OFFICIAL

WAITANGI TRIBUNAL

Wai 2200

CONCERNING the Treaty of Waitangi Act 1975

AND the Porirua ki Manawatu District Inquiry

MEMORANDUM-DIRECTIONS (No. 7) OF DEPUTY CHIEF JUDGE C L FOX, PRESIDING OFFICER AND EMERITUS PROFESSOR TAMATI REEDY

Tena koutou katoa

Introduction

1. This memorandum-directions addresses the submissions that have been filed in response to Judge Fox's memorandum-directions dated 18 August 2010 (Wai 2200, #2.5.12). It also addresses a number of other matters arising in this inquiry including the venue and agenda for the judicial conference, and potential conflicts of interest relating to Professor Reedy's membership on this Tribunal.

2. We have considered the submissions received and a proposed process for the Porirua ki Manawatu district inquiry is set out below.

Change of venue for judicial conference

3. In her memorandum of 29 November 2010 on behalf of Te Hono ki Raukawa (Wai 2200, #3.1.136), Donna Hall requests that the venue of the judicial conference be relocated to a mutually acceptable place within the Raukawa rohe. Dr Gilling has responded for his clients (Wai 2200, #3.1.137; #3.1.138). They wish to retain the initial venue set by the Tribunal or, at the least, have a neutral venue.

4. The Tribunal's reasoning for setting the conference in Plimmerton was to hold official events throughout the Porirua ki Manawatu inquiry district. Previous conferences have been held in Otaki and Palmerston North.

5. On further consideration, the Tribunal has determined that it is appropriate to hold the conference on a marae as the issue of having an appropriate powhiri for all parties has been raised. However, once matters of tikanga are addressed and while in conference, it is understood that the venue will be a neutral one. The Tribunal is extremely grateful to Ngati Toa for agreeing to this venue change. Thus the judicial conference on 13 and 14 December 2010 will now be held at:

Takapuwahia Marae
2 Nohorua Street
Takapuwahia
Porirua

6. The location of the conference should not be interpreted as the Waitangi Tribunal adopting a position where any claimant iwi has been given the right to lead the terms of engagement of other iwi within this Tribunal. All iwi will be treated with the same respect and will lead their own engagement for their own people.

Proposed agenda for the judicial conference

7. In his memorandum of 26 November 2010 (Wai 2200, #3.1.135), Professor Boast informs the Tribunal that he has a High Court fixture on 13 December 2010 and will be unable to attend the conference on that date. Professor Boast asks the Tribunal to consider deferring the conference to a more suitable date in consultation with claimants and counsel.

8. It is not possible for the Tribunal to defer the conference at this stage. However, as Professor Boast is able to attend the conference on 14 December 2010, the agenda will be set so that his clients' concerns will all be addressed on the second day.

9. At the judicial conference on 13 and 14 December 2010, the Tribunal will hear from claimants in their tribal groupings. The agenda will be as follows:

<u>Monday 13 December 2010</u>

10am Powhiri on Takapuwahia Marae
1) Appearances
2) Hearing from groups in response to the proposed inquiry plan in the following order:
   - Ngati Apa
   - Ngati Haua
   - Ngati Rangatahi
   - Rangitaane
   - Muaupoko
   - Ngati Toa

<u>Tuesday 14 December 2010</u>

9am Re-convene conference
1) Hearing from groups in response to the proposed inquiry plan:
   - Ngati Kauwhata
   - Ngati Raukawa
2) Other business

Potential conflicts of interest

10. Professor Reedy has been appointed as a kaumatua member on this Tribunal panel. Professor Reedy has advised that he does not think he has any conflicts of interest with claimants or claimant groups in the Wai 2200 district inquiry. However, he notes the following:

    a) He was involved in the establishment of runanga throughout Aotearoa in his role as Secretary of Maori Affairs;
    b) He was also the academic advisor for the establishment of the three wananga, including Te Whare Wananga o Raukawa;
    c) He is related to the following counsel in this district: Atareta Poananga, Matanuku Mahuika and Charl Hirschfeld; and
    d) Matanuku Mahuika is also acting for Professor Reedy in respect of personal matters totally unrelated to matters before the Tribunal.

