# WAITANGI TRIBUNAL

Wai 1040

**CONCERNING** the Treaty of Waitangi Act 1975

**AND** the Te Paparahi o Te Raki Inquiry

## MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER

### Introduction

1. This memorandum-directions addresses issues arising out of the judicial conference convened on 9 May 2011. This conference focused solely on the shape of Stage 2 of our Te Paparahi o Te Raki inquiry.

2. Our initial Stage 2 memorandum of 15 November 2010 set out how Tribunal inquiries add value to Treaty settlements and how this Tribunal is committed to consulting with the parties in planning the continuation of our inquiry (Wai 1040, #2.5.59).

3. In that memorandum, we provided a number of options for claimants to consider. In December 2010, we received responses through submissions from claimants and the Crown. Then, on 25 March 2011, we provided what we considered a preferred option in terms of how the Stage 2 hearings might proceed (Wai 1040, #2.5.79). This was discussed at our judicial conference.

4. While it may seem a bit repetitive, we also need to remind ourselves of the enormity of the task we are faced with. We anticipate that the Stage 2 hearings will be like no other inquiry. We are dealing with several hundred claims of many whānau, hapū and iwi. The Te Paparahi o Te Raki region comprises five sub-regions, which have been grouped together for common action. This will be the Tribunal's largest ever inquiry in terms of number of claims and size of claimant communities involved. As we have stated a number of times, the conduct of the Stage 2 hearings will require an innovative approach. It also requires a clear and simple process. A complex and highly technical process will not assist the claimants, the Crown or the Tribunal. Furthermore, an inquiry the size of Te Paparahi o Te Raki demands a co-operative approach.

### Stage 2 Hearings

5. It is now very clear that a regional, Te Paparahi o Te Raki-wide approach should continue. Stage 1 hearings were marked by a coming together of many

claimants for a common purpose, while still maintaining their autonomy. It is no surprise to us that claimants within Te Paparahi o Te Raki maintain rangatiratanga at a local level in keeping with the traditions of their tupuna – a true reflection of Ngāpuhi Kowhau Rau.

*Hearings on generic issues*

6. The general consensus expressed by claimants at the recent judicial conference was that the Stage 2 hearings should commence with a first round of regional hearings. These hearings should focus on claimant and technical evidence on the generic or big picture issues that are shared by most claimants. As we have said previously, an early hearing of the substantial body of technical evidence now available is likely to provide the parties and the Tribunal with a greater understanding of the main Te Paparahi o Te Raki-wide issues. This will then create a platform for the more effective organisation of the subsequent local-level hearings.

7. We have considered the proposal Mr Williams put to the Tribunal of adopting an 'Urewera Inquiry approach' (Wai 1040, #3.1.556). This approach combined the hearing of tangata whenua and technical evidence. While this has much to recommend it, we believe that the size and diversity of our inquiry requires a different approach. We believe that we will begin each technical hearing with the usual tangata whenua welcome, but a full presentation of local evidence is best left for subsequent hearings that can give full attention to hapū-specific and local issues.

8. The encouraging level of co-operation developed through the Stage 1 hearings evidently contributed to general claimant agreement on a way forward into Stage 2. Although the Crown expressed its preference for initial local hearings, we believe that the generic approach is a better alternative.

*Hearings at sub-regional level*

9. The regional hearings, it has been submitted, could proceed by rotating within the five sub-regions of Mahurangi, Whangārei, Taiamai Taumarere, Whangāroa and Hokianga. We are in broad agreement with this approach. How the Tribunal will move through these areas and in what order will be decided later when the hearing programme is planned in detail.

10. The Tribunal prefers that the Crown gives its evidence once all the claimant technical evidence has been presented. We believe this is preferable to hearing Crown evidence interspersed with the claimant evidence on different issues.

