

**WAITANGI TRIBUNAL**

Wai 1040

**CONCERNING**the Treaty of Waitangi Act  
1975**AND**the Te Paparahi o Te Raki  
Inquiry**MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER****Postponement of October 2009 initial hearings**

1. In our 3 September 2009 memorandum-directions (Wai 1040, #2.5.25) we advised that the Tribunal has decided to postpone until 2010 the commencement of the initial hearings in Te Paparahi o Te Raki inquiry, previously scheduled for October 2009. The grounds for our postponement decision are explained in this memorandum-directions.

**Matters are not ready to proceed to hearing**

2. We advised in our 29 May 2009 memorandum-directions (Wai 1040, #2.5.23) that the Tribunal needs a clear indication of readiness for hearing before it will proceed. The indicators we identified were:
  - The readiness of any further commissioned technical evidence;
  - The proper briefing of witnesses;
  - A schedule of witnesses for the initial hearings; and
  - Suitable venue arrangements.
3. Despite strong indications earlier that claimants wanted to commence hearings on 28 October 2009, claimants were divided at the 17 August 2009 judicial conference between those who said they were ready to proceed to hearing and those who said they were not ready.
4. It is clear to us that the required preparation to begin the initial hearings has not been completed. While much progress has been made we note below, at paragraphs 9 and 10, the matters we consider still need to be completed.
5. We know it is not easy to prepare for a hearing – and when you are dealing with over 600 claims it makes the task that much more difficult.

6. The Tribunal wishes to reiterate its firm view that the initial hearings will require a co-ordinated effort by all claimants within Te Paparahi o Te Raki. We are expecting a united approach.
7. It is quite clear that most claimants are using counsel to assist them. Counsel have taken a leading role in pursuing a co-ordinated approach to hearing preparation. Claimants need to follow this lead. For the most part, counsel are experienced in Waitangi Tribunal matters. These counsel are of assistance not only to the claimants, but also to the Tribunal.
8. We also remind people that we cannot hear every cluster's and individual claimant's views on He Whakaputanga and Te Tiriti o Waitangi. We expect there will be a co-ordinated effort to present Te Paparahi o Te Raki views. Most claimants may not participate in the initial hearings other than as observers and in a support capacity.

### **What needs to be done to get ready for the initial hearings?**

9. Although much progress has been made towards more effective co-ordination, more work needs to be done. We want to be very specific about what is needed before hearings can get underway, though the main requirement is the proper briefing of witnesses.
10. In our assessment, the main outstanding tasks to be completed are:
  - Claimant briefing of witnesses.  
We would urge claimants to present their best witnesses. As we have indicated previously, it is about quality witnesses, not quantity. It is not about every cluster or claimant saying the same thing.
  - Completion of schedule of claimant witnesses.  
The Tribunal had provided a draft hearing schedule with spaces for claimants to put in the names of witnesses. We were disappointed that there had been little visible co-ordination amongst the claimants to fill in the schedule. An updated draft schedule is **attached**.
  - Decision on location and venue for initial hearings.  
The message from claimants has also been clear that they want the initial hearings on He Whakaputanga and Te Tiriti to be held at Waitangi. We understand there has been some preliminary discussion about a pōwhiri at Te Tou Rangatira then having the hearings in either the Waitaha room or in a marquee.
11. As we have stated on a number of occasions the initial hearings are an opportunity for Te Paparahi o Te Raki claimants to give their evidence, their kōrero, and their version (or versions) of events about He Whakaputanga and Te Tiriti.

12. We were told that in order to complete the briefing of witnesses, wānanga still need to be finalised. The delay in the start of the initial hearings will allow time for the wānanga to be completed.

### **What is the plan?**

13. The Tribunal is adamant that the next time we come to the north, it should be for hearings. The time for judicial conferences is over.

14. Meanwhile, our staff will continue to engage with claimants and assist wherever possible.

15. Our plan is to obtain monthly updates from all parties as to the progress being made towards hearing. We consider that hearings will start in the first half of next year, 2010. As stated in our 3 September 2009 memorandum-directions we have reason to believe that claimants may be ready to commence hearings by 1 March 2010.

16. However, we want claimants to advise us of their preferences for a date to start the first hearings for Te Paparahi o Te Raki inquiry. We invite claimants to advise us of their preference by 28 October 2009.