Response to submissions

11. We have considered the submissions made by parties in response to Judge Fox's directions of 18 August 2010. A summary of the submissions received will be sent out only in electronic form next week.

12. The following section of this direction sets out the legal and procedural framework that this particular panel of the Tribunal will function within. A proposed inquiry process based on this approach follows. It should be emphasised that the approach taken reflects the circumstances for this historical inquiry and the undoubted emphasis on iwi and hapu in the submissions for claimants.

Procedure

13. In the Crown memorandum dated 15 November 2010 (Wai 2200, #3.1.125), counsel noted that:

> *The Waitangi Tribunal must inquire into all claims brought before it by individuals. The Tribunal has a wide discretion as a commission of inquiry to set its own procedures, having regard to the Treaty of Waitangi Act 1975 and relevant principles of public law. The Tribunal must observe natural justice in hearing those claims. All claimants are entitled to appear before the Tribunal. The Crown's support for the Declaration does not alter the Tribunal's obligations or powers.*

14. The Crown submits that the Tribunal's own existing practices and jurisprudence are sufficient to address the inquiry planning issues raised by my memorandum-directions of 18 August 2010 and also including the points raised by Te Hono ki Raukawa (Wai 2200, #3.1.100).

The procedural framework

15. The functions of the Tribunal relevant to this inquiry are to be found in sections 5 and 6 of the Treaty of Waitangi Act 1975.

16. How we exercise these functions is the subject of some discretion in terms of procedure, but is guided by schedule 2 to the Treaty of Waitangi Act 1975.

17. Under this schedule, the Tribunal is deemed to be a commission of inquiry, under the Commissions of Inquiry Act 1908 (COI Act 1908), and, subject to the provisions of the Treaty of Waitangi Act 1975, all the provisions of that Act, except sections 11 and 12 (which relate to costs) apply accordingly. The Chairperson of the Tribunal, or any other person, being the presiding officer at a sitting of the Tribunal or a member of the Tribunal purporting to act by direction or with the authority of the Chairperson:

    a) May issue directions or conduct conferences; or
    b) May issue summonses requiring the attendance of witnesses before the Tribunal, or the production of documents; or
    c) May do any other act preliminary or incidental to the hearing of any matter by the Tribunal.

18. In addition to these powers, under section 4 of the COI Act 1908, the Tribunal has all the powers of the District Court in the exercise of its civil jurisdiction, in respect of citing parties and conducting and maintaining order at an inquiry.

19. Sittings of the Tribunal are held at such times and places as the Tribunal or the presiding officer from time to time appoints. The Tribunal may meet in private or in public, as the Tribunal from time to time decides. The presiding officer determines what notice he or she thinks is needed to be given of any public sitting of the Tribunal to any persons likely to be affected.

20. Any claimant or other person entitled to appear before the Tribunal may appear either personally or, with the leave of the Tribunal, by a barrister or solicitor of the High Court; or any other agent or representative authorised in writing. Any such leave may be given on such terms as the Tribunal thinks fit, and may at any time be withdrawn.

21. The Tribunal may appoint counsel to assist it in respect of any proceedings or any part of any proceedings before the Tribunal. The Tribunal may appoint counsel to assist any claimant in respect of any proceedings or any part of any proceedings before the Tribunal if it is satisfied that the matter is of sufficient importance or complexity to warrant such an appointment or that it would be unjust to the claimant not to make such an appointment.

22. Unless expressly provided in the 1975 Act, the Tribunal may regulate its procedure in such manner as it thinks fit, and in doing so may have regard to and adopt such aspects of te kawa o te marae as the Tribunal thinks appropriate in the particular case, but shall not deny any person the right to speak during the proceedings of the Tribunal on the ground of that person's sex. As with all commissions of inquiry, the Waitangi Tribunal has wide powers to regulate its own procedures.

23. The Tribunal may act on any testimony, sworn or unsworn, and may receive as evidence any statement, document, information, or matter which in the opinion of the Tribunal may assist it to deal effectually with the matters before it, whether the same would be legally admissible evidence or not. In addition, witnesses appearing before the Tribunal may give their evidence in the Maori language.