**Interlocutory Process**

11. A simple but effective interlocutory process is required. Claimants told us that they preferred one interlocutory process over a dual process with interlocutories before and after the generic hearings. The interlocutory process in which we will engage over the coming months is:

    (a) Tribunal recommendations concerning gap-filling research on generic issues, if required, on the basis of its preliminary review of the evidential casebook;

(b) Consolidation and aggregation of claims participating in the Te Paparahi o Te Raki inquiry;
(c) Amended statements of claim;
(d) A joint claimant statement of generic issues;
(e) Claimant statements of local issues;
(f) A Crown statement of response and concessions; and
(g) A final Tribunal statement of generic issues.

*Consolidation and aggregation of claims*

12. The Tribunal will start the interlocutory phase by progressing the consolidation and aggregation of claims into the inquiry along with the finalisation of unregistered claims. It is essential that the Tribunal and the parties know which claims or parts of claims are included in the inquiry and that any jurisdictional questions are resolved. We plan to issue a proposed list of claims to be included in our inquiry so as to allow parties to comment before we make a final determination.

*Amended statements of claim and claimant statements of issues*

13. Following consolidation and aggregation, amended statements of claim are needed to give the Tribunal an indication and appreciation of all claim issues at both a generic and a local level. We understand that it may be difficult for counsel to particularise every local issue, but we respect the claimants' preference for avoiding a two-step interlocutory process.

14. Following the submission of their amended statements of claim, the claimants' articulation of issues should be presented on two levels: a combined statement of generic issues; and separate statements of local issues that are not covered under generic issues. Within one interlocutory process we think it will be logistically difficult for the hundreds of claimants to integrate their local issues to produce a single joint claimant statement of local issues. The Tribunal is also aware that local issues research will be incomplete at this stage. We have therefore provided for claimant statements of local issues and a Crown response, to the extent that it can, to those local issues as well as to the generic region-wide issues. Depending on the number and specificity of the claimant statements of local issues we may still need to enter into a very brief interlocutory process at the start of the sub-regional local hearings, which would give the claimants the chance to update their local issues on the basis of more complete research.

*Crown statement of response and concessions*

15. We think it pointless and an expensive task to require the Crown to respond to every amended statement of claim. That would be counter-productive. A single Crown response is more efficient and more helpful to the Tribunal and claimants. We therefore do not require the Crown to respond to hundreds of amended statements of claim. A similar approach is being adopted in the Te Rohe Pōtae inquiry. We would rather the Crown respond to both the joint claimant statement of generic issues and, to the extent it can, to the claimant statements of local issues.

16. The key aim of this interlocutory phase is to shorten the time requirements and to have us all (Tribunal, the claimants and the Crown) focus on the key issues within

this inquiry. The statements of issues will direct us all, where possible, to points of agreement and points of difference.

**Timetable**

17. Our proposed timetable for interlocutories is as follows:

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| Tribunal recommendations on gap-filling research on generic issues, if required | **4 July 2011** |
| Preliminary consolidation and aggregation of claims | **7 July 2011** |
| Response by parties to any recommendations for additional research | **28 July 2011** |
| Responses to preliminary consolidation and aggregation | **4 August 2011** |
| Tribunal decision on research recommendations | **11 August 2011** |
| Tribunal decision on consolidation and aggregation of claims | **18 August 2011** |
| Amended statements of claim to be filed | **30 September 2011** |
| Draft joint claimant statement of generic issues | **3 November 2011** |
| Draft claimant statements of local issues | **3 November 2011** |
| *Judicial conference on:*<br>▪ *Joint claimant statements of generic issues*<br>▪ *Claimant statements of local issues* | **24 November 2011** |
| Final claimant statements of generic and local issues | **21 December 2011** |
| Draft Crown statement of position and concessions | **9 February 2012** |
| *Judicial conference on:*<br>▪ *the Crown statement of position and concessions* | **20 February 2012** |
| Final Crown statement of position and concessions | **29 March 2012** |
| Draft Tribunal statement of generic issues | **3 May 2012** |
| *Judicial conference on:*<br>▪ *the Tribunal statement of generic issues*<br>▪ *planning the generic issue hearings* | **22 May 2012** |

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| Final Tribunal statement of issues | **28 June 2012** |
| *Regional generic issue hearings commence* | **Mid 2012** |

18. As we have stated previously, we will not be commencing the Stage 2 hearings until the Stage 1 report is completed. A number of claimants indicated their support for this position at the recent judicial conference.

