OFFICIAL

IN THE WAITANGI TRIBUNAL

Wai 1040

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF Te Paparahi o Te Raki Inquiry (Wai 1040)

JOINT MEMORANDUM OF THE COUNSEL COORDINATING COMMITTEE REGARDING STAGE TWO HEARING PLANNING

Dated this 3rd Day of September 2012

RECEIVED
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WELLINGTON

McCaw Lewis Lawyers Ltd
One on London
1 London Street
PO Box 9348
Hamilton 3240
Phone: (07) 838 2079
Fax: (07) 834 3062
Solicitor Acting: Season-Mary Downs

Counsel instructed:
Michael J Doogan
Barrister
PO Box 5494
Level 5, Legal House
101 Lambton Quay
Wellington
Phone: (04) 499 9415
Fax: (04) 499 2323

MAY IT PLEASE THE TRIBUNAL:

Introduction

1. This joint memorandum is filed in response to the Memorandum and Directions of the presiding officer dated 2 August 2012 (Wai 1040, #2.5.127) which directed that the Counsel Coordinating Committee ("CCC") file further information in respect of Stage Two hearing planning by 23 August 2012, including information on:

   (a) The proposed interlocutory phase for Stage Two;

   (b) A draft hearing week plan; and

   (c) A long term hearing week plan.

2. By Directions dated 27 August 2012 (Wai 1040, # 2.5.128) the CCC was granted an extension to file this information until 3 September 2012.

3. The CCC has had regard to the Tribunal's Directions dated 19 June 2012 (Wai 1040, # 2.5.123) which set out a number of proposals and procedural considerations for Stage Two.

4. Accordingly, a draft long term Stage Two hearing plan is set out in **Annex A** and a hearing week plan for the first week of Stage Two hearings is contained in **Annex B**. This memorandum also contains additional submissions intended to clarify how Stage Two hearings may proceed.

5. The Te Kotahitanga o Nga Hapu Ngapuhi working party, claimants and counsel have had only a very limited opportunity to review and discuss these draft hearing plans. This proposal is therefore an initial attempt and will be further refined by more considered input from claimants and counsel together with the incorporation of Crown and Tribunal views.

6. We advise that for a number of these issues, such as the order of sub-regional hearings, Te Kotahitanga has yet to fully discuss and decide their general position. Therefore this proposal is interim, pending further input from Te Kotahitanga. We understand that these matters are being discussed

during this month by the sub-regions and will be on the Kotahitanga agenda for its September hui.

7. The intention of the CCC in preparing this proposal has been to try to facilitate an effective hearing process as much as possible and to make it as efficient as possible in all the circumstances. The ultimate aim is, of course, to have all of the claims from this Inquiry District investigated and reported on thoroughly in accordance with the Tribunal's statutory brief.

8. It is submitted that it is also imperative for the claimants to have their claims comprehensively reported on and their well-founded claims clearly identified – again as is part of the Tribunal's statutory brief – and that this occurs expeditiously to enable a timely and meaningful resolution of their Tiriti grievances, whether that be by way of Tribunal remedies or negotiation with the Crown.

9. To this end, the CCC have attempted to assist the Tribunal's reporting process such that material is provided and structured so that the reporting process, including detailed recommendations, can be begun from the very commencement of hearings. It is anticipated that this will allow the release of a timely Stage Two report to assist the claimants in settling or otherwise remedying their claims.

10. The CCC is conscious of the Tribunal's resourcing difficulties however and believes that the programme outlined – and to be further refined – will help to achieve the claimants' needs and objectives, while also assisting the Tribunal through providing indications of evidence required, timetabling, involvement of claimants, counsel and the Crown, and also planning to actively shoulder responsibility for assisting the sub regions to develop their own capabilities for coping with the hearings.

