

IN THE WAITANGI TRIBUNAL

CONCERNING

the Treaty of Waitangi Act 1975

AND

remaining historical claims

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MEMORANDUM OF THE CHAIRPERSON APPOINTING A STANDING  
PANEL TO INQUIRE INTO REMAINING HISTORICAL CLAIMS IN THE  
SOUTH-WESTERN NORTH ISLAND, THE SOUTH ISLAND AND THE  
CHATHAM ISLANDS

6 September 2018

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Tēnā koutou katoa

## **Introduction**

1. The purpose of this memorandum-directions is to appoint a Tribunal standing panel to inquire into certain claims that are not included in the recognised mandates of groups in Treaty settlement negotiations and have remaining historical grievances that have not previously been heard or settled and are not being heard in current Tribunal inquiries.
2. The memorandum-directions also sets out the eligibility of claims to participate in the standing panel process and the panel's scope of work.

## **Background**

3. In my memorandum of 22 September 2015 to all claimants and the Crown, I outlined the place of the remaining historical claims programme in the Tribunal's strategic framework; the general scope of remaining historical claims and the Tribunal's approach; a district framework for considering the claims; and a standing panel programme involving:
  - (a) a fast-track process for claims filed after the cut-off dates for inclusion in the respective district inquiries; and
  - (b) a standard process for claims in districts that have not seen a Tribunal inquiry.
4. The programme envisaged two standing panels working in parallel, one for each process. Their appointment was to follow a preliminary interlocutory phase to clarify the eligibility of claims and claimants' interest in participating in the programme. This would aim:
  - (a) to clarify the extent to which partly settled historical claims remained within the Tribunal's jurisdiction;
  - (b) establish whether claims included in current settlement negotiations had any remaining historical grievances not covered;
  - (c) identify the districts in which eligible claims with remaining historical grievances were located;
  - (d) ascertain whether or not claimants with eligible claims were likely to wish to participate in a standing panel process and on what grievances; and
  - (e) evaluate whether any such grievances might more appropriately be redirected to a kaupapa inquiry.
5. Following completion of the preliminary phase, the Tribunal was to communicate a provisional listing of all claims eligible for and interested in participating in the remaining historical claims programme, the districts to which they related and the principal issues they wished to raise.
6. Substantial desk work has been undertaken on the first three preliminary steps (paragraph 4(a)-(c)). The assessment of claim eligibility has, however, been complicated by the large numbers included in historical Treaty negotiations and settlements and the participation of growing numbers of claims in the preparation of new kaupapa inquiries. The Tribunal's resources have also been stretched in progressing the large district inquiries and a large number of urgent inquiries and remedies proceedings.
7. It has become evident that the plan to produce a national list of eligible claims and principal issues is no longer practicable. Nor do the Tribunal's resources currently suffice to enable two standing panels to conduct simultaneous fast-track and standard processes. A Tribunal pathway for remaining historical claims will nonetheless be an important contributor towards achieving the Tribunal's strategic goal of completing as rapidly as possible its inquiries into all historical claims that the claimants wish to be

heard. It will also fulfil the Tribunal's statutory duty to hear all claims before it. An alternative approach is needed.

### **Starting the standing panel process**

8. That approach will have three main aspects. First, the initial interlocutory proceedings will be undertaken by the standing panel. This is standard practice in new inquiries and involves:
  - (a) consultation with claimants to establish which claims are eligible;
  - (b) whether the claimants for those claims wish to participate;
  - (c) what grievances they propose to bring before the Tribunal; and
  - (d) how ready they are to proceed.
9. Secondly, at the outset the standing panel will consider claims relating to inquiry districts where the Tribunal has completed an inquiry either into all claims arising in the district at the time of inquiry or into its principal tribal claims. These districts offer the best prospect for a fast-track process and for making rapid progress with many of the remaining historical claims.
10. Thirdly, districts will be grouped into regions for assignment to a standing panel. This will better enable the panel to manage its workload, develop its process and adjust to changing contexts, in particular progress in Treaty settlement negotiations. Each region will, where possible, comprise adjacent districts so as to assist in considering claims where the claimants have interests in more than one district and to take account of shared histories.
11. A standing panel may be assigned one or more regions and its mandate may be extended to other regions. One or more additional standing panels may also be appointed to expedite the Tribunal's consideration of claims in other regions.

