OFFICIAL

BEFORE THE WAITANGI TRIBUNAL

WAI no 121, 654, 914, 1129, 1460, 1941, 1970, 2190 2309,and others

Concerning **THE TREATY OF WAITANGI ACT 1975**

And

of claims by Marama Stead Teresa Orsler, Gillie Parker, Naomi Epiha, Joseph Kiingi, Elizabeth Warren, Kingi Taurua, Rhoda Hohepa and others

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MEMORANDUM OF COUNSEL

DATED THIS 2ND DAY OF MAY 2012

RECEIVED
Waitangi Tribunal
4 May 2012
Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL

1. I refer to you directions of 10 April concerning the Northern hearings. I apologise for the delay in filing but I believe having regard to the timescales and the long term nature of the issues there is no prejudice. In addition counsel considered it appropriate to consider the thoughtful representations of Mr Doogan and his team and Dr Gilling and his acolytes.

STAGE ONE REPORT

2. As you may be aware the inquiry process in the Stage I hearings remains subject to judicial review proceedings. These proceedings are currently in recess until the report is issued. This is because if a favourable report is issued then any breach of process and fairness is mute.

3. There is a call over on 10 July and Counsel would be indebted to the Tribunal if a certain date could be indicated to the High Court by that time.

DELAY Financial

4. It has been 15 years since Ngai Tahu received it's 170 million dollars for its settlement. Depending upon the return of assets of that settlement, they are likely to be now worth in excess of one billion dollars. This inherently distorts the tribal landscape, and leaves those with whom the Crown wishes to settle to exercise disproportionate influence arising from their increased economic power.

5. The extent of the delay is considerable, and will further exacerbate the problem.

DELAY Dissonance

6. There have already been significant examples of those wishing to proceed to settlement and accordingly disrupted the hearing process, as claimant's were obliged to divert resources to avoid any mandate for pre-emptive settlement to be agreed. The Crown has actively promoted and funded this process.

7. It is worth observing that many urgencies arise from questionable and pre emptive attempts to obtain mandates which then exclude claimants rights to be heard.

DELAY Resourcing

8. Compared to resources available from CFRT in past years there is a much reduced fund available. The CFRT structure in itself leaves Counsel very remote from the process of directing the areas of research.

9. Tribunal witnesses although often useful remain distant from claimant counsel.

10. Legal Aid has used the pretext of CFRT to deny any funding to date. The bar lacks general confidence in obtaining any meaningful funding from this area.

11. In the more general context Legal Aid payments to Counsel have remained an ongoing issue. Restrictions on deployment of secondary providers often counsel with more than five years experience has also been problematic. Some firms have had to lay off staff, while others have had to curtail activities to earn the revenue necessary to pay overheads.

12. This has resulted in a prejudice to some claimants.

Crown's Role in Inquiry

13. The Crown has a number of roles in this process and needs to exhibit the highest standards of probity in undertaking them. The roles that cause greatest concern are:

    a. their role as funder of the claims process arising from the State Owned Enterprises settlement. There are clear grounds to consider current Legal Aid arrangements breach these undertakings;

    b. Their role as funder of the Tribunal. The Tribunals difficulties arise from a series of Crown actions including:

        i. the cut off of new historic claims,

        ii. The attempts at unstructured early settlement precipitating the need for urgency inquiries;

        iii. The new policies of the Crown in various fields including SOEs and education that also engendered urgencies;

        iv. The artificial dates for settlement;

        v. The general stringency of Treasury limited the resources of the Tribunal.

14. In the end the speed of these hearings is within the control of the Crown. Claimant Counsel are merely reactive.

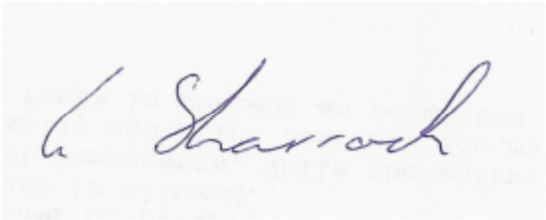
Nature of the Inquiry

15. For any settlement to be seen as valid there is a need that in the adversarial nature of the inquiry process there is not only fairness but a perception of fairness. In the absence of this the historical efficacy of any settlement will be challenged.

16. Counsel is reminded of the Emperor Commodus who fought combats in the Coliseum with gladiators. The perceptive Plebeians noted that his opponents had brittle armour and blunt weapons. The Emperor's attempt to demonstrate his prowess drew only ridicule and contempt. I hope the Crown will not fall into such a precarious position.

17. The Crown must ensure that these processes are properly funded. In the absence of such matters the efficacy of settlement process is called into question.

DATED at Auckland this 2nd day of October 2011



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Gerald Sharrock

Claimant counsel