Proposed interlocutory phase

11. The CCC agrees with the Tribunal's stated preference for a simple but effective interlocutory process.[1]

Combined Statement of Issues

12. The CCC has endeavored to consult widely with sub-regional groupings, claimants and their counsel on the combined generic and local statements of issues which the CCC prepared ("Claimants' Combined Generic and Local Statement of Issues").

13. The Claimants' Combined Generic and Local Statement of Issues was supplied to the Crown on 21 August 2012 for their consideration. The CCC had the expectation that, if required, discussions could then take place between the CCC and the Crown. This was to enable a Combined Statement of Issues, which had been agreed to by the CCC and the Crown, to be filed on 3 September 2012.

14. The Crown has, however, been unable to adequately engage with this document given their work commitments in other inquiries. The CCC understands that the Crown will be filing an explanatory Memorandum.

15. On this basis, regrettably it has not been possible for the CCC to file a combined generic and local Statement of Issues today. The CCC will however, be filing the widely discussed and agreed Claimants' Combined Generic and Local Statement of Issues today.

16. At this time, without knowing the extent of Crown agreement or disagreement with the Claimants' Combined Generic and Local Statement of Issues, the CCC cannot provide any real guidance on a pathway towards achieving a Combined Statement of Issues.

17. The CCC remain committed, however, to working with the Crown, as far as is possible, towards an agreed Combined Statement of Issues. To this end, the CCC will continue to engage in a dialogue with the Crown as circumstances permit once the Crown is in a position to make a response.

[1] Wai 1040, # 2.5.127, para 8 (a).

Additional Evidence to be added to the Wai 1040 Record of Inquiry

18. In the Tribunal's Memorandum-Directions dated 11 July 2011 (Wai 1040, #2.5.88) it directed that Tribunal staff compile a final bibliography for distribution to parties within two weeks of the finalization of the Tribunal's Statement of Issues.

19. On this basis the Tribunal said that Counsel may continue to propose further evidence from neighboring inquiries for addition to the preliminary bibliography throughout this interlocutory phase of the Inquiry.

20. Counsel are currently considering other material which they will propose should be added to the Wai 1040 Record of Inquiry.

21. There now remain few interlocutory steps prior to the commencement of hearings (other than administrative judicial conferences).

Long term hearing week plan

22. The draft long-term hearing plan at **Annex A** identifies the following information:

    (a) The four rounds of sub-regional hearing rotations;

    (b) The proposed date for each hearing week;

    (c) The key issue/s and technical report/s to be heard in each hearing week; and

    (d) The counsel responsible for leading the technical witnesses.

23. Additional explanatory information on the rationale for this plan is provided below.

Spacing of hearing weeks

24. The long-term hearing week plan is based on the assumption that 21 hearing weeks will be available for Stage Two hearings.

25. The Tribunal has said that it would not, for reasons of manageability, wish to timetable hearing weeks any less than 4-5 weeks apart. [2] Counsel have considered this in drafting the long-term hearing plan and have largely scheduled hearings 4 weeks apart. In some cases there are 5 weeks between hearing weeks as a particular hearing week would fall on a public holiday.

26. There may be occasions where it might be possible (and sensible) to schedule some days or part weeks to hear technical evidence in addition to the regular monthly hearing weeks.

27. No hearing weeks have been set in the January months during the course of the hearing programme.

Sub-regional rotations

28. As set out in the draft long-term hearing plan the hearing weeks are scheduled on a sub-regional rotational basis.

29. The hearings commence in February 2013 with one opening hearing week where it is proposed that the Tribunal hear opening statements for the sub-regions and then hear key technical evidence on issues including Rangatiratanga and Kawanatanga which relate to many claimants.

30. The opening sub-regional statements could consist of selected tangata whenua representatives and counsel to provide an initial high-level overview of nga hapu me nga whanau o Te Paparahi o Te Raki, the key issues the hearings will address, and the types of findings and recommendations that may be sought from the Tribunal. The intention is to provide the Tribunal with a road map for the hearing of claims in this Inquiry and an outline and focus for expeditious and efficient report writing which could commence at the outset of the hearing programme.

