

IN THE WAITANGI TRIBUNAL

Wai 45

CONCERNING

the Treaty of Waitangi Act 1975

AND

applications to the Renewed
Muriwhenua Land Tribunal for
binding recommendations

MEMORANDUM-DIRECTIONS OF JUDGE C M WAINWRIGHT
CONCERNING RESEARCH

22 December 2022

Introduction

1. These directions:
 - (a) confirm the inquiry boundary for the Renewed Muriwhenua Land Inquiry;
 - (b) discuss recent legal developments concerning the Tribunal's jurisdiction to make binding recommendations;
 - (c) set out the research programme that the Tribunal proposes, taking into account what happened at the October 2022 research hui and also discussing recent legal developments, and seek feedback; and
 - (d) address a Crown extension request concerning the provision of feedback on the draft report 'Social issues in the Renewed Muriwhenua Inquiry (Wai 45) district, 2002-2020'.

Background

2. In directions dated 5 August 2022 (Wai 45, #2.884), I confirmed that a research hui would be held to:
 - (a) exchange views on the research plan I released on 8 June 2022 (Wai 45, #2.878);
 - (b) discuss Ngāti Kahu's response to that research plan expressed in a memorandum of counsel dated 30 June 2022 (Wai 45, #Wai 45, #2.880); and
 - (c) plan how best to use the limited resources available to ensure that all the necessary evidence is before the Tribunal.
3. The research hui took place at Taipā on 27 October 2022. Waitangi Tribunal research staff presented the 8 June 2022 proposed research plan and explained the proposed Tribunal research projects. Staff clarified that claimants' independent research projects would also be part of the research casebook.

Area of inquiry

4. For research planning, it is necessary to confirm the inquiry boundary for the Renewed Muriwhenua Land Inquiry. We have decided to adopt the same district boundary as the original Muriwhenua Land Inquiry, with one minor variation. The variation arises from the revision in 2015 of the northern boundary of the adjacent Te Paparahi o Te Raki (Northland – Wai 1040) inquiry district (see Wai 1040, #2.6.89 & Wai 1040, #2.6.101). The changes made to Te Raki's northern boundary affect this inquiry's southern boundary.
5. Attached as **appendix A** is a map depicting the official district of the Renewed Muriwhenua Land Inquiry.
6. In confirming this, I note the following:

- (a) This area includes the primary rohe of groups that have settled their claims with the Crown. This Tribunal may still inquire into such areas to the extent they relate to the claims before us now, but an obvious qualification is that we cannot make findings where settlement legislation has removed the Tribunal's jurisdiction; and
- (b) Some claims before us extend over the southern boundary into the Te Paparahi o Te Raki inquiry district. This Tribunal will inquire into those claims only to the extent that they fall within the district for this inquiry.

Kaupapa Māori approach to research programme

- 7. At the research hui, claimants expressed support for an approach that involved research reports being provided both by the Tribunal and claimant groups themselves. Piri Cribb, Waitangi Tribunal Puna Hapai, applied a kaupapa Māori lens to this approach, using the themes of Mana Whenua, Mana Tāngata, and Mana Motuhake.
- 8. Below, I discuss the Tribunal's proposed research programme in those terms, and introduce new suggestions arising from recent developments.

Mana Whenua: comprehensive block-by-block narratives

Background

- 9. The 8 June 2022 research plan proposed a thematic approach that involved three Tribunal commissioned projects:
 - (a) A report on land purchase by the Crown before 1865;
 - (b) A report on the Native Land Court and land purchase by the Crown after 1865; and
 - (c) A report on the fate of reserves and any other land set aside for Māori.
- 10. At the October research hui, there was general support for (a) and (b) above. There was some discussion about splitting (c) into two separate reports due to the scale of work involved. There has also been discussion about the possibility of an additional report on 20th century land alienation covering issues such as rating and compulsory acquisitions for public works.

Where we are now

- 11. I am acutely aware of how long it has taken for Ngāti Kahu to get to this point, and the many twists and turns that have caused delays – sometimes for years. The natural response to this situation is to prioritise haste.
- 12. However, it is imperative that at the end of the mini-inquiry we are in a position where the Tribunal's move to consider remedies is not hampered by a lack of evidence.
- 13. The problems we face are twofold. First, the Muriwhenua Land Report (Wai 45, 1997) did not delineate tribes' separate interests in its concern at that time to emphasise the effect of the Crown's Treaty breaches on *all* of those under the maru of the Rūnanga o

Muriwhenua across the district. Now, when most of the iwi under the Rūnanga have settled, it is important to be able to discern the influence, landholdings and experience of the particular groups now before us. To do that requires more research and more evidence.

