OFFICIAL

In the Waitangi Tribunal

Wai 1510

Concerning	the Treaty of Waitangi Act 1975
and	the Taihape ki Kāpiti Inquiry Region

Memorandum and directions of the Presiding Officer and the Acting Chairperson

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Introduction

1. At the judicial conference at Ōtaki on 16 April 2009, a number of matters were raised for consideration by The Hon E T J Durie, spokesperson for Te Hono ki Raukawa, concerning the Tribunal's approach to the proposed Taihape ki Kāpiti inquiry region. Submissions were also made on the issues of mandate, overlapping claimant groups, the role of claimants and their counsel and how the Tribunal might restrict the participation of particular claimants. The issue of conflicts of interest was also mentioned.

2. Given the wide-ranging policy and procedural issues raised, both the presiding officer and the acting chairperson issue this memorandum and directions. We want to take this opportunity to highlight the Tribunal's premises (legal and policy) for conducting its district inquiries. In addition, we seek responses from claimants on a proposed division of Taihape ki Kāpiti into two separate district inquiries. Finally we revisit very briefly three matters raised at the conference.

Background

3. On 9 December 2008 Judge Wainwright, as acting chairperson of the Tribunal, appointed Judge Harvey as presiding officer to conduct a series of judicial conferences with the assistance of kaumātua member Professor Hirini Mead (Wai 1510 #2.5.1). The hui were to determine whether or not claimants in the large Taihape ki Kāpiti area wanted the Tribunal to conduct an inquiry into the historical claims of that region.

4. After discussions with Tribunal staff, Judge Harvey directed that a judicial conference would be convened at the Ōtaki War Memorial Hall (Wai 1510 #2.5.2). The proposed agenda was set out and Judge Harvey invited written submissions on the questions posed. Most submissions were duly received by the due date with two requests for time extensions.

5. On the day before the conference, Professor Whatarangi Winiata contacted Judge Harvey inviting the Tribunal to convene the conference at Raukawa Marae, Ōtaki. After convening a brief telephone conference with counsel, Judge Harvey and Professor Mead decided to accept Professor Winiata's invitation. The judicial conference thus took place at Raukawa Marae. Numerous iwi and hapū were represented at the hui, with more than 200 people attending throughout the day. Claimants or their counsel recorded forty-four appearances. This was thus a well-attended conference that generated considerable interest in the claimant community.

Legal and policy settings

6. At the conference on 16 April, suggestions were made about a different approach to running district inquiries. It is therefore appropriate for the Tribunal to set out the key factors that influence the Tribunal's processes.

Treaty of Waitangi Act 1975, Section 6

7. Section 6 provides that "any Māori..." may make a claim to the Tribunal. This is an open and permissive provision. There is no requirement for a claimant to be connected to or mandated by any traditional descent group (hapū or iwi). Thus, an individual Māori may bring a claim before the Tribunal, and is entitled to be heard, and to be represented by legal counsel – unless the Tribunal determines that the claim is vexatious or frivolous (section 7). Any group of Māori is in the same position. Different views are held as to whether the permissive nature of this provision is a strength or a weakness of the legislation. But whether it is good or bad, it is the law.

8. In practice, the Tribunal does not accord all claimants the same level of inquiry into their claims. Put simply, more time and resources go to significant, well-supported claims at iwi and hapū level, than to small claims advanced by individuals alone. All claims, however, are entitled to be heard. Often the issues raised by sole claimants end up being dealt with under the umbrella of larger comprehensive tribal claims. And, when the Tribunal eventually reports, it often recommends that the Crown negotiate with iwi and hapū. For example, in Tauranga Moana, in excess of fifty claims were filed and the issues raised in these claims were heard, but the Tribunal recommended that the Crown enter into settlement discussions with the principal iwi groups of the district.

