

section 3.3 |



appendix 1

Context and process

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3.3 Formal Hearings: the process

Introduction

The Royal Commission developed an extensive public consultation programme to meet the requirements of its terms of reference (Warrant) and its obligations under the Commissions of Inquiry Act 1908 (the Act).

The consultation programme included Formal Hearings, Public Meetings, Hui, Public Submissions, a public opinion survey and a Youth Forum.

This paper summarises the process involved in conducting Formal Hearings of presentations by Interested Persons, over a total period of 13 weeks.

An analysis of the Interested Persons' submissions, their witnesses' evidence and subsequent cross-examination, during the Formal Hearing process, is presented in Appendix 2 of this report.

Regulatory requirements regarding consultation process

This Commission, as with all commissions of inquiry, was bound by the provisions of the Commissions of Inquiry Act 1908, including section 4A(1), *Persons entitled to be heard*.

The relevant definition of 'person' is in section 30 of the Interpretation Act 1999:

'Person' includes a corporation sole, and also a body of persons, whether corporate or unincorporated.

Section 4A(1) of the Commissions of Inquiry Act identifies the situations in which a person is 'entitled to appear and be heard at the inquiry'. These include where a person is 'party to the inquiry' or where a person satisfies the Commission that they have 'an interest in the inquiry apart from that in common with the public'.

In addition, section 4A(2) of the Act states:

Any person who satisfies the Commission that any evidence given before it may adversely affect his interests shall be given an opportunity during the inquiry to be heard in respect of the matter to which the evidence relates.

No person made application under this provision.

The Warrant establishing the Commission does not name any specific ‘parties’ to the inquiry, nor has the Commission cited any parties; therefore the second part of section 4A(1) is the applicable criteria governing Interested Person status before the Commission. In terms of that provision, those seeking Interested Person status must satisfy the Commission:

- that they have “an interest in the inquiry”, that is, an “interest” in the Inquiry on Genetic Modification, and
- that their interest is “apart from that in common with the public”.

Those accorded Interested Person status had the right to appear before the Commission in person (or by their counsel or agent) and give oral evidence.

Commission interpretation of regulatory requirements

As stated in the Commission’s opening address at the public Scoping Meeting, a Commission is quite different from a court of law as nobody is on trial. In its address the Commission also outlined the principles for its consultation process:

Subject to the basic requirements set out in the Commissions of Inquiry Act, and the directions given in the Warrant, we are entitled to fix our own procedure, and to gather our information and conduct our investigations in the way we think is most suitable. In carrying out our mandate to consult the public of New Zealand we wish to be as open as possible, and as inclusive as we can, giving everyone who wishes to present their views to us a fair and reasonable opportunity, although not necessarily by way of a personal appearance. Clearly there will be practical limitations; everything we would like to do, or people would wish us to carry out, will need to be accommodated within the limits of our resources, both of time and in physical terms.

To ensure transparency of its processes, the Commission announced that all of its hearings would be in public, and that oral evidence given at its Formal Hearings would be recorded and the transcripts placed on the Commission website.

The Commission also stated that confidentiality of information could be sought and where granted, those submissions could be heard in private or remain unpublished. However, confidentiality would be granted only in exceptional instances. In the event, no evidence was heard in confidence.

The Commission determined that Interested Persons, while not having a ‘right’ to cross-examine other Interested Persons and their witnesses, were able to apply for leave to do so. Leave was freely granted, although at times the Commission had to place limits on the length of the cross-examination.

Establishing the consultation programme

The Commission's Formal Hearing process included the following components:

Application for Interested Person status

- applications in writing for Interested Person status
- oral presentations in support of applications, at the discretion of the Commission.

Written submissions

- written submissions by Interested Persons and their witnesses.

Formal Hearings

- oral presentation of submissions by Interested Persons, and their witnesses
- cross-examination of presenting Interested Persons and their witnesses by other Interested Persons, their representatives or legal counsel, and by Counsel assisting, at the discretion of the Commission
- questions by the Commissioners.

Additional presentations

- oral presentation of evidence by individuals and organisations not accorded Interested Person status, at the invitation of the Commission.

Rebuttal and new evidence

- application to present new evidence that arose after an Interested Person appeared before the Commission
- written application to present rebuttal evidence that could not reasonably have been foreseen and referred to in the original presentation
- oral presentation of new and rebuttal evidence, at the discretion of the Commission.