24. As a commission of inquiry, the Tribunal's jurisdiction is inquisitorial in nature. It does not have to wait for issues to be submitted, but itself can originate inquiry into the matters which it is charged to investigate. The Tribunal may commission, or authorise a claimant to commission at the expense of the Tribunal, any person (whether or not a member of its staff appointed under clause 9 of the schedule) to investigate any matter relating to a claim under section 6 of the Act; or any other matter relating to the functions of the Tribunal; and to prepare a report on any matter investigated and to submit that report for consideration by the Tribunal. The Tribunal may receive any such report in evidence and every party to the proceedings shall be entitled—

    a) To receive a copy of the report; and
    b) To make submissions on it to the Tribunal.

25. Any party to the proceedings may, with the leave of the Tribunal, cross-examine the person by whom the report was made. Subject to the above regarding evidence, the Evidence Act 2006 applies to the Tribunal in the same manner as if the Tribunal were a Court within the meaning of that Act.

Jurisdiction and role of the Waitangi Tribunal

26. In the *Pouakani* Report *1993* the Waitangi Tribunal stated that:

> *... like any commission of inquiry the Waitangi Tribunal has an inquisitorial role. [The Waitangi Tribunal] is concerned with finding out what happened that led to the sense of grievance felt by the claimants.*[1]

27. This was reiterated by the Waitangi Tribunal in the Turangi Township Remedies Report 1998 where the panel agreed that:

> *... the Waitangi Tribunal is not a Court of law. It has the powers of a commission of inquiry and has the unique power to regulate its procedure... The Crown as a party to the proceedings before the Tribunal is obliged to furnish the Tribunal with evidence of all relevant matters within its control.*[2]

28. In the Pouakani Report 1993 the Tribunal stated that:

> *The Tribunal's task is to enquire whether the claim is well-founded. Nothing is said in the TOWA about the standard or BOP [burden of proof] cast upon the claimants. In its reports the Tribunal doesn't generally refer to burdens or standards of proof at all, and this is no doubt because of the Tribunal's status as a COI. Its task is inquisitorial [sic] – to enquire into, and make recommendations.*

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[1] Waitangi Tribunal, *The Pouakani Report* 1993 (Wellington, Brokker and Friend Ltd, 1993), p 6.
[2] Waitangi Tribunal, *Turangi Township Remedies* Report (Wellington, GP Publications, 1998), p 24.

Concepts of standards and burdens of proof are inappropriate except to the extent that the Tribunal must find to its own satisfaction that a claim is well-founded.[3]

29. The nature of the Tribunal's jurisdiction has not been changed substantively, despite the power it has had since 1989 to make binding recommendations with respect to certain lands.[4] The High Court's explanation in *Haronga v Waitangi Tribunal* of the Tribunal's role as approved by the Court of Appeal is repeated below:

> *[40] The Tribunal is established by s 4(1) of the ToWA. In terms of the long title to the ToWA, the Tribunal was established "to make recommendations on claims relating to the practical application of the Treaty and to determination whether certain matters are inconsistent with the principles of the Treaty".*
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> *[41] The Tribunal's jurisdiction – as originally provided for – was recommendatory only, in the sense that recommendations it might make, under s 6(3), were not binding on the Crown. Section 6(3), as originally enacted and today, provides as follows:*
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> *If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.*
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> *[42] As relevant for this application, the functions given to the Tribunal by s 5 of the ToWA include the function of "inquir[ing] into and mak[ing] recommendations upon, in accordance with this Act, any claim submitted to the Tribunal under section 6".*
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> *[43] Section 6 provides for claims by any Maori or any group of Maori where they are, or are likely to be, prejudicially affected by, amongst other things, any Act, regulations, proclamation, notice, policy or practice (whether or not still in force) adopted (or proposed to be adopted) by or on behalf of the Crown, or any act done or omitted (or proposed to be done or omitted) by or on behalf of the Crown, which was or is inconsistent with the principles of the Treaty. That section was amended in 1986 to allow for historical claims – i.e. claims in relation to enactments passed or actions done or omitted at any time on or after the 6th day of February 1840. The Tribunal is required to inquire into those claims, subject to a time bar provision (in s 6AA(1)) and s 7.*
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> *[44] Under s 7(1), the Tribunal may in its discretion decide not to inquire (further) into any claim under s 6 if in the opinion of the Tribunal:*
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> *(a) The subject-matter of the claim is trivial; or*
> *(b) The claim is frivolous or vexatious or is not made in good faith; or*
> *(c) There is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to the Ombudsman, which it would be reasonable for the person alleged to be aggrieved to exercise.*

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[3] Ibid, p 9.
[4] *Haronga Jnr v Waitangi Tribunal* [2010] NZCA 201, para 45.