19. On the current timetable it is anticipated that we will look to commence hearings of the generic issues in mid-2012, depending on when the Stage 1 report is completed. We anticipate, given our preliminary review of the evidential casebook, that the generic hearings will require 3 weeks for claimant and technical evidence, 1 week for Crown evidence and 1 week for closing submissions, making 5 weeks in all.

20. We are unable to give a definite assessment of how many weeks will be required for the sub-regional hearings of local issues until we have assessed the amended statements of claim, the claimant statements of local issues and the Crown's statement of position and concessions. A very preliminary estimate would see 12 to 16 weeks of hearing organised into 3-5 sub-regional blocks.

**Crown Concessions**

21. We acknowledge the Crown's genuine efforts to assist the Tribunal with this inquiry. This has been evident throughout the Stage 1 hearings and continues with their helpful memoranda filed with regards to planning for Stage 2. This assistance has recently extended to indications that the Crown would seek to make concessions in this inquiry.

22. Our planning for Stage 2 has not fully accepted the Crown's proposal in terms of how Stage 2 hearings would proceed. We are heartened by the Crown's submissions regarding concessions. For a long time now and in a number of inquiries the Tribunal has indicated that early Crown concessions would assist in achieving a more focused and efficient inquiry process. It must also be remembered that these hearings and concessions should not be seen in isolation.

23. Crown concessions are not new. The Crown has made concessions in a number of inquiries. These inquiries include Wairarapa ki Tararua, Tauranga Stage 2, Urewera and, most recently, Whanganui.

24. Further, settlement legislation also provides Crown acknowledgements of Treaty breaches and apologies for Crown acts and omissions. These Crown acknowledgements embodied in settlement legislation have been specific to settlement areas, while acknowledging generic Treaty matters potentially applicable to many inquiry areas. These matters include confiscation, Native Land Court matters and public works takings. Settlements close to the area of the Te Paparahi o Te Raki Inquiry include Te Uri o Hau and Te Roroa.

25. The point is that in terms of concessions and acknowledgments, the Crown is not starting from scratch and neither is the Tribunal. In Te Paparahi o Te Raki we will seek to build from information already available from other inquiries.

26. The Tribunal will be focussing specifically on the evidence before this inquiry but is cognisant of previous Tribunal reports and findings in areas close to the Te Paparahi o Te Raki Inquiry region. We will take due account, where applicable, of the Muriwhenua (Wai 45), Te Roroa (Wai 38) and Kaipara (Wai 674) reports.

**Relevant Evidence from Other Inquiries**

27. I anticipate that evidence and commissioned reports may have been produced in those inquiries that have some relevance to our inquiry. As an example, the Muriwhenua Report makes findings in regards to pre-Treaty land transactions. It appears to me that some of the transactions referred to in that inquiry are in the area of the Bay of Islands and therefore within this inquiry area.

28. Claimants and the Crown are to advise the Tribunal by midday, **7 July 2011** of any relevant evidence or commissioned reports from other Tribunal inquiries adjacent to this inquiry area, that they would seek to have put on the record of inquiry for Wai 1040.

**Research**

29. As indicated in the interlocutory timetable above, the Tribunal will shortly release its recommendations concerning additional gap-filling research on generic issues, if any, that may be required to ensure that the evidential casebook is sufficient and adequate for the purposes of the hearings on region-wide generic issues.

30. Most of the technical research and other evidence relevant to region-wide generic claim issues has been available to the parties for some time past. We will provide a short period for the parties to file submissions on the recommendations and on any other generic research gap that they consider must be addressed. The submissions should focus on the big-picture generic issues and not on local matters.

