

**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**

1. On 21 April 2010, counsel for claimants and for the Crown filed a joint memorandum with a request from claimants that the Tribunal attend the pōwhiri being held on Sunday 9 May for the Tribunal and the Crown (Wai 1040, #3.1.180). I would like to express my gratitude to parties for this invitation and can confirm that there will be full Tribunal attendance.
2. On 26 April 2010 another joint memorandum was filed, this time on behalf of counsel for the claimants (Wai 1040, #3.1.182). The memorandum advised that Mr Te Waihoroi Shortland will be available to assist the Tribunal's interpreter, Mr Rangi McGarvey. Provided that the Crown has no objection to this arrangement, I see no issue with it and am happy for Mr Shortland to be present at the first week of the initial hearings.
3. On 27 April 2010 Michael Doogan, counsel for Te Aho Claims Alliance and Te Runanga o Ngāti Hine filed a memorandum seeking an order for parts of Mr Hirini Henare's evidence to be made confidential to parties outside of this Inquiry (Wai 1040, #3.1.185).

The Tribunal in other inquiries has granted confidentiality orders to claimants who wish to keep material confidential as they may consider this material to be sensitive and private, for example, Whakapapa and Ngā Kōrero-o-Neherā. The order ensures that access to the material is restricted to parties participating in the inquiry only and the Tribunal for the purposes of writing its report.

Parties who wish to apply for confidentiality must do so by filing a memorandum stating their reasons, in accordance with paragraph 4.7 of the *Guide to the Practice and Procedure of the Waitangi Tribunal*. I attach this as appendix 1. We may sometimes call for submissions from parties who wish to comment and all applications are considered on a case by case basis.

On consideration of the application made by Mr Doogan, I am prepared to grant a confidentiality order with regard to the evidence that Mr Hirini Henare will present in the first week of the initial hearings. The evidence is therefore to be made available **only to those in the Te Paparahi o Te Raki Inquiry** for the purposes of the Inquiry and must not be disseminated beyond the notification list without first obtaining the permission of Mr Henare.

4. I would like to remind parties of our filing dates for these initial hearings. In my previous memorandum-directions of 12 March 2010 (Wai 1040, #2.5.34), I outlined that we require all technical evidence and reports to be filed **one month** prior to the hearing taking place. We require any questions of clarification for the authors to be filed **fifteen working days** prior to the hearing in which they will be presented. We also require that briefs of evidence of all other witnesses be filed **ten working days** prior to the hearing in which that evidence is to be presented. For clarification, I attach a schedule (as appendix 2) with all remaining filing dates for these initial hearing weeks.

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 30<sup>th</sup> day of April 2010



Judge C T Coxhead  
Presiding Officer

**WAITANGI TRIBUNAL**

## Appendix 1

### WAITANGI TRIBUNAL PRACTICE NOTES

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#### 4.7 Restricting access to, or use of, sensitive evidence

##### **(1) Applications**

A party or a person entitled to appear may seek the protection of particularly sensitive evidence by applying to the Tribunal for a direction restricting access to it or the use of it (or both). In considering an application for such directions, the Tribunal must have regard to the rules of natural justice and clause 5A of the second schedule to the Treaty of Waitangi Act 1975.\*

The Tribunal itself is not constrained by a direction it makes to restrict access to, or the use of, evidence, and it may use the evidence as it sees fit for the purpose of conducting its inquiry into, and reporting on, the claim or claims to which the evidence relates, although it will do so with due regard to the sensitivity of the evidence. Further, witnesses are to be informed that, irrespective of any Tribunal directions restricting use or access, evidence presented to the Tribunal could be brought before the courts in judicial review proceedings, although protections apply in such proceedings as to how material relating to the proceedings can be used.

##### **(2) Procedure for making applications**

Where restrictions on access or use are sought in advance, then, in order that the Tribunal may assess whether such restrictions are appropriate, a brief of the evidence, together with a memorandum setting out the grounds for the application, shall be filed with the Tribunal, and contemporaneously with counsel for affected parties, and counsel for other persons who are affected by the application, at least 20 working days before a hearing. Where restrictions are sought in advance for oral evidence, a memorandum describing the nature of the evidence to be given is to be submitted to the Tribunal.

Counsel who have been served with an application and who wish to make submissions on it shall file their submissions with the Tribunal at least 10 working days before the hearing. Where possible, the Tribunal will issue a decision within five working days of the start of the hearing. Counsel who receive any evidence that is the subject of an application to restrict access or use must keep the content of that evidence strictly confidential until the Tribunal directs what, if any, restrictions are to be placed on it.

If restrictions are sought for part only of the evidence, that part is to be highlighted in the application.

If the Tribunal refuses to restrict access or use, or both, the witness may then elect to withdraw the evidence.