Closing and legal submissions

- written closing submissions by Interested Persons
- written legal submissions by Interested Persons
- oral presentation of closing and legal submissions, at the discretion of Interested Persons.

Documents tabled during Formal Hearings

- documents presented to the Commission during the Formal Hearings, which were tabled and listed on the Commission website.

Application process for Interested Person status

The Commission called for applications for Interested Person status in its first public notice, placed in the 22 national daily newspapers on 29 July 2000. By closing date (4 August 2000), some 265 applications were received. Having considered all applications, the Commission concluded, on the basis of the written information provided, that a number were sufficiently clear-cut to enable the Commission to grant Interested Person status without further submissions at its applications hearing.

On 10 and 11 August 2000, the Commission proceeded to hear oral submissions in support of applications from those who had not already been accorded Interested Person status.

In its written Decision, released on 17 August 2000, the Commission accorded status to 109 applicants (later amended to 110).

In addition, the Decision identified 21 persons whose applications were not received in time to be heard on 10 and 11 August 2000 and noted that these would be heard at a subsequent hearing.

On 21 August 2000 the Commission issued a news release announcing the outcome of the application process. The release noted that the consultation programme would commence with a series of Public Meetings, the first to be held on 18 September 2000.

The news release also addressed concerns regarding the interpretation of section 4A(1) of the Act, raised by some unsuccessful applicants for Interested Person status. The Commission stated “it was obvious many members of the public were acutely interested in the inquiry and often highly informed ... many people [were] concerned to varying degrees of intensity but, by itself, this [did] not amount to ‘an interest apart from that of the general public’”.

At its second application hearing on 5 September 2000, the Commission heard from the 21 persons identified in its decision of 17 August 2000. At this hearing it also dealt with a small number of applicants who had been unable to attend the earlier hearing, and six late applicants. The Commission also sought clarification from two previous applicants.

On 14 September 2000, the Commission released a Supplementary Decision according Interested Person status to a further seven organisations.

At the conclusion of the two application hearings, the Commission had considered 292 applications for Interested Person status, deciding that 117 were considered to met the statutory criteria.

A total of 15 applications for Interested Person status were received from Maori or Maori organisations, of which seven were accorded status.

During the course of the Inquiry, a further five applications were received and processed but no further applicants were granted Interested Person status.

Copies of the Commission's decisions on applications and lists of successful applicants were posted on the Commission website.

Establishing the Formal Hearings procedure

Next, the Commission set about establishing the procedure for receiving written submissions, and the Formal Hearing process.

In establishing its processes, the Commission was mindful of, among other things, the need to utilise the limited hearing time efficiently; provide certainty to Interested Persons with respect to the date on which they were to appear before the Commission; and ensure that the process was fair and equitable to all Interested Persons irrespective of whether they were to be heard in the early or latter stages of the process.

In order to achieve these objectives, the submission and hearing process of Interested Persons included the following parameters:

- Submissions and witness briefs would be provided and read in advance so that, in their presentation at the Formal Hearings, Interested Persons and witnesses would be speaking to their submission or briefs rather than reading the evidence verbatim.
- This approach, coupled with the Commission placing the submission and briefs on the website 10 working days prior to the Interested Person being heard, allowed other Interested Persons to prepare any cross-examination in advance.
- The total presentation time allocated of 80 minutes per Interested Person would allow for the presentation of evidence by submitters and their witnesses, and leave a reasonable opportunity for cross-examination, and questioning, by the Commission
- Requiring other Interested Persons to give three days notice to seek leave to cross-examine would enable the Commission to utilise the allocated hearing time efficiently by gauging the relative interest in cross-examining Interested Persons appearing on the same day.
- The Commission's discretion in allowing cross-examination and controlling the time would reduce the duplication of questioning and information presented to it.

Notification of Formal Hearing process

On 31 August 2000, the Commission released its first ‘Notification to Interested Persons’ (Notification) outlining the procedures on the following aspects:

- filing of written submissions, including briefs of evidence (witness briefs)
- the availability of submissions received from Interested Persons
- the format and time frames for appearances before the Commission
- procedures for cross-examination of the evidence of other Interested Persons
- Notice of Closing Submissions.

The Notification also advised the timetable for Formal Hearings, beginning on 16 October 2000.