**Resourcing**

31. Mr Doogan requested that the Tribunal indicate what it could afford in terms of hearing weeks in 2012 and beyond. He also asked when Stage 2 could be completed. The Tribunal is unable to make such indications at this stage. This is because we are unable to predict demands upon the finite resources currently available to the Tribunal.

32. At the judicial conference, Crown counsel suggested that the Tribunal, the Crown Forestry Rental Trust and the Office of Treaty Settlements should meet to discuss the resourcing of our inquiry. This is a matter which I have referred to the Director of the Waitangi Tribunal. I understand that she is looking to pursue these discussions.

33. I have also asked the Tribunal to look at other ways in which our Tribunal hearings can be conducted. Any proposals would obviously be put to claimants and counsel. While we undertake an innovative Te Paparahi o Te Raki inquiry approach, it may also be necessary for us to take a unique Te Paparahi o Te Raki hearing approach. It may be that we look to utilise technology for a more efficient hearing process.

**Parallel Process**

34. At the judicial conference a number of submissions were made regarding the Crown's proposed parallel process. This would involve a Tribunal inquiry running concurrently with Treaty settlement negotiations.

35. The Tribunal continues to proceed on the basis that it is preparing for Stage 2 of its Te Paparahi o Te Raki inquiry. At this stage the Tribunal is focused on writing its report on the Stage 1 hearings and how Stage 2 should proceed.

36. While the Tribunal is focused on our process, the inquiry is part of a wider movement towards settling Treaty claims. If parties choose to leave our inquiry and enter into negotiations, that is their choice. Our Te Paparahi o Te Raki inquiry and the Treaty settlement process should be seen as complementary. As the Tribunal has stated previously:

> *The Tribunal aims for a balanced approach that is practical, efficient and economical. Research, multiple claims, and a fair hearing will always take time – and time is a necessary characteristic of a process that is transformative. But it cannot be allowed to take too long. The challenge is always to balance the need for a process that is comprehensive and healing with a recognition that early settlement must be encouraged and facilitated.*[1]

37. The Tribunal will not impede in any way people who wish to enter into settlement discussions in the same way that we would not and could not prevent people from entering into other judicial avenues available to them to seek redress. We will, however, carry out our statutory functions to inquire into the many Te Paparahi o Te Raki claims before us.

**Queen's Counsel Proposal**

38. In her submissions Ms Donna Hall proposed that a Queen's Counsel be appointed in order to assist and act as a co-ordinating counsel in Stage 2.

39. It was apparent from the submissions of other counsel at the judicial conference that this proposal is not supported. In respect of this proposal I am satisfied that the Stage 2 hearings can proceed in a similar fashion to how Stage 1 hearings were held. It is not necessary for a Queen's Counsel to be appointed for the purposes of acting as a co-ordinating counsel in Stage 2.

**Water Issues**

40. Ms Hall also submitted that her clients have some water rights claims which could be heard in Stage 2. Ms Hall submitted that these issues be heard as a matter of importance in Stage 2.

41. Mr Jason Pou submitted that many claimants in the Te Paparahi o Te Raki inquiry have similar water rights claims. Mr Pou suggested that these claimants may be able to plead this issue as a group.

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[1] Chief Judge Joe Williams, 'A Critical Role in New Zealand Society' (media statement), 9 December 2005.

42. At this stage I will leave this issue up to those claimants to recommend the next step before any decision is made. If there are any issues arising, they should file memoranda advising the Tribunal.

**Shift of Burden of Proof**

43. In her submissions Ms Linda Thornton proposed that the burden of proof be shifted to the Crown on those issues that have already been proven time and time again in other inquiries.

44. I would like to emphasise the co-operative nature of this inquiry. The Crown has made submissions on concessions it would like to make in this inquiry and I hope parties can co-operate in order for these proceedings to move forward in a meaningful way.

45. I do not see any significant benefit to parties in shifting the burden of proof to the Crown on issues that have already been proven in other inquiries.

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

**DATED** at Rotorua this 27th day of June 2011

Judge C T Coxhead
Presiding Officer
**WAITANGI TRIBUNAL**