OFFICIAL

IN THE WAITANGI TRIBUNAL

WAI 898

Wai 1977

IN THE MATTER of the Treaty of Waitangi Act 1975 and its amendments

AND

IN THE MATTER of Te Rohe Potae District Inquiry

AND

IN THE MATTER of A claim by Piko Davis for and on behalf of the tangata whenua of Ngati Maniapoto and the 23 Marae of Ngati Maniapoto.

MEMORANDUM OF COUNSEL

Dated this 1st day of November 2013

RECEIVED
Waitangi Tribunal
1 Nov 2013
Ministry of Justice
WELLINGTON

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May it please the Tribunal:

1. Counsel files with this Memorandum with the Summary of the Brief of Evidence of Piko Davis and in response to the Memorandum-Directions dated today (Wai 898 2.6.46) in which the issue of putting questions in writing to Mr Davis is said to be inherently problematic.

2. Counsel regrets that the late filing of this evidence has occurred and accepts that this causes difficulties for parties to prepare and again apologises in this regard. Counsel makes the following submissions intended to assist in alleviating the difficulties your Honour has highlighted.

3. Questions in writing for witnesses seems to have become common place in the Waitangi Tribunal forum over the past 8 years or so thus the inference that this is now problematic must in Counsels submission be applied consistently.

4. In many cases where this 'in writing' process has been adopted by the Tribunal it has been to alleviate the significant time constraints placed on all parties when there simply hasn't been the time to allow all questions to be put *viva voce* at hearing and has thus become 'acceptable' practice.

5. Further, the point that Counsel have a direct role in preparing the witnesses response infers there is a risk of witnesses answers to questions being influenced by Counsel. Counsel objects to any inference to this effect for which professional conduct requirements are in place.

6. As Counsel the relevant rule that applies in this situation would be rule 13.10.7 of the rules of conduct and client care for lawyers contained in the schedule to Lawyers and Conveyancers Act Rules 2008 whereby:

> *A lawyer must not communicate with a witness during the course of cross-examination or re-examination of that witness or between the cross-examination and the re-examination, except where good reason exists and with the consent of either the judge or the lawyers for all other parties (or, where a party is unrepresented, the consent of that party). This applies during adjournments of the hearing.*

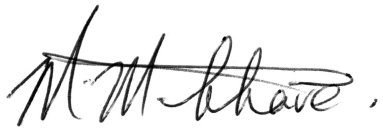
7. Therefore, in Counsel's submission the appropriate extent of communication between Counsel and Mr Davis would be limited to the forwarding of questions filed for him and the filing of his responses, formatted and with an accompanying intituling page. This has been the practice of Counsel in the past for which no objection has yet been raised.

8. In the absence of specific consent allowing communication between the relevant lawyer and the relevant witness by either your Honour or the lawyers for all the parties, Counsel submits that implied consent by virtue of written Directions to the effect the questions and answers be filed necessarily involving the limited communication I have outlined in the paragraph above has become standard practice.

9. If the rules outlined above are insufficient and there remains real concern that such processes are challengeable or the evidence given in the witnesses' answers is somehow

less robust, or carries less weight than if the questions were put during the hearing, then Counsel suggests the Tribunal adopt a process whereby further hearing time is made available for all questions to be put *viva voce* in a later hearing or Tribunal staff forward the questions to the witness concerned and receive their responses directly, thereby alleviating the need for any contact between Counsel and witness. Mr Davis although not having access to email is very capable of typing and structuring his written answers.

Dated at Whangaroa this 1st day of November 2013



Moana Tuwhare

Counsel acting