The indicative timetable grouped Interested Persons broadly on the basis of ‘like’ organisations. For example, one group included organic farming groups and another included Crown Research Institutes (CRIs). The groups were then allocated to weeks within the Formal Hearings schedule, based on the premise the Commission could hear two to three Interested Persons per day over the initial 12-week Formal Hearing period.

The Notification also included a format for the presentation of written submissions (Form 1) and witness briefs (Form 2) based on the subject matter outlined in the Warrant.

Interested Persons were encouraged to use the formats provided, in the interests of consistency and to enable a framework for the analysis of submissions to be developed corresponding the specific items of the Warrant.

The Notification provided a timeline for the receipt of written submissions and witness briefs from Interested Persons which comprised rolling deadlines for those appearing in the first four weeks of hearings, the remainder being required to file their material by 30 October 2000.

The Notification advised that generally Formal Hearings would be held in Wellington, but indicated that, where appropriate, the Commission would conduct hearings in Auckland or Christchurch.

The Notification advised of the procedures for making a submission, or presenting to the Commission, in Maori.

The Commission also issued a news release announcing its Formal Hearings schedule and outlining the hearings process, which would be open to the public. The release referred to the Commission’s public written submission process

available for those who had not obtained Interested Person status yet wanted to contribute to the Commission's body of evidence.

In addition to notifying all Interested Persons individually, the Commission placed the notifications, schedules and forms on its website.

The Commission formally announced its consultation programme by public notice in the 22 daily newspapers on 15 September 2000. This notified the commencement of Formal Hearings on 16 October 2000 and advised of the publication of scheduling details on the Commission's website. It also recorded the availability of guidelines for submissions from the Commission office.

To facilitate communication with Interested Persons, the Commission used electronic technology extensively. An email distribution list was established and utilised in nearly all aspects of the Commission's interaction with Interested Persons. The Commission website was established as the primary source of documentation including Formal Hearing schedules, Interested Person submissions and witness briefs and, later, transcripts of the proceedings.

Additional notification of Formal Hearing process

Following feedback on the initial Notification, the Interested Person submission and hearing process was revised and fine-tuned by a 'Supplementary notification to Interested Persons' (Supplementary notification) released on 29 September 2000.

Among other things, the Supplementary notification advised that the Commission would accept collaborative submissions and/or presentations by submitters seeking to advance a similar viewpoint, in particular where this would lead to economies in the overall presentation time.

As the deadline for receipt of Interested Person submissions drew closer, the Commission clarified a number of aspects of the submission and hearing process through informal notifications to all Interested Persons, primarily by email. These notifications addressed issues such as the provision of CVs for witnesses presenting evidence in support of submissions, the availability of written submissions on the Commission website, and the availability of video-conferencing facilities for those wishing to present international witnesses to the Commission in its Wellington Formal Hearings venue.

Interested Person written submission process

The initial deadline for Interested Person written submissions and witness briefs was 25 September 2000, applying to those appearing in the first week of Formal

Hearings. This equated to 15 working days prior to their appearance before the Commission.

The Commission's intention was to publish the submissions and witness briefs on its website 10 working days prior to the start of the week in which the Interested Person was scheduled to appear. In addition, submissions were emailed directly to all Interested Persons as soon as available.

As at 30 October 2000, the final deadline for all Interested Person submissions, 105 had been received. A formal extension was given to the remaining organisations.

A small number of Interested Persons subsequently withdrew from the Formal Hearing process, citing a range of reasons including that their interests were adequately represented by other Interested Persons. Some of these organisations, however, provided written submissions through the general public submission process.

A few Interested Persons provided written submissions but declined the opportunity to present to the Commission.

Overall, of the 117 organisations that had been accorded Interested Person status, 107 filed written submissions for the Formal Hearing process.

Formal Hearings venues, dates and times

The hearings room was located on the 11th floor of Dalmuir House, 114 The Terrace, Wellington, where the Commission secretariat was housed. The standard sitting hours were Monday to Thursday, 9.30 am to 5 pm.

A public notice was placed in the 22 daily newspapers on 2 September 2000 advising the location, time and commencement date of the Formal Hearings.

As a result of delays in the completion of the 11th-floor facilities, the first week of hearings was held in the Quality Inn Hotel's Challenge Hall, Willis Street, Wellington.