17. We also need to know when claimant briefs of evidence will be filed. These briefs must be filed with the Tribunal at least one month in advance of the hearing at which the evidence is presented.

### **Filing of Crown evidence**

18. We were heartened to hear at the 17 August 2009 judicial conference that the Crown is committed to filing technical evidence by 18 December 2009. We wish to hold the Crown to that commitment. While we believe that, at the Tribunal hearing claimant evidence should be presented first, we also believe that the availability of Crown evidence in December 2009 will assist our process.

19. We understand that the Crown will call Dr Donald Loveridge, Professor Allan Ward, and one other technical witness. It would be helpful for the Crown to name their third technical witness, and to indicate that this evidence, too, will be filed by 18 December 2009.

### **Will there be a Tribunal Report after the initial hearings?**

20. At our 17 August 2009 conference, a number of claimants and counsel asked whether the Tribunal would be producing a report following the initial hearings. The short answer is that we do not know. The Tribunal has not made a commitment one way or the other. Whether the Tribunal can issue a report depends largely on the submissions and evidence that are put before it. Based on our understanding of the issues, it is difficult to predict the outcome.

21. The Tribunal notes, however, that its jurisdiction to make recommendations to the Crown is limited to recommending how the Crown might remedy the prejudice to claimants that has been found by the Tribunal to have been caused by Crown acts, omissions, policies and practices or statutory instrument inconsistent with the principles of the Treaty (s6(3) Treaty of Waitangi Act 1975). The issues in the initial Te Paparahi o Te Raki hearings concern the meaning of He Whakaputanga and Te Tiriti. At the conclusion of the initial hearings, therefore, the Tribunal will not be in a position to make findings that would support recommendations to the Crown. This could influence the decision as to whether Tribunal resources should be dedicated to writing a report at that stage of the Te Paparahi o Te Raki inquiry.

### **Tribunal witnesses**

22. The Tribunal has been asked whether Tom Bennion, who we have engaged to brief our technical witnesses, would be available to discuss briefing with claimant counsel. It needs to be clearly understood that Mr Bennion's role is limited to assisting in the briefing of evidence of the witnesses who are being called by the Tribunal. With the exception of Mr Carpenter, Tribunal witnesses are not undertaking new research. The Tribunal has asked them to address the questions in the Statement of Issues on the basis of their previous research and writing.

23. The Tribunal is happy to have counsel and Mr Bennion discuss that briefing process. Again, with the exception of Mr Carpenter, we think that the Tribunal's witnesses will not be available to engage with other counsel.

### **Who will go first?**

24. Several counsel argued that the Crown should go first at the initial hearings. The Tribunal does not support this approach. In our view, it would not allow the claimants to "take the lead". If the Crown preceded claimants in order of appearance, claimants could be reduced to responding to the Crown case rather than presenting their own cases.

25. Therefore, while the Crown has offered to file evidence ahead of the claimants, we think claimants should present their evidence first at hearings. As indicated earlier, we think the early filing of Crown evidence is a constructive move and will be of great assistance to all parties.

### **Extra hearing time for the initial hearings**

26. The **attached** draft hearing schedule (**Appendix 1**) provides for two extra days of hearing time for claimants. It also allows the Crown three days to present submissions and evidence. This additional hearing time is warranted, we believe, by Mr Irwin's submission that it will allow more time for claimants to cross-examine Crown witnesses.

### **Post-1840 understandings bearing on initial inquiry issues**

27. Several counsel questioned whether the Tribunal had properly defined the way post-1840 understandings could be considered germane to the issues in the initial inquiry. The Tribunal believes that post-1840 understandings are relevant to the events surrounding the signing of He Whakaputanga and Te Tiriti, but only insofar as those events caused those later understandings.

### **Muriwhenua – Wai 45**

28. We have concluded that the Wai 45 Muriwhenua claim should not be included in the Te Paparahi o Te Raki inquiry. This is because the Te Raki Tribunal's jurisdiction does not extend to the Muriwhenua area. That does not stop those claimants who support the Wai 45 claim continuing to support the claimants within this inquiry.

### **Crown Forestry Rental Trust**

29. A number of issues were raised concerning funding from the Crown Forestry Rental Trust. These are matters to be addressed directly with the Crown Forestry Rental Trust.