### **Appointing a standing panel**

12. Pursuant to clause 5(1)(a)(i) of the Second Schedule to the Treaty of Waitangi Act 1975, I now appoint myself as presiding officer for the standing panel inquiry into remaining historical claims, as further specified below.
13. Other panel members will be appointed later.

### **Scope of the standing panel inquiry**

14. The standing panel will inquire into claims with historical grievances that remain within the Waitangi Tribunal's jurisdiction in the inquiry districts stated in paragraph 18, subject to the exclusions specified in paragraph 16 below. A historical claim is defined in section 2 of the Treaty of Waitangi Act 1975 as:

a claim made under section 6(1) that arises from or relates to an enactment referred to in section 6(1)(a) or (b) enacted, or to a policy or practice adopted or an act done or omitted by or on behalf of the Crown, before 21 September 1992.
15. Where a claim alleges a historical grievance that extends to or beyond 21 September 1992 and thus raises contemporary matters, the standing panel will have discretion to decide whether to admit the contemporary aspects of the allegations.
16. The eligibility of claims to participate in the standing panel process is subject to exclusion to the extent that the claims:
  - (a) have been settled by legislation and removed from the Tribunal's jurisdiction;
  - (b) are included in the mandates of groups that have agreed or subsequently agree terms of negotiation with the Crown for the settlement of their historical Treaty

- claims, by listing in the mandate of the claim or the iwi or hapū on whose behalf the claim is brought;
- (c) have been heard in previous inquiries on which, aside from any subsequent remedies proceedings, the Tribunal has completed its reporting; or
  - (d) are participating in current Tribunal inquiries.
17. Claimants intending to participate in the standing panel process are reminded that its purpose is to provide a forum for their existing historical grievances rather than new ones. While claimants may amend their historical claims 'in any way' and may thereby add new causes of action, the Tribunal has discretion to defer its inquiry into any claim for sufficient reason (sections 6AA(2) and 7(1A) of the Treaty of Waitangi Act 1975). This does not limit the ability of claimants to particularise their existing grievances or the Tribunal's ability to request them to do so.

### **Districts**

18. The standing panel will consider remaining historical claims, as specified above, that arise in the south-western North Island, the South Island and the Chatham Islands, comprising the following inquiry districts (see **Appendix A**):
- (a) Taranaki;
  - (b) Whanganui;
  - (c) Te Whanganui a Tara/Wellington;
  - (d) Te Tau Ihu/Northern South Island;
  - (e) Southern South Island; and
  - (f) Rekohu/Chatham Islands.
19. The Tribunal has completed district inquiries for all six districts. Settlements of historical Treaty claims have been concluded in four of the six and are in negotiation in the other two.
20. Some claimants with historical claims arising in the listed districts may also have grievances that arise in adjacent districts outside the region. For these claims, the claimants may apply to the standing panel to include their grievances outside the region, provided that their claim falls mainly within the listed districts. The inclusion of any such grievances will be at the discretion of the standing panel.
21. Not all the claims that relate to the six districts will be eligible to participate in the standing panel process and some may be eligible in respect of only some of their historical grievances (see paragraph 16 above). In each case, claim eligibility will be determined by the standing panel.
22. I may refer claims relating to further districts or groups of districts for the standing panel's consideration as its work progresses.

### **Standing panel process**

23. The standing panel will set its own procedure and order of business, taking due account of the guidelines indicated in my memorandum of 22 September 2015 (attached in **Appendix B**).
24. The Registrar is directed to establish a new combined record of inquiry, which will be identified as 'Inquiry into Remaining Historical Claims: Southern North Island and South Island Claims' with the reference number Wai 2800. All documents and other evidential material will be entered on the combined Wai 2800 record of inquiry and all future documents filed by parties in relation to the matters subject to this inquiry should now refer to this Wai number.

The Registrar is to send this memorandum to the Crown and all claimants with registered claims and to place an electronic copy on the Tribunal's website for public information.

DATED at Gisborne this 6<sup>th</sup> day of September 2018

A handwritten signature in black ink, appearing to read 'W W Isaac'.

Chief Judge W W Isaac  
Chairperson  
WAITANGI TRIBUNAL

### Appendix A. Map of the included inquiry districts



## **Appendix B. Outline of a fast-track process for claims in districts with completed Tribunal inquiries**

The following extracts from the Chairperson's memorandum of 22 September 2015 describe a standing panel process for inquiring into remaining historical claims arising in inquiry districts where the Tribunal has completed a district inquiry or an inquiry into the principal tribal claims. The extracts have minor updates where needed to align the text with the changed context of this memorandum-directions.