9. Since 2001, under the "New Approach" to district inquiries, it has been the Tribunal's practice to use the interlocutory lead-up to hearings commencing as an opportunity to come to grips with where the claims sit in the spectrum of significance and support. These are not matters into which the Tribunal has insight on day one of its judicial conferencing, as there are many groups, and their accounts of themselves and others do not always coincide. But as judicial conferencing proceeds and the Tribunal gets to know the claimant groups and their issues, understanding grows. Important questions include the scope of the claims, and the 'mandate' for them – that is, the degree of support behind each claimant. A statement of issues is usually prepared by the Tribunal with the assistance of claimants and the Crown to ensure that the critical claim issues are included for consideration during the hearing process. By the time the inquiry gets to the stage of planning for hearings, there is a good understanding and consensus around which iwi and hapū groupings in the district lead the main claims, and therefore require most hearing time.

10. This approach was deployed in Tūranganui-ā-Kiwa, Central North Island, Wairarapa ki Tararua, Urewera, and Whanganui.

Legal Aid

11. Section 42 of the Legal Services Act 2000 makes provision for legal aid to claimants before the Waitangi Tribunal. The Legal Services Agency determines eligibility and the amount of assistance that may be provided. The Tribunal's role is limited to providing the Agency with contextual information about the claims (section 44) to assist with their assessments. We understand that the Agency takes into account matters such as the scope of the claim, the size of the claimant group (iwi, hapū, whānau or individual), and the extent of participation in the inquiry. It also considers, we are told, the risk of duplication of work and whether a claim issue might be covered by an existing claim when deciding on the limits of any assistance that it might provide.

12. There does not appear to be a statutory basis for the Tribunal denying or even influencing a claimant's choice as to legal representation. Many claimants do seek to have their own lawyer. Selection of suitable counsel and the extent of legal aid support are matters for the claimant and the Agency to determine.

13. We also note in passing that unlike conventional civil legal aid Tribunal claimants are not required to repay any grant and nor can their current or settlement assets be used to recover any grant of aid. (See section 9 and 32(5) Legal Services Act 2000.)

14. For completeness we agree with the submission that clause 7 of the Second Schedule to the Treaty of Waitangi Act 1975 does provide that claimants appear as of right but that for counsel leave must be granted by the Tribunal. The terms of that leave are a matter for the Tribunal to determine and any leave granted can be withdrawn. We do not consider that this provision is a vehicle for the Tribunal to deny claimants legal representation if that is what they prefer to have.

District inquiries

15. Initially, the Tribunal set about hearing registered claims one by one, but in the 1990s, as the number of claims steadily increased, the then chairperson, Chief Judge E T J Durie, introduced an important change in approach. This was to arrange for claims to be heard together on a district-by-district basis. A large historical research project called Rangahaua Whānui was undertaken as a scoping exercise and to provide a basis for the new district approach. These changes responded (a) to the need for the Tribunal to proceed more quickly and efficiently, and (b) to the recognition that many claimants' grievances against the Crown were held in common with other claimants – particularly with those in the same district. Currently, the Tribunal hears historical claims on a district-by-district basis.

16. Hearing claims grouped together in districts is not prescribed by legislation. The Tribunal elected to amend its own practice and procedure in order to respond to the need to inquire into and report on claims more efficiently and speedily. At the

time, there was mounting disquiet about delays in the Treaty claim and settlement process. The Tribunal was under pressure to reduce the length of time claimants were required to wait for their claim to be heard and reported on. Many factors played a part in the overall delay, including the lack of research and funding for both the claimants and the Tribunal. The readiness of claimants to proceed also affected whether the Tribunal was able to begin hearings.

17. Hearing claims on a district-by-district basis was well established when, in 2000 the then acting chairperson Chief Judge J V Williams introduced what became known as the New Approach in the Tūranganui ā Kiwa (Gisborne) district inquiry. The New Approach was a further effort to improve and streamline the Tribunal's procedures for inquiring into historical claims.