[45] Under s 7(1A), the Tribunal may, from time to time, for sufficient reason, defer its inquiry into any claim made under s 6, for such period or periods as it thinks fit.

[46] As quoted above, s 6(3) provides that, where a Tribunal finds a claim to be well-founded, and it thinks fit having regard to all the circumstances, it may recommend to the Crown that it take action to compensate for or remove the prejudice, or to prevent other persons being similarly affected in the future.

[47] That recommendation may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take (s6(4)). The Tribunal shall not recommend the return to Maori ownership of any private land or the acquisition by the Crown of any private land (s 6(4A)). Under s6(5):

The Tribunal shall cause a sealed copy of its findings and recommendation (if any) with regard to any claim to be served on—
(a) The claimant:
(b) The Minister of Maori Affairs and such other Ministers of the Crown as in the opinion of the Tribunal have an interest in the claim:
(c) Such other persons as the Tribunal thinks fit.

[48] In addition to its general power to make non-binding recommendations under s 6(3), the amendments to the ToWA enacted following the Lands case, the Forests case and the subsequent Crown Forests Agreement...give the Tribunal powers to make binding recommendations in certain circumstances.[5]

The relevance of the Treaty of Waitangi

30. As noted above, the initial function of this Tribunal is to inquire into and make recommendations upon, and in accordance with the Treaty of Waitangi Act 1975, any claim submitted to the Tribunal under section 6. The Tribunal takes an inquisitorial approach, so as to get to the truth of what happened concerning any particular claim before it. In doing so it should ensure as far as possible that all parties do all they reasonably can to assist the Tribunal to fulfil its functions, including providing relevant evidence.[6]

31. I note that in exercising any of our functions under section 5, the Tribunal must have regard to the two texts of the Treaty of Waitangi set out in schedule 1 to the Act and, for the purposes of the Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them.

32. The purpose of the Treaty of Waitangi itself, is described in its Preamble. In the English version that purpose follows the Queen's declaration that as she regards "the Native Chiefs and Tribes of New Zealand with favour" she is "anxious to protect their just rights and property and to secure to them the enjoyment of peace and good order." The Maori version provides "i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o

[5] *Haronga v Waitangi Tribunal* [2010] BLC 214 (HC).
[6] Waitangi Tribunal, *Turangi Township Remedies* Report (Wellington, GP Publications, 1998), p 24.

ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki..." Similar emphasis on the Chiefs and Tribes can be found at the conclusion of the Articles of all three the Treaty.

33. Article 1 emphasises the role of the Chiefs.

34. Article 2 in the English version "confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession." In the Maori version the Crown's guarantee is rendered as follows: "ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa." Although apparently broader in scope than the English version, the words "ki nga tangata katoa" are coloured by what precedes that term and by the words that follow "tino rangatiratanga ***o o ratau wenua o ratou kainga***".

35. Article 3 provides that "[i]n consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects". However, the Maori version discusses treating them the same as British subjects. "Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata Maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa **rite tahi ki ana mea** ki nga tangata o Ingarani."

36. It follows that it is consistent with the emphasis on the Chiefs and Tribes, rendered Hapu in the Maori text, that all those who belong to these polities either as families or individuals may claim the protections afforded by the Treaty or Te Tiriti as part of that collective even though they individually possess property or taonga referred to in the Treaty. In other words, it is their membership in the collective that ignites the cloak of royal protection for that which they may possess as individuals. Even Chiefs are linked with the Tribes as indivisible entities.

