. I'll just close as we started. He mihi tēnei ki a koe Alan thank you for your assistance. Ngā kaimahi i mua e mihi ana mō tō koutou mahi. Nā te atua tātou e tiaki. Me inoi tātou.

KARAKIA WHAKAMUTUNGA (JUDGE DOOGAN)

HEARING ADJOURNS: 2.52 PM

MINISTRY OF JUSTICE
Tāhū o te Ture

Notes of Evidence Legend

National Transcription Service

Indicator	Explanation
Long dash –	Indicates interruption: Q. I think you were – (*Interrupted by A.*) A. I was – (*Interrupted by Q.*) Q. – just saying that – (*First dash indicates continuation of counsel's question.*) A. – about to say (*First dash indicates continuation of witness' answer.*) This format could also indicate talking over by one or both parties.
Long dash (within text)	Long dash within text indicates a change of direction, either in Q or A: Q. Did you use the same tools – well first, did you see him in the car? A. I saw him through – I went over to the window and noticed him.
Long dash (part spoken word)	Long dash can indicate a part spoken word by witness: A. Yes I definitely saw a blu – red car go past.
Ellipses … (in evidence)	Indicates speaker has trailed off: A. I suppose I was just… *(Generally witness has trailed off during the sentence and does not finish.)* Q. Okay well let's go back to the 11th.
Ellipses … (in reading of briefs)	Indicates the witness has been asked to pause in the reading of the brief: A. "…went back home." The resumption of reading is noted by the next three words, with the ellipses repeated to signify reading continues until the end of the brief when the last three words are noted. A. "At the time…called me over."
Bold text (in evidence)	If an interpreter is present and answering for a witness, text in bold refers on all occasions to the interpreter speaking: Q. How many were in the car? A. **There were six.** Q. So six altogether? A. **Yes six** – no only five – **sorry, only five.** *(**Interpreter speaking** – witness speaking – **interpreter speaking**.)*
Bold text in square brackets (in evidence)	If an interpreter is present and answering for a witness, to distinguish between the interpreter's translation and the interpreter's "aside" comments, bold text is contained within square brackets: Q. So you say you were having an argument? A. Not argue, I think it is negotiation, ah, re – sorry. **Negotiation, bartering. [I think that's what he meant]** Yeah not argue.