18. Thus, procedure for inquiring into historical claims has been shaped by both the former chairpersons of the Tribunal. First the district inquiry approach, then the New Approach with its greater use of interlocutory procedure, the consensus mode of developing statements of issues, and the attempt to provide claimants with a comprehensive treatment of their historical claims, have led to the Tribunal's current practice.

19. Improvements are always sought. Various innovations were deployed in the Wairarapa ki Tararua, Central North Island, and Whanganui inquiry districts as the Tribunal sought to enhance its processes to ensure their continuing relevance to Māori. These approaches have generally been well received by the respective claimant communities. It remains a work in progress. There will be new aspects of the inquiries in both Te Rohe Pōtae and Te Paparahi o Te Raki-(Northland).

20. 1920 claims are now registered with the Tribunal, with a further 1355 awaiting more information to enable their registration. The current environment – and here we refer to the current fiscal and policy environment – would suggest that the Tribunal's process should facilitate claimants getting through their inquiries to settlement as soon as they can. However, the Tribunal works with claimants to ascertain what their desired outcomes are. For instance, if claimants wish to move into negotiations with the Crown soon, it is sometimes possible for the Tribunal to limit the scope, breadth or depth of its inquiry. This occurred in the Central North Island regional inquiry where a focus on generic issues for a large group of overlapping iwi and hapū was applied to provide a basis for negotiations.

21. Against the background of these general comments, we now consider this district inquiry.

District inquiry boundaries

22. As mentioned already, the organisation of claims into district inquiries is a confirmed practice of the Tribunal, and it is not one that we propose to review now.

23. The Tribunal does exercise discretion as to the boundaries of inquiry districts. Agreeing on appropriate boundaries is an important issue for the parties in the start up phase of any inquiry. Working with claimants and the Crown, the Tribunal considers the common claim issues, the geographical size of the district, the number of claims to be heard, tribal associations with an area, and the effect on neighbouring districts. The Tribunal has twice combined districts into regional inquiries, in order to meet participants' desires for a speedier process (as in CNI), or one better responding to tribal spread (as in Te Paparahi o Te Raki-Northland).

24. The Tribunal received a number of written submissions on potential boundaries of an inquiry in the area from Taihape to Kāpiti. Some requested a separate Taihape inquiry - that is, separate from any inquiry into claims in the Manawatū, Horowhenua and Kāpiti Coast area. Others requested that Ngāti Raukawa claims be heard in one unified inquiry district. A brief summary of the various submissions on inquiry boundaries is attached.

25. Having considered the submissions of claimants alongside the criteria outlined in paragraph 20, we propose that the area from Taihape to Kāpiti be divided into two separate inquiry districts for which separate Tribunals would be appointed: a Taihape district inquiry, and a Manawatū ki Horowhenua-Kāpiti district inquiry.

Taihape

26. A Taihape inquiry district would lie to the north of the 1849 Rangitikei-Turakina Purchase and the 1866 Rangitikei-Manawatū Purchase. Its other boundaries would be those of the Whanganui, National Park, Taupō, and Mōhaka ki Ahuriri inquiry districts, and the potential Heretaunga (Hawkes Bay) inquiry district.

Manawatū ki Horowhenua-Kāpiti

27. A Manawatū ki Horowhenua-Kāpiti inquiry district would extend from the southern bank of the Rangitikei River to Porirua Harbour. Its western and southern boundaries would follow the boundaries of the Wairarapa ki Tararua and Wellington districts.

Submissions

28. All those wishing to make their views on this proposal known to the Tribunal should file a submission by **4.00pm on Friday 29 May.**

Other matters

Judicial management

29. We have considered Mr Webster's submission on the question of possible conflicts of interest. In light of Judge Harvey's earlier involvement with Rangitāne during their settlement negotiations and as their counsel during the Wellington inquiry, we have come to the view that it is preferable for another presiding officer to be appointed in due course to deal with areas where Rangitāne assert interests. Accordingly, if the Tribunal decides (after receiving submissions) to proceed with a Taihape district inquiry, Judge Harvey will preside there. This is subject to the proviso that no issues of conflict arise with Te Rūnanga o Tupoho in the proposed Taihape inquiry.