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\* The rules of natural justice may require that some or all counsel (and their clients) have a right to access and use the evidence for the purposes of the Tribunal's inquiry, and clause 5A gives every party to proceedings a right to receive a copy of a report that the Tribunal has itself commissioned.

Alternatively, and particularly in the case of oral testimony, where counsel may not appreciate until part way through that the evidence is of a culturally sensitive nature, counsel may apply for access or use restrictions during the presentation, or at the end, of a claimant's evidence. Such an application is to include the grounds for the application, and the Tribunal may, if appropriate, seek submissions from counsel for affected parties or other affected persons who are entitled to be heard.

#### **4.8 Public access to documents on the record of inquiry**

Members of the public may access and copy a document entered on the record of inquiry, subject to any Tribunal directions restricting use of and access to documents (see sec 4.7), the provisions of the Copyright Act 1994, and any other statutory provision or rule of law.

Parties to a claim, and others who are entitled to be heard, will be served copies of documents in accordance with the procedure for service of documents above (see sec 4.6). A claimant seeking access to a document entered on the record of inquiry of a claim to which she or he is not a party will be treated initially as a member of the public.

#### **4.9 Disclosure of documents**

Unlike the general courts, there is no formal discovery process in the Waitangi Tribunal.

In all cases, the Tribunal encourages cooperation amongst parties and others involved in an inquiry in the disclosure of documents that are relevant to the claims in issue. Particularly for historical claims, documentation is usually disclosed by the filing of document banks that are compiled in conjunction with research reports. Where claims relate to recent or current Government policy, parties and others involved in an inquiry should, where necessary, exercise their rights under the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987.

The Tribunal encourages cooperation in disclosing documents in this way but will, in appropriate circumstances, use its powers under the Commissions of Inquiry Act 1908 to require the production of documents.

### **5. CONDUCTING THE INQUIRY**

#### **5.1 Conferences**

In order to closely case-manage its inquiry process, the Tribunal can convene conferences of claimants, the Crown, and such others as the Tribunal considers

## Appendix 2

Week One – Claimant evidence: 10 – 14 May 2010		
<b>10 working days before hearing commences:</b>		
<ul style="list-style-type: none"> <li>- Co-ordinating Counsel and Claimants to file proposed hearing timetable</li> <li>- File all remaining tangata whenua briefs of evidence</li> </ul>		<b>26 April 2010</b>
<b>Hearing commences</b>		<b>10 May 2010</b>
Week Two – Claimant evidence: 14 – 18 June 2010		
<b>1 month before hearing commences:</b>		
<ul style="list-style-type: none"> <li>- Technical witnesses to file briefs of evidence or summaries of their reports</li> <li>- Crown to file research reports</li> <li>- Counsel to seek leave to cross-examine witnesses</li> </ul>		<b>17 May 2010</b>
<b>15 working days before hearing commences:</b>		
<ul style="list-style-type: none"> <li>- Filing of written questions of clarification by counsel for the proceeding hearing week</li> </ul>		<b>21 May 2010</b> (Queens Birthday falls on 7 June)
<b>10 working days before hearing commences:</b>		
<ul style="list-style-type: none"> <li>- Co-ordinating Counsel and Claimants to file proposed hearing schedule</li> <li>- File all remaining tangata whenua briefs of evidence</li> </ul>		<b>28 May 2010</b> (Queens Birthday falls on 7 June)
<b>Hearing commences</b>		<b>14 June 2010</b>
<b>BREAK BETWEEN HEARING BLOCKS</b>		
Week Three – Claimant technical and Tribunal witnesses: 9 – 13 August 2010		
<b>1 month before hearing commences:</b>		
<ul style="list-style-type: none"> <li>- Technical witnesses to file briefs of evidence or summaries of their reports</li> <li>- Crown to file research reports</li> <li>- Counsel to seek leave to cross-examine witnesses</li> </ul>		<b>12 July 2010</b>
<b>15 working days before hearing commences:</b>		
		<b>19 July 2010</b>

Filing of written questions of clarification by counsel for the proceeding hearing week		
<b>10 working days before hearing commences:</b> - Co-ordinating Counsel to file proposed hearing schedule		<b>26 July 2010</b>
<b>Hearing commences</b>		<b>9 August 2010</b>
Week Four – Crown evidence and closings: 11 – 15 October 2010		
<b>1 month before hearing commences:</b> - Technical witnesses to file briefs of evidence or summaries of their reports - Crown to file research reports - Counsel to seek leave to cross-examine witnesses		<b>13 September 2010</b>
<b>15 working days before hearing commences:</b> - Filing of written questions of clarification by counsel for the proceeding hearing week		<b>20 September 2010</b>
<b>10 working days before hearing commences:</b> - Co-ordinating Counsel to file proposed hearing schedule		<b>28 September 2010</b>
<b>Hearing commences</b>		<b>11 October 2010</b>