37. Thus section 6(1) of the Treaty of Waitangi Act 1975 is consistent with the text of the Treaty in that any Maori may bring a claim. It is also consistent with the Treaty of Waitangi Act 1975 to require under section 6(2) that this Tribunal inquire into every claim submitted to it. But once those claims are filed, it is also equally clear that this Tribunal has the power to set the procedure for how it will inquire into those claims.

38. Given the primacy afforded to the Chiefs and to Tribes/Hapu in the Treaty, this Tribunal has, at the very least, a moral obligation to exercise its discretion to set its own procedures in a manner consistent with the text and the principles of the Treaty of Waitangi.

Legal obligation to comply with the principles of the Treaty of Waitangi

39. In the Court of Appeal decision of *Attorney-General v Mair*[7] Baragwanath J stated:

> *So New Zealand legislation, public policy and practices are all within the Tribunal's jurisdiction. It is now indisputable that the Judiciary, recognised by s 3 of the New Zealand Bill of Rights Act 1990 as "the ... judicial branch ... of the government of New Zealand" contributes to all three. In the case of legislation, that includes both statutes, as to which decision of the court is definitive, and the development of the judge-made common law. It must follow that like the Bill of Rights (see Paki v Attorney-General [2009] NZCAR 584), the Treaty of Waitangi Act extends to the judiciary. And since it extends to the courts there can be no reason to exclude its application to the Waitangi Tribunal itself. A further and surely decisive point is that the New Zealand legislation is presumed to conform with our obligations under treaties, of which the Treaty of Waitangi is paramount.*

40. Although the majority of the Court of Appeal in this case did not accept that section 5(2) provides the authority needed to impose this obligation on the Tribunal, especially down to the level of case management, they did not fully consider the different approach taken by Baragwanath J.

41. His views differed because he considered the obligation from a different pathway to section 5(2) as argued by counsel for the appellant in the *Mair* Case. It appears that he adopted an approach whereby the Treaty of Waitangi Act 1975 must be considered both according to its text and having regard to its purpose. In *Paki v Attorney-General*[8], the Court of Appeal adopted such an approach, as follows:

> *[71] New Zealand law has long espoused the proposition that legislation must not be interpreted solely in a pinched and literal mode. It must be interpreted both according to its text, and having regard to the purposes of the legislation. ...*
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> *[76] ... because all Acts of Parliament must fit into the body of the law as a whole, it is permissible in interpreting one Act to have regard to other statutory law. In Statute Law in New Zealand (4ed 2009), Burrows and Carter suggest (at 248):*
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> *"If several Acts form a comprehensive statutory scheme ... a perusal of all of them may assist in the better understanding of one of them. ... Even if there is no statutory scheme as such, a study of analogous provisions in other statutes may sometimes help to reveal a legislative policy that can assist with the interpretation of the provision in hand."*
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> *[77] Burrows and Carter cite the "extreme example" of Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR 188 (HC). In that case, Chilwell J held that in determining whether to grant a water right under the Water and Soil Conservation Act 1967 the spiritual values and cultural relationship of the Maori people to the waters of the region were proper matters to be considered. Although the Water and Soil Conservation Act made no express reference to such considerations the Town and Country Planning Act 1977 did. Since the two*

[7] *Attorney-General v Mair* [2009] NZCA 625, [2010] NZLJ 101, para 88.
[8] *Paki v Attorney-General* [2009] NZCAR 584.

Acts could be seen as part of a statutory scheme it was proper to import those same considerations into the Water and Soil Conservation Act.

[78] In addition to considering other Acts of Parliament, it is undoubtedly permissible to consider the social and economic factors that existed at the time an Act was passed. See Burrows and Carter at 253:

Such an examination may clarify the "mischief" that the Act was passed to remedy. It may sometimes also immediately clarify the meaning of a provision to see the circumstance that the framers of the Act had in mind when they prepared the legislation: the abstract words of legislation can often take on a new clarity when one discovers the exact situation that the legislators were addressing. As Lord Simon has said [in Maunsell v Olins [1975] AC 373 at 391 (HL)], a court should put itself in the place of the drafter and of the other framers subject to whose direction and control the drafter acted, and determine meaning in the light of the circumstances known to the drafter and to those other framers.