30. Although another presiding officer will be appointed for the district inquiry in the proposed Manawatū-Horowhenua-Kāpiti district in due course, in the meantime the Acting Chairperson, Judge Wainwright, will deal with the management of interlocutory matters affecting that area.

31. Judicial conferences will be convened as soon as the boundary definition questions are resolved.

Right of reply

32. At the judicial conference on 16 April 2009, Judge Harvey intimated that he expected to convene another conference at which other parties would have an opportunity to respond to matters put before the Tribunal by spokespeople for Te Hono ki Raukawa.

33. In light of our current focus on determining the boundaries of the inquiry first, the question of responses will be deferred. Once judicial conferencing recommences, we will return to this matter.

Conflicts of interest and overlapping claims

34. The Tribunal has before it insufficient information to form any view at all on whether any counsel may have conflicts of interest in representing multiple clients in this or related districts.

35. That said, it is of course essential that counsel for Waitangi Tribunal claimants are able to represent their clients' interests appropriately and in accordance with the relevant professional rules of conduct. We therefore invite any lawyer who has a relationship with more than one claimant group in or involved with this inquiry to ensure that the groups concerned are not pursuing inconsistent arguments or interests. It would be of considerable assistance if any areas of ambiguity of this kind were addressed as between counsel and their clients before the Tribunal reconvenes in the district (whether in the north or the south or both).

The Registrar is to distribute this direction to all parties on the notification list for Wai 1510, the combined record of inquiry for the Taihape ki Kāpiti claims.

DATED at Rotorua and Wellington this 27th day of April 2009

Judge L R Harvey
Presiding Officer
WAITANGI TRIBUNAL

Judge C M Wainwright
Acting Chairperson
WAITANGI TRIBUNAL

Annex 1: Summary of submissions on boundaries

1. This Annex briefly summarises the written submissions received on potential inquiry boundaries in the Taihape ki Kāpiti area. They are grouped by the general areas indicated in the submissions.

Taihape

1.1. Counsel for Wai 1705, 647, and 588 requested that a Taihape district include claims to the Rangipō-Waiū block up to the Moawhango River as only Ngāti Rangi were heard in the Whanganui inquiry (Wai 1510 #3.1.9).

1.2. Counsel for Wai 1260 requested an early inquiry into the Waiouru Defence Lands as this matter was only partly dealt with by the National Park and Whanganui inquiries Wai 1510 #3.1.4). A late submission by counsel for Wai 575 supported the proposal for an expedited inquiry into the Waiouru Defence Lands, which would enable all Ngāti Tūwharetoa issues to be dealt with in comprehensive negotiations (Wai 1510 #3.1.39).

1.3. Late submissions by counsel for Wai 1835 and 662 separately argued that the water catchments within the Taihape area be treated as a separate inquiry district from the Rangitikei-Manawatū (Wai 1510 # 3.1.36 & #3.1.37).

1.4. Counsel for Wai 400 and 1034 separately noted that their interests extended beyond the Mōhaka ki Ahuriri inquiry district into the north-eastern corner of the potential Taihape inquiry district (Wai 1510 #3.1.15 & #3.1.16).

1.5. Late submissions by counsel for numerous Ngāti Kahungunu claims in the Heretaunga and Tamatea areas noted their interests along the Kaweka and Ruahine ranges (Wai 1510 #3.1.40). They noted that some claimants from the Heretaunga Taiwhenua rohe had elected to pursue their claims within the Taihape inquiry as their marae are within that area.

1.6. Late submissions by counsel for Wai 151, 277 and 554 noted interests in several blocks that had not been heard in either the National Park or Whanganui inquiries (Wai 1510 #3.1.25).