### **A fast-track process in districts with completed inquiries**

37. Many of the remaining historical claims arise in districts on which Tribunal panels have previously reported (18) or are now preparing their reports (3). In all these inquiries the Tribunal investigated the principal grievances of the participating claimants. In most, the Tribunal heard claimants on all the issues they wished to present, whether district-wide or local. It is likely that many claimants with remaining historical claims will find some or all of their grievances have been addressed in the respective district inquiry's evidential record of documents and Tribunal report.
38. The nexus between remaining historical claims and previous district inquiries, in particular their evidential resources and the Tribunal's reports on claims with similar issues, opens the door to a fast-track inquiry process. The process will focus on claims with grievances where a nexus can be demonstrated.
39. In outline, under the fast-track process the Tribunal will take the following steps for each district:
  - a) Identify remaining claims with historical grievances that arise in the district and relate to issues heard in the preceding district inquiry;
  - b) Consult with and confirm which claimants want the Tribunal to consider their claims;
  - c) Resolve any jurisdictional matters affecting the Tribunal's ability to inquiry into the claims;
  - d) Commission an assessment of claim issue coverage in the evidential record of the preceding district inquiry and in the Tribunal report;
  - e) In consultation with the claimants, determine:
    - which claims or parts of claims are ready to proceed;
    - what are the priority issues to be heard; and
    - which claims, if any, raise grievances not considered in the preceding inquiry;
  - f) Commission any essential gap-filling research required;
  - g) Hear any claimant and Crown evidence, any technical research, and submissions from the parties; and
  - h) Complete short reports on the claims, either individually or jointly.
40. The main purpose of this expedited process is to enable many of the claimants with remaining historical claims that were submitted too late for inclusion in a district inquiry to have their claims rapidly considered and reported on by the Tribunal. To that end, under step 39(d) above the Tribunal will commission, for consultation with the parties, a claim coverage assessment for each district that will assess:
  - a) The sufficiency of evidence relevant to the claims that is already on the record of inquiry or otherwise in the public domain;
  - b) The extent to which issues similar to those of the remaining claims have been addressed in the previous Tribunal's report, and in what manner.

41. The Tribunal will generally not commission new technical research for the fast-track process. Exceptions may apply where a remaining claim's issues are covered in the respective Tribunal report but there is insufficient specific evidence on the claim itself. Brief, targeted research may then be undertaken. It will also be open to the claimants to commission their own evidence, produce expert witnesses and present tangata whenua evidence. For a fast-track process to achieve its purpose, however, the parties must be ready to proceed rapidly to hearing. The Tribunal will seek to ensure that the production of any new evidence does not unduly slow the proceedings.
42. Together with any gap-filling research and any new evidence and submissions presented by the parties, the claim coverage assessment will assist the Tribunal in determining the extent to which it can hear and report on the remaining historical claims before it.
43. The focus of the fast-track process is on remaining historical claims. The Tribunal's overarching goal of completing historical claims requires that contemporary (post-1992) grievances be deferred to a subsequent contemporary claims process. However, particular exceptions may be allowed into the fast-track process where a historical grievance extends beyond 1992 and falls within the issue coverage of the Tribunal's district inquiry report, provided that the claimants are ready to proceed with it.
44. This fast-track process will best serve its purpose if it moves at pace. Any required gap-filling research will be precisely targeted and claim issues prioritised for hearing and rapid Tribunal reporting. With the cooperation of the parties, the Tribunal considers that its consideration of many of the outstanding historical claims can be effectively expedited.

#### **Standing panel – fast track process**

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50. As a general approach, the standing panel will consider remaining historical claims within a single inquiry process for each district in which they arise. This has the advantage of being able to draw on a common foundation of evidence and Tribunal reporting in the preceding district inquiry.
51. At the same time the standing panel will be able to adopt flexible procedures. These may include:
  - a) proceeding in parallel with multiple districts;
  - b) taking into account the readiness of claimants to proceed with their claims;
  - c) early access for claims in circumstances meriting priority; and
  - d) opportunities to bring together all aspects of claims that span more than one district.

...

67. It will be for each standing panel to decide the order in which the districts for which it is responsible will proceed. There is no predetermined order and a panel may decide to consider several districts in parallel.
68. As circumstances are likely to vary widely across districts and between the claimants in a district, the standing panel will adopt a flexible and responsive approach to setting a process for considering the claims arising in each district.