[79] To like effect, in Bennion on Statutory Interpretation (5ed 2008), Bennion discusses the informed interpretation rule in the following way (at 588):

For the purpose of applying the informed interpretation rule, the context of an enactment comprises, in addition to the other provisions of the Act containing it, the legislative history of that Act, the provisions of other Acts in para materia, and all facts constituting or concerning the subject-matter of the Act.

[80] In other words, the interpreter of a statute should read the express words of an enactment as illuminated by its context or setting.

The purpose of the Treaty of Waitangi Act 1975

42. In this Tribunal we are guided by the Treaty of Waitangi Act 1975. The Preamble to the Act states the purpose of the Act as:

An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty

[10 October 1975]

WHEREAS on the 6th day of February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Maori people of New Zealand: And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language: And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.

BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

43. The purpose of the Act can also be ascertained by referring to the speech of the Minister of Maori Affairs, the Honourable Matiu Rata when he moved the introduction of the Bill in November 1974.[9] He stated:

> *Its purpose is to provide for the observation and confirmation of the principles of the Treaty of Waitangi and to determine claims about certain matters which are inconsistent with those principles. While the Treaty can be regarded as the possession by the whole of our nation of an instrument of mutuality that has endured for the past 134 years, to the Maori people it is a charter that should protect their rights. The Bill is primarily aimed at satisfying honour. It will also give physical and lawful sustenance to the long-held view that the spirit of the treaty more than warrants our country's continued support. ...*
>
> *... The Government is conscious that the Bill will have some considerable constitutional effect, and for that reason it will be referred to the Maori Affairs Select Committee for recess consideration. ... The Bill will both sustain and perpetuate the principle of the Treaty.*

44. The Maori Land March had commenced by the time of the second reading of the Bill in September 1975. The Minister in moving the second reading of the Bill noted he was conscious of the importance the Treaty had played and the influence it has had for the Maori people. He then stated:

> *The Bill before the House gives effect to the Government's acknowledgement of the importance of the Treaty of Waitangi to both the Maori people and our country. ...*
>
> *... the principal purpose of the Bill is to give statutory acknowledgement to the principles of the treaty as set out in the schedule to the Bill in both English and Maori and to establish a tribunal ... .*

45. Then during the third reading in October 1975, the Minister recognised that the Bill was the first attempt, in 135 years since its signing, to put the Treaty *"... into statutory form and give it the practical application it deserves."* He believed *"... that the Bill is an important measure in the constitutional history of New Zealand."*[10]

46. As we know, the Bill was enacted in 1975 and then amended in 1985 to give the Waitangi Tribunal retrospective powers to hear all claims back to 1840.

47. The social and economic context behind the Bill was traversed by various Members of Parliament during the Parliamentary Debates in 1975 and 1985. In particular Maori dissatisfaction with the failure to have the Treaty acknowledged in law and land loss and claims leading to the Maori Land March 1975 were highlighted.

48. In addition, the statutory context is such that the Treaty of Waitangi Act 1975 remains the paramount statute in a series of statutes (e.g. State Owned

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[9] Parliamentary Debates (Hansard, Volume 395, 5725-5726).
[10] (10 October 1975) 402 NZPD 5406-5408.

Enterprises Act 1986 and the Resource Management Act 1991) that give recognition to the Treaty of Waitangi.

Application to the Tribunal

49. With that review of the legislative purpose and the social, economic and statutory context behind the purpose of the Act, and having regard to its text in terms of this Tribunal's core functions under section 5(1) and 5(2) and section 6, then it would be inconsistent with the principles of the Treaty if this Tribunal itself ignored the text of the Treaty of Waitangi and its principles while attempting to develop its procedures. The Tribunal was set up to deal with the Maori people and their claims. It is the one and only forum where their Treaty claims may be fully heard.

50. That is the reason why Baragwanath J made the point that if the Courts in applying the New Zealand Bill of Rights Act 1990 are obliged to comply with the human rights standards, as is any other branch of Government, then *a fortiori* (by even greater force of logic), the Waitangi Tribunal charged with interpreting the Treaty of Waitangi during an inquiry into the claims before it, should also comply with the principles of the Treaty that it is charged with applying while undertaking its functions.