14. Secondly, claimants before us seek binding recommendations under section 8A of the Treaty of Waitangi Act 1975. To make binding recommendations, the Tribunal has to be satisfied that the Crown's hara 'relates to' the land titles that have memorials on the title saying that they may be compulsorily resumed to satisfy Treaty of Waitangi claims. The nexus between prejudice from Crown breaches, claimant groups and whenua is currently the subject of focus in the higher courts. In *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Limited* [2022] NZSC 142, the Supreme Court very recently talked about that nexus and implied that it would take a different view from that of Justice Cooke in his High Court judgement in *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654. However, what 'relates to' means in the legislation, and the necessary connection between the people, the whenua and the Crown's breach, was not appealed to the Supreme Court. This means that although the Supreme Court commented on this crucial question, what it said about it did not have the effect of overturning what Justice Cooke said in the High Court. It is simply an indication of what the Supreme Court might decide if and when it does have before it an appeal that directly addresses the 'relates to' aspect of the Tribunal's binding recommendation. Where the law on this question will finally land therefore remains uncertain.
15. Assessing the effect of all this on research planning for this inquiry is a challenge we must face now. We must be careful to ensure that the evidence-gathering we do covers all the bases. In other words, we have to provide for the current situation where the law requires a very close nexus between the claimant group, the Crown's breach and the whenua, but we must also keep an eye on the possibility that in the future the ability of parties to benefit from the return to Māori of memorialised land may have reference to the prejudice suffered by a much wider group.
16. These considerations – and also the emphasis at the research hui on manawhenua and the ability of claimants to talk from their own mātauranga – have led us to move away from the thematic approach to evidence that we first suggested. Although it is more time-consuming and exacting, we have decided that research on a block-by-block basis is the safest means of ensuring that all potentially relevant land-related evidence is before us. That is, for each parent block within the district, a block narrative report will be produced. These reports will cover pre-1865 and post-1865 activity, including research into the reserves in each block, dealings in the Native Land Court, Crown purchases, rating and public works takings.
17. Block-by-block narratives will give much more comprehensive coverage than the original Muriwhenua Tribunal attempted. It will allow methodical research into the whenua Māori issues across the whole district. We hope that we will also gain efficiency from the fact that the work will be divided between more researchers who will undertake this detailed work concurrently under the oversight of a historian who will play a coordinating role. The researchers will draw upon the Muriwhenua Land Report 1997 and the existing Wai 45 casebook where relevant.

18. This detailed grassroots approach complements the top-down bird's-eye view of the Muriwhenua Land Report because research will cover every block and will go from the ground up. Each of the 112 parent land blocks listed in **appendix B** would be investigated. The list of blocks may not be comprehensive. More research is needed: to identify any resumable properties further north than Muriwhenua South block; to name some as yet unidentified blocks; and to clarify ambiguities. Researchers for each block will work closely with whānau and hapū, whose input will be sought at every stage.

Parties' feedback sought

19. The downside to the block-by-block approach is the time it will take and the resulting delay before hearings can commence. It is hard to say how much more time it will take than our previously suggestion of a thematic approach, because that too would be time-consuming.

20. We have considered short-cuts, such as doing histories only for those blocks where resumable properties are located. This would entail research into 34 parent blocks, which is many fewer.

21. However, I would prefer a comprehensive approach because:

(a) I think we may regret it if we end up with patchy coverage; and

(b) If the judgment of the High Court in *Wairarapa Moana Ki Pouākani Incorporation v Mercury NZ Limited* is overturned before we make binding recommendations, we would be in a stronger position if we had evidence that covered the whole of the district so that we could assess all breaches and all prejudice. This would be particularly important for any claimant groups whose claims are not directly connected to resumable property or the land blocks in which they lie.

22. Acknowledging that this memorandum discloses ideas that have not been the subject of discussion, I propose a judicial conference to allow parties to let us know if they support the comprehensive block-narrative approach even though it will take longer. If parties take a contrary view, they can explain the reasons for it and put forward what they consider will work better. I am taking these steps because of the importance of gaining the parties' – and particularly claimants' – buy-in to how we go about this task of gathering further evidence.

23. The judicial conference will take place remotely via AVL at **10am, Thursday, 12 January 2022**. Please RSVP by emailing wt.registrar@justice.govt.nz by no later than **Friday, 6 January 2022**.