1.7. Counsel for Wai 1632 noted that while some aspects of their claim fell just within the border of the Whanganui district, they would prefer to be heard in the Taihape district as their marae community and other aspects of their claim are located within the Taihape area (Wai 1510 #3.1.31).

Rangitikei-Turakina

1.8. Counsel for Wai 1641 requested the Tribunal inquire into the Turakina Māori Girls' College near Marton (Wai 1510 #3.1.12).

Taihape and Rangitikei-Manawatū

1.9. Counsel for Wai 1872 noted that while Ngāti Pikiahu customary interests extend from Lake Taupo to Te Reureu and the Manawatū River, they wished to cover in full the claims concerning the Rangitikei-Manawatū purchase and the Rangitikei awa.

1.10. Counsel for Wai 1260 and 651 separately noted their claims in the Te Reureu block, but considered they would form part of any Taihape district (Wai 1510 #3.1.4 & 3.1.5). The Te Reureu block near Halcombe, however, falls within the area of the Rangitikei-Manawatū purchase and presumably would not be included in any separate Taihape inquiry.

Rangitikei-Manawatū and Horowhenua-Kāpiti

1.11. Counsel for Wai 784 and 972 requested that the Tribunal enquire into their claims falling within the Rangitikei-Manawatū area (Wai 1510 #3.1.10).

1.12. Counsel for Wai 1482 requested that the Tribunal enquire into their claims within the Rangitikei-Manawatū and Horowhenua-Kāpiti areas (Wai 1510 #3.1.13).

1.13. Counsel for Wai 113, 408, 757 and 1932 argued that it would be unacceptable to divide the Rangitikei-Manawatū and Horowhenua areas (Wai 1510 #3.1.18).

1.14. Counsel for Wai 1944 requested a Tribunal inquiry into the Manawatū, Rangitikei and Tangimoana areas (Wai 1510 #3.1.26).

1.15. Counsel for Te Hono ki Raukawa argued that the Tribunal should hold a separate inquiry for the Manawatū-Horowhenua-Waikanae area lying between Ngā Reureu marae and Whakarongotai (Wai 1510 #3.1.27(a)). This was supported by counsel for Wai 1461 (Wai 1510 #3.1.28) and counsel for Ngāti Rangatahi kei Rangitikei (Wai 1510 #3.1.32).

1.16. Counsel for Wai 1618 sought further instructions on this matter (Wai 1510 #3.1.34).

Horowhenua

1.17. Counsel for Wai 1629, 237, 1621 separately requested that the Tribunal enquire into their claims in the Horowhenua area (Wai 1510 #3.1.11 & 3.1.19 & 3.1.21).

1.18. Counsel for an unregistered claim by Kahu Pene and for Wai 1490 separately noted they fell within the potential Taihape ki Kāpiti region (Wai 1510 #3.1.29).

1.19. Counsel for an unregistered new claim by Te Rautangata required further instructions at a later date (Wai 1510 #3.1.38).

Kāpiti

1.20. The spokesperson for Wai 1018 requested the Tribunal enquire into the area between the Kukutauaki and Whareroa streams in the Kāpiti area (Wai 1510 #3.1.24).

Other

1.21. Counsel for Wai 207 noted customary interests as far as the Whangaehu river in the north (Wai 1510 #3.1.14).

1.22. Counsel for Wai 443 noted a number of hapū who affiliate to both Ngāti Raukawa in the Waikato and Ngāti Raukawa ki te Tonga (Wai 1510 #3.1.29 & 3.1.30)

1.23. Counsel for Wai 48, 81, 146, 671 and 978 noted interests from Taumarunui and Southern Whanganui extending into the potential Taihape ki Kāpiti region, and asked that the potential inquiry include the eviction of Ngāti Hāua from the Hutt Valley (Wai 1510 #3.1.22).