51. Given the elevation in the Treaty of Waitangi of the Chiefs and Tribes rendered hapu in the Maori text, then their interests should lead the manner in which the inquiry will proceed. For claimants without a similar mandate their claims will be clustered under the mantel of those tribal/hapu groupings.

52. This means that the Tribunal will inquire into their claims but it will do so having determined its procedure in a manner that requires all claimants work with their tribal leadership to ensure that their tribe, as a collective, moves forward together in their preparation for the Waitangi Tribunal inquiry process.

53. As appearing before the Waitangi Tribunal requires leave, all counsel representing the main tribal groups will lead those counsel who represent hapu of those iwi and any individual claimants. We consider the main Tribal groups to include:

- Rangitane
- Muaupoko
- Ngati Raukawa
- Ngati Kauwhata
- Ngati Apa
- Ngati Toa

54. The consequence of this is that the Tribunal will follow an inquiry programme led by the views of each tribe who will determine what type of inquiry they wish to pursue for their hapu and whanau.

Declaration on the Rights of Indigenous Peoples

55. The Tribunal accepts that the UNDRIP is not binding at international law in respect of indigenous peoples. However, it does declare base standards of

indigenous rights for all States who have affirmed it. As the courts and tribunals of this country are part of the state of New Zealand, then to the extent that rights declared in the UNDRIP may be recognised consistent with the jurisdiction and procedures of the Tribunal, then this Tribunal should do so.

56. It is consistent with the Treaty of Waitangi Act 1975, the Commissions of Inquiry Act 1908 and the rules of natural justice for the Tribunal to adopt a hearing process that gives due recognition to the relevant articles of the UNDRIP whilst performing its functions in accordance with the law of New Zealand.

57. The UNDRIP supports the procedural emphasis that the Tribunal has adopted in favour of tribes rendered hapu in the Maori text.

Recusal

58. I will only recuse myself on the Turakina Maori Girls College Claim.

Claims outside the scope of the inquiry

59. The Turakina Maori Girls College claim is outside the scope of this inquiry, raising as it does issues affecting the education of Maori girls within the boarding school environment. This matter will be addressed through the Tribunal's generic inquiry into mana wahine issues, if and when one occurs in the future.

60. The claims concerning the Treaty settlement policies of the Crown are outside the scope of this inquiry and will not be heard by this Tribunal. The Crown's current settlement policy is a contemporary issue, which is relevant throughout the country. This policy has also previously been considered by the Tribunal in the Tamaki Makaurau Settlement Process report and the Te Arawa Settlement reports.

61. The Mana Wahine claim is considered a generic claim and therefore falls outside the scope of this inquiry district. As noted above, this will be inquired into as part of the Tribunal's generic inquiry into mana wahine issues, if and when one occurs in the future.

Preferred inquiry type

<u>Ngati Apa</u>

62. Submissions from the Crown have indicated that there is a tribal preference to enter or finalise direct negotiations with the Crown.

<u>Rangitaane</u>

63. The submissions from those of Rangitaane before this inquiry wish to see a standard new approach with modifications.[11] Submissions from the Crown have

[11] Wai 2200, #3.1.124.

indicated that there is a tribal preference to enter or finalise direct negotiations with the Crown.

Muaupoko

64. The submissions from those of Muaupoko before this inquiry wish to see a standard new approach with modifications.[12] Submissions from the Crown have indicated that there is a tribal preference to enter or finalise direct negotiations with the Crown.

Ngati Toa

65. Submissions from the Crown have indicated that there is a tribal preference to enter or finalise direct negotiations with the Crown.

Ngati Haua

66. The Ngati Haua claims concerning the detention, trial and execution of prisoners following the Hutt Valley wars that are marginal to the hearing of the major tribal groups listed above will be integrated into the inquiry. Counsel for Ngati Rangatahi may represent their clients in this matter but counsel involved in this matter will need to liaise to nominate a lead counsel.

Ngati Kauwhata

67. The submissions from those of Ngati Kauwhata before this inquiry wish to see a standard new approach with modifications.[13] In terms of Ngati Kauwhata they will be led by Te Hono and Te Kotahitanga.