24. Although we want to discuss these ideas, we are also trying to move things forward so there is no more delay than necessary. Staff are working on the project briefs with a view to drafts being circulated for feedback in the first half of 2023.

Mana Tāngata: claimant-led research

Background

25. The Tribunal's 8 June 2022 research plan proposed a Tribunal-commissioned customary tribal landscape report.
26. At the October 2022 research hui, there was no unified view on this matter. Some claimant groups were happy to be included in a report commissioned by the Tribunal and suggested they would also produce their own research to sit alongside this. Other claimant groups said they did not wish to be included in a report commissioned by the Tribunal.

Proposed approach

27. We have decided that, rather than the Tribunal commissioning an independent customary tribal landscape report, claimants should do their own. The Tribunal will benefit from claimants' own independent research that tells us who they are, where they were over time and where they are now. As discussed below, the Tribunal understands that every iwi and hapū grouping before us should be able to access Crown Forestry Rental Trust (CFRT) funding for this purpose.
28. I will call on counsel at the judicial conference for information as to:
- (a) whether the claimants they represent intend to produce their own research report on their customary interests in the district; and
 - (b) when it is estimated this work will be completed.
29. When all claimant research on customary interests has been received, the Tribunal will identify any areas where the accounts differ. If it appears that the differences may cause difficulties for our process, the Tribunal will work with the relevant claimants on a process to enable us to understand and reconcile the differences.

Mana Motuhake: independent research and Crown Forestry Rental Trust funding

30. The research programme described above involves (a) the Tribunal commissioning a land block narrative report into each parent block within the district and (b) claimants producing their own independent research on who they are, where they were over time, and where they are now.
31. The independent claimant research will complement the Tribunal commissioned research and will be crucial in enabling the Tribunal to identify which relevant groups were affected by Crown conduct and when. This is something only the claimant groups themselves can produce as it involves drawing upon knowledge generally not available to an outsider.
32. To this end, the Tribunal supports any CFRT funded research in line with my description at paragraph 27 above.

33. Ngāti Kahu and Te Paatu ki Kauhanga have both confirmed that they are approved clients of the CFRT. I understand that Ngāti Tara too are in the process of applying for approved client status. Because they were clients in the Te Raki inquiry, it seems likely that the Whangaroa and Hokianga claimants will also be eligible for approved client status in this inquiry.
34. It therefore appears that iwi and hapū claimant groupings before us should be able to access CFRT funding to produce their own research for this inquiry.

Crown extension request

35. On 25 November 2022, Tribunal staff circulated a draft report: 'Social issues in the Renewed Muriwhenua Inquiry (Wai 45) district, 2002-2020' to parties who were invited to provide feedback by no later than 16 December 2022.
36. On 16 December 2022, Andrew Irwin, Crown counsel, filed a memorandum advising that some Crown agencies were able to provide feedback by this time but that an extension was sought until mid-January 2023 for 'a number of agencies' to provide their feedback (Wai 45, #2.889).
37. Granting this request disrupts the timetable for this commission which requires the author to submit the report to the Waitangi Tribunal Chief Historian for internal review by mid-January 2023. However the overall situation is that research will be undertaken over a longer period, so the inquiry timetable will not be jeopardised by the Crown's late comments. I have therefore decided to accede to the request.

Crown memorandum concerning research hui

38. On 22 December 2022, the Crown filed a memorandum that (Wai 45, #2.890):
- (a) suggested the speaking notes for the 27 October 2022 research hui be added to the Wai 45 Record of Inquiry;
 - (b) expressed concern about Tribunal research commissions being independent; and
 - (c) sought confirmation that the Crown's chosen representatives can attend future research hui that discuss the Wai 45 research programme.
39. In response:
- (a) I append as **appendix C** the speaking notes from the 27 October 2022 research hui. An obvious qualification is that this memorandum-directions outlines a new pathway for the research programme.
 - (b) All research commissioned by the Tribunal will be independent and consider all relevant sources.
 - (c) The Crown's chosen representatives may attend any research hui that discuss the Wai 45 research programme.

The Registrar is to send this direction to all those on the notification list for Wai 45, the Renewed Muriwhenua Land Inquiry

DATED at Ōmarumutu this 22nd day of December 2022.

A handwritten signature in black ink, appearing to read 'C M Wainwright', written in a cursive style.

Judge C M Wainwright
Presiding Officer

WAITANGI TRIBUNAL