Formal Hearings were also held in Auckland, on 13 November 2000 and 15-16 February 2001 (Auckland District Court) as well as in Christchurch on 23 February 2001 (Grand Chancellor Hotel).

Most Interested Persons introduced their presentation and conducted cross-examination, by an officer, member or other representative of the particular organisation, but some were represented by counsel.

During the Formal Hearings, a number of overseas witnesses, who were unable to attend the hearings in person, presented by video or telephone conferencing.

Presentations in Maori

In its first notification to Interested Persons, the Commission indicated that it would accept written submissions and oral presentations in Maori during its Formal Hearing process. The Commission, however, requested advance notice of the intention to present in Te Reo in order to enable the provision of translation services.

There was one presentation in Te Reo.

Evidence recording

The Formal Hearings were recorded by audiotape and stenotype. By virtue of simultaneous computer-assisted transcription, the Commissioners were able to view the transcription on their laptop computers. The transcript was posted on the Commission's website.

Public and media attendance

Public notifications and news releases invited members of the public and media to attend the proceedings. Public attendance waxed and waned, depending on the Interested Persons being heard.

The Commission informed media of the proceedings regularly. Representatives of Radio New Zealand and *The Dominion* were in attendance each day. The Formal Hearings received almost daily coverage in national print and radio media.

Summary of the Formal Hearings

Opening statements by the Commission and its legal counsel

The Formal Hearings began on 12 October 2000 with an opening statement (the Statement) made by counsel assisting the Commission, outlining the task of the Commission and how it might achieve this, as provided in its Warrant. The Statement discussed the environment in which the Commission was conducting its inquiry, including reference to the Treaty of Waitangi and New Zealand's relative geographical isolation.

It also outlined the types of information and considerations the Commission would have to take into account, including scientific and technical information, legal matters, commercial interests, and cultural and ethical viewpoints. Furthermore, the Commission was to have regard for the inherent complexities of such information, including the differing attitudes people had to different aspects or applications of the technology.

The Statement concluded by outlining the role of counsel assisting and clarified the cross-examination process.

On behalf of the Commission, the Chair also delivered an opening statement. He emphasised the importance of the Commission completing its work in a timely way and, therefore, the need for cooperation from all parties in the conduct of the Formal Hearings.

On 26 February 2001, at the beginning of the Formal Hearings of Interested Persons representing Maori, the Commission made additional opening remarks. Following a mihimihi by the Commission kaumatua, Pihopa Kingi, the Chair outlined the Commission's process for consulting with Maori.

Copies of these opening statements were posted on the Commission's website.

Oral presentation of submissions

Over the course of 12 weeks, the Commission heard presentations from 107 Interested Persons.

A number of these presentations were on a collaborative basis where organisations representing the same sector, or with like interests, provided joint submissions and/or joint presentations.

Such collaborations included Interested Persons representing the meat industry (including Meat New Zealand, Meat Industry Association of New Zealand and New Zealand Game Industry Board), a joint submission and presentation by New Zealand Vegetable and Potato Growers' Federation, New Zealand Fruitgrowers' Federation and New Zealand Berryfruit Growers' Federation; and another by New Zealand Feed Manufacturers Association, Egg Producers Federation of New Zealand and Poultry Industry Association of New Zealand.

New Zealand Life Sciences Group, an umbrella group for national organisations which are involved, or have an investment in, research or the application of biotechnology, cooperated with some of its member organisations that had obtained Interested Person status, through the joint presentation of witnesses.

The Commission also heard collaborative submissions from those representing the organics industry, six of such organisations working together throughout the proceedings, both in cross-examination and in their presentations. The Commission heard from these organisations over three days of hearings, in early December 2000, with two groups presenting consecutively in the morning (including presenting witnesses drawn from the whole group) and then facing cross-examination as a panel at the conclusion of the presentations.

The Commission accepted this approach as it was in line with its objective to use the available hearing time efficiently and avoid duplication of information.

Cross-examination of Interested Persons

In nearly all instances, the evidence presented by Interested Persons in the Formal Hearings process was subject to cross-examination by other parties, by leave of the Commission.

In establishing its procedures at the outset of the hearings, the Commission indicated it would allocate the available time equally among those seeking to cross-examine. It also encouraged Interested Persons holding the same, or a similar view, to work together to utilise the hearing time more effectively and reduce repetition among Interested Persons with similar viewpoints.