Ngati Raukawa

68. In terms of the Ngati Raukawa groups before this inquiry, the detail of how those claims will unfold will be based on the suggestions received from all Ngati Raukawa leaders and their counsel. That at the least means that Ngati Raukawa will be led by Te Hono leaders and Woodward Law and Ngati Raukawa ki te Tonga leaders and Kensington Swan. Given the emphasis in this inquiry and in the submissions on the importance of iwi and hapu[14], the Tribunal will seek confirmation from the Ngati Raukawa leaders regarding whether they have reached a consensus on the approach for the inquiry that they would like the Waitangi Tribunal to adopt.

Details of the inquiry

69. As a result of the approaches preferred above and the submissions received, this is the proposed inquiry process the Tribunal will follow:

[12] Wai 2200, #3.1.105; #3.1.113.
[13] Wai 2200, #3.1.108; #3.1.109; #3.1.110.
[14] Wai 2200, #3.1.100; #3.1.101; #3.1.103; #3.1.114; #3.1.115; #3.1.117; #3.1.122; #3.1.133.

a) Claimant survey completed by post or by follow up by staff;
b) Second judicial conference March 2011 finalising inquiry planning;
c) No research coordinating committee will be established as all research for the issues affecting all claimants in this inquiry will be developed based on the common research programme confirmed with CFRT by the Tribunal. Further discussions will be needed to determine which research reports are commissioned by the Tribunal and which by CFRT. That programme will integrate, as far as possible, the submissions of counsel;
d) Tribal claimant research coordinating committees established with hapu representation organised by the claimants or their counsel who will work directly with CFRT to pursue claimant specific research;
e) Regular CFRT, claimant and Crown research hui to be held at least quarterly, especially for issues common across claimant groups. Contracts to researchers should require attendance at such hui where progress reports are to be given;
f) Third judicial conference May 2011 to finalise planning for Nga korero tuku iho hearings;
g) Tribal Korero Tuku Iho hearings at venues and according to procedures determined by the claimants in their tribal clusters. These hearings should hopefully address what specific evidence the claimants want the Tribunal to hear and what further evidence the tribes wish time to prepare to inform the historical research programme. These should commence during the 2011-2012 year. Any additional research that is required should be identified as part of the Korero Tuku Iho process;
h) Claimant research filed;
i) Crown evidence filed in reply before the casebook is closed;
j) Tribunal review of research and casebook closed;
k) Judicial conference 2012 to prepare for hearing;
l) Combined tribal statements of claim fully footnoted and particularised with only one statement of claim per tribe but with hapu statements contained therein;
m) Crown statement of position fully footnoted and particularised with Crown concessions as response to statements of claim;
n) Draft combined tribal and Crown statement of district-wide issues developed by all counsel. This should also determine priority issues;
o) Final statement of district-wide issues finalised by the Tribunal;
p) Judicial conference to finalise interlocutories process and identify possible discrete remedy hearings;
q) Investigation and report on possible discrete remedy hearings prior to hearing;
r) Judicial conference to finalise arrangements for hearing;
s) Hearings of claims in tribal clusters at venues selected by the respective tribes, allowing generic and hapu issues to be heard at the same time; and
t) Staged report production.

Late submission received

70. On Thursday 25 November 2010, the Tribunal received a request from Atareta Poananga for a late submission to be entered on to the record of inquiry. It appears this memorandum was not received due to administrative errors. We grant leave for this submission to be entered on to the record of inquiry.

71. However in light of this, I would like to reiterate to all parties that the process for filing memoranda and submissions is set out in the Tribunal's Guide to Practice and Procedure. These processes are set to allow reasonable time for all parties to consider the matters before us. In future, anything filed out of time in this inquiry without a request for leave will not be entered on to the record of inquiry.

The Registrar is to send a copy of this direction to all those on the notification list for Wai 2200, the combined record of inquiry for the Porirua ki Manawatu Inquiry.

DATED at Gisborne this 3rd day of December 2010

Deputy Chief Judge Caren Fox
Presiding Officer
Waitangi Tribunal