### **Conclusion**

30. In conclusion, we ask that counsel directly involved in co-ordinating the initial hearings file monthly updates with the Tribunal. I direct parties to file submissions by **5pm, 28 October 2009** to advise the Tribunal when claimants will be ready for the initial hearings. The Crown is directed to file technical evidence by **5pm, 18 December 2009**.

31. As stated above the time for judicial conferences is over. It is time for continued focussed preparation. The positive momentum and progress to date must continue. It is time for a planned and co-ordinated effort so this Tribunal can begin to hear the kōrero, the evidence and the rich history pertaining to He Whakaputunga and Te Tiriti.

The Registrar is to send this direction to all those on the notification list for Wai 1040, the combined record of inquiry for the Te Paparahi o Te Raki claims.

**DATED** at Wellington this 17<sup>th</sup> day of September 2009



Judge C T Coxhead  
Presiding Officer

**WAITANGI TRIBUNAL**

## Appendix 1

### Draft Hearing Schedule

WEEK 1:

VENUE:	Monday	Tuesday	Wednesday	Thursday	Friday
9-10.30	Opening pōwhiri (Time & Venue to be arranged by Claimants)	Session 3 <b>Oral-traditional evidence</b>	Session 7 <b>Oral-traditional</b>	Session 11 <b>Site-visits</b>	Session 15 <b>Oral-traditional</b>
11-12.30		Session 4 <b>Oral-traditional evidence</b>	Session 8 <b>Oral-traditional</b>	Session 12 <b>Site-visits</b>	Session 16 <b>Oral-traditional</b>
1.30-3.00	Session 1 <b>Claimant opening submissions</b>	Session 5 <b>Oral-traditional</b>	Session 9 <b>Oral-traditional</b>	Session 13 <b>Oral-traditional</b>	Session 17 <b>Oral-traditional</b>
3.30-5.00	Session 2 <b>Claimant opening submissions</b>	Session 6 <b>Oral-traditional</b>	Session 10 <b>Oral-traditional</b>	Session 14 <b>Oral-traditional</b>	Session 18 <b>Oral-traditional</b>

WEEK 2:

VENUE:	Monday	Tuesday	Wednesday	Thursday	Friday
9-10.30	Session 1 <b>Oral-traditional</b>	Session 5 <b>Oral-traditional</b>	Session 9 <b>Site-visits</b>	Session 13 <b>Technical evidence (e.g. historians)</b>	Session 17 <b>Technical</b>
11-12.30	Session 2 <b>Oral-traditional</b>	Session 6 <b>Oral-traditional</b>	Session 10 <b>Site-visits</b>	Session 14 <b>Technical</b>	Session 18 <b>Technical</b>
1.30-3.00	Session 3 <b>Oral-traditional</b>	Session 7 <b>Oral-traditional</b>	Session 11 <b>Site-visits</b>	Session 15 <b>Technical</b>	Session 19 <b>Technical</b>
3.30-5.00	Session 4 <b>Oral-traditional</b>	Session 8 <b>Oral-traditional</b>	Session 12 <b>Site-visits</b>	Session 16 <b>Technical</b>	Session 20 <b>Technical</b>

WEEK 3:

VENUE:	Monday	Tuesday	Wednesday	Thursday	Friday
9 -10.30	Session 1 <i>Technical</i>	Session 5 <i>Technical</i>	Session 9 <i>Crown opening submissions and evidence (including questions)</i>	Session 13 <i>Crown evidence</i>	Session 17 <i>Crown evidence</i>
11-12.30	Session 2 <i>Technical</i>	Session 6 <i>Technical</i>	Session 10 <i>Crown evidence</i>	Session 14 <i>Crown evidence</i>	Session 18 <i>Crown evidence</i>
1.30-3.00	Session 3 <i>Technical</i>	Session 7 <i>Technical</i>	Session 11 <i>Crown evidence</i>	Session 15 <i>Crown evidence</i>	Session 19 <i>Crown evidence</i>
3.30-5.00	Session 4 <i>Technical</i>	Session 8 <i>Technical</i>	Session 12 <i>Crown evidence</i>	Session 16 <i>Crown evidence</i>	Session 20 <i>Crown evidence</i>