31. The first sub-regional rotation would then continue with the second hearing week in the Nga Hapu o Te Takutai Moana sub-region, which will be followed by Whangaroa (week 3), Te Waimate Taiamai/Kaikohe (week 4), Whangarei/Mangakahia (week 5), Mahurangi (week 6) and Hokianga (week

[2] Wai 1040, # 2.5.123, para 25.

7). The second rotation of sub-regional hearings would then commence back at Nga Hapu o Te Takutai Moana.

32. The 21 hearings weeks have generally been allocated as follows (Note: The number of hearing weeks required by the sub-regions may be refined during the process of the sub-regions producing their individual detailed sub-regional hearing plans):

Sub-region	**Hearing weeks**
Opening week 1	1
Nga Hapu o Te Takutai Moana /Waitangi	4
Whangaroa	3
Te Waimate Taiamai / Kaikohe	3
Whangarei /Mangakahia	4
Mahurangi	1
Hokianga	4
Closings	1

Hearing the technical evidence thematically

33. Without accounting for any Crown evidence that may be heard, there are currently up to 18 technical historical reports and up to a further 7 oral-traditional or tribal-landscape reports filed or to be filed.

34. It was suggested by the Tribunal that the simplest approach to the hearing of technical evidence would be to allocate technical witnesses thematically and chronologically (as far as possible).[3]

35. The CCC agrees with this approach but also submits that the reports generally relating to Issues 1, 2, and 3 would be best highlighted in a separate hearing week. It was proposed that, given the importance of these issues, this hearing week could be *Week One* and in turn act as an opening and foundation for the Stage Two hearings.

Crown evidence to be heard concurrently

[3] Wai 1040, # 2.5.123, para 14, 15.

36. The Tribunal has noted its preference for Crown evidence to be given in response to claimant technical evidence. The CCC agrees that the Crown evidence be heard concurrently during the hearings.

37. We have not been able to include in our planning any detailed provision for Crown evidence as the Crown has not yet provided an indication regarding its intentions to call its own evidence. Therefore we suggest that the CCC will need to continue to develop the sub-regional hearing plans for each hearing week.

38. Claimant counsel have begun considering which pre-existing Crown reports would be useful for Stage Two and submissions about including these reports on the Record of Inquiry may be made at the Judicial Conference on 10 September 2012. This may assist the Tribunal and the Crown in respect of the early identification of Crown technical evidence and facilitate the planning process.

39. The CCC seeks a direction from the Tribunal setting a deadline for the Crown to file its evidence for this Inquiry, or at the very least a deadline by which the Crown indicates the evidence it is looking to file. We note that time is now short for this to happen, and for the Crown to commission evidence that relates to this Inquiry, particularly in respect of the initial hearing weeks.

Other hearing matters

Detailed sub-regional hearing plans

40. The Tribunal had originally directed that claimants and the Crown jointly produce a draft hearing timetable by Tuesday 25 September 2012.[4] While this was intended for the generic hearing phase, the CCC submits that it will be necessary for the sub-regions to file draft detailed hearing plans which identify which hearing rotation and week hapu and claimants will present in and how much hearing time they will require for the presentation of their evidence. This will assist with refining the broad hearing plan, and help the sub-regions to focus on the structure of their own allocated hearing time.

[4] Wai 1040 # 2.5.123, para 11.

41. The CCC requests that the Tribunal direct that the detailed sub-regional hearing plans be filed by **7 December 2012.**

Venues and site visits

42. It is proposed that the sub-regions consider the draft long-term hearing plan and work with the Tribunal, CFRT, Te Kotahitanga o Nga Hapu Ngapuhi working party and the CCC to organise hearing venues.

43. It is also proposed that the matter of site visits be left for the sub-regions to consider in their detailed sub-regional hearing planning.

Leading of claimant technical witnesses

44. As mentioned, counsel have been nominated to lead the claimant technical witnesses for the Stage Two hearings.

45. The CCC seeks clarification as to whether the Tribunal wishes claimant counsel to lead the Tribunal witnesses.

Filing requirements for evidence and questions of clarification

46. The CCC agrees with the Tribunal's earlier proposal that all technical witnesses should file a summary of their report, and, as far as possible, also answer in that summary the Tribunal's statement of issue questions relevant to their particular report.

47. The CCC proposes that all technical witness summaries be filed at least four weeks prior to the Stage Two hearings commencing in February 2013 (not the particular hearing week that the technical evidence is to be heard). The date for the filing of technical witness summaries would therefore be **21 January 2012**.

48. Again, although this creates a hiatus between the summary and the presentation of the evidence, the intention is to provide the Tribunal and its report writers with as much information as early as possible to facilitate Tribunal engagement with the evidence and to expedite the reporting process.

49. Given the timeframe available before the filing date in January 2013, in the very near future the CCC will also approach the Crown Forestry Rental Trust to facilitate and fund this process in a timely manner and assist the Trust to work with the technical witnesses in preparing the summaries of their evidence.

50. The CCC respectfully recommends that one month prior to the hearing week in which a witness's evidence is heard, that the Tribunal allows counsel to submit written questions of clarification. It is proposed that technical witnesses then be given two weeks to respond, allowing one week for parties to consider the responses prior to the hearing week commencing. This proposal aims to make oral cross examination during hearing time as efficient and effective as possible.

51. The length of technical witness's briefs should take account of the probable length of time that would be allocated for them to present during hearings. The CCC can propose that approximately 30-45 minutes of hearing time will be allocated for technical witnesses to present summaries of their evidence.[5]

52. The CCC also proposes that tangata whenua evidence be filed no less than four weeks in advance of the hearing week in which it is scheduled to be heard.

Cross examination by nominated or lead counsel

53. The Tribunal has said that coordinating counsel or lead counsel should be nominated by the CCC and Claimant Working Party to conduct cross-examination of particular claimant technical and Crown witnesses.

54. The CCC agrees with this approach and anticipates that the detailed sub-regional hearing week timetables will include estimates for lead and cross examination of witnesses.

55. It is suggested that any other counsel wishing to cross examine should seek leave to do so, set out the particular issue/s basis for needing to cross

[5] Wai 1040, # 2.5.123, para 27 – 29.

examine and time estimates and reasons why these matters cannot be covered by the general lead counsels cross examination.

Stage Two report

56. The CCC also proposes that the Tribunal completes its Stage Two report promptly, preferably no later than ten months from receipt of final closing submissions. This objective would be aided by the provision of a dedicated report writer (or writers), available to attend hearings and assist with the preparation of the report on a full time basis for the duration of the hearing schedule and thereafter until completion of the report. The CCC's procedural suggestions above also aim to facilitate this process.

57. The proposal is for an optimum hearing and reporting programme that meets the reasonable needs and expectations of the Ngapuhi claimants. The CCC seeks agreement in principle to these proposals from the Tribunal so that the question of appropriate resourcing to ensure delivery can then be taken up with the Crown.

Stage One report

58. As the Tribunal knows, there is considerable support for the view that Stage Two ought not to start without the Stage One report.

59. In the Tribunal's directions dated 2 August 2012 (Wai 1040 # 2.5.127) the Tribunal noted that given the claimants' strong regard to the importance of having the Stage One report prior to Stage Two hearings that it is considering a number of options to speed up the writing process.

60. Claimants require more specific information from the Tribunal about this so as to make final decisions and therefore requests that a Tribunal update be given at the Judicial Conference on 10 September 2012.

61. The Counsel Coordinating Committee looks forward to continuing working with parties on Stage Two hearing planning.

DATED this 3rd Day of September 2012

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Michael J Doogan / Season-Mary Downs / Alana Thomas

On behalf of the Counsel Coordinating Committee