The Commission did not, at any stage in the proceedings, exercise its discretion to decline an application for leave to cross-examine. In many cases, however, cross-examination was limited by the time available.

Additional hearings

The Commission had authority to invite individuals or organisations to appear to present information to assist the Commission in its considerations.

The Commission invited the Australia and New Zealand Food Authority (ANZFA) to appear on 8 March 2001, to provide information on its processes and to respond to the comments and criticisms that had been made during the Formal Hearings. Notification of the additional hearing was given to all Interested Persons who were invited to apply for leave to cross-examine the ANZFA witnesses. As with an earlier hearing at which Environmental Risk Management Authority (ERMA) presented, the ANZFA hearing was extended to accommodate cross-examination. Copies of ANZFA's written submission (prepared as a general public submission) and its written response to criticism were posted on the Commission's website.

New and rebuttal evidence

By means of a 'Second supplementary notification' issued on 18 December 2000, the Commission announced its procedure for new and rebuttal evidence at the conclusion of the presentations by all Interested Persons. This notification also referred to the process for closing and legal submissions. A 'Third supplementary notification' on 21 February 2001 advised that any new or rebuttal evidence would be heard on 9 March 2001.

New evidence was defined as “evidence that constitutes a significant matter that has arisen since the Interested Person first presented to the Commission, and must be information that was not available, nor could have reasonably been found out, at the time the Interested Person appeared before the Commission”.

Rebuttal evidence was defined as “evidence that could not have reasonably been foreseen and presented in the original appearance before the Commission”.

In each instance, the Commission would consider applications for leave to address such evidence, on a case-by-case basis. Any new or rebuttal evidence would be subject to cross-examination, at the Commission’s discretion.

The Commission received four applications to present new evidence and accepted none. There were eight applications to present rebuttal evidence of which one was accepted.

The notifications were placed on the Commission’s website, together with the successful application for leave to present rebuttal evidence.

Closing and legal submissions

As indicated in the initial notification, the Commission invited Interested Persons to make succinct closing submissions at the end of the Formal Hearing process. The Notification indicated that closing submissions could be a summary of the Interested Person’s own position; a critique of other submissions; or both. The proviso was, however, that these submissions would not be a repetition of material the Commission had previously heard.

Written closing submissions were not to exceed 10 pages in length, unless by prior arrangement, and were to be filed by 9 March 2001.

In addition, the Commission invited Interested Persons to prepare legal submissions on specific aspects of the Warrant, such as legal liability for loss or damage caused by genetic modification, Treaty of Waitangi issues, international legal or trade issues, or intellectual property law. These, too, were to be filed by 9 March 2001 and, in conjunction with the closing submissions, would be heard in the period 12 to 15 March 2001.

Interested persons provided a total of 17 written closing submissions and six written legal submissions. There were 15 oral presentations, made on behalf of 51 Interested Persons altogether.

Counsel assisting the Commission opened proceedings on 12 March 2001 with a detailed address outlining the process undertaken and some overarching

principles for analysing the evidence, information, arguments and debate presented to the Commission during its Formal Hearing process.

The Commission placed the notifications and the closing and legal submissions on its website.

Conclusion

By the completion of the Formal Hearings, the Commission had heard from some 300 people over a total of 58 days. The hearings produced 4656 pages of transcripts and almost 2 m³ of submissions and evidence.

In the course of closing remarks by the Commissioners at the end of the Formal Hearing process on 15 March 2001, the Chair said:

The Commission was directed to consult with the people of New Zealand in a way that allowed them to express their views clearly. We gave a lot of thought to our processes, and received much help from the participants. We have not pleased everyone, and as indeed we have pointed out from time to time, that was neither our intention nor our function. We believe, however, that we have fulfilled the aim we expressed at the outset, to give everyone who wished to present views to us a fair and reasonable opportunity.

As announced at an earlier stage, we decided there were good reasons why the Commission should try to adhere to its reporting date. Thus the time for our public hearings had to be controlled. In fact, we do not believe that either the time limit for presentations or the restrictions on cross-examination, were detrimental to our being well informed. In the event we did not refuse any application to cross-examine outright and had to limit time only occasionally. Participants had to be focused in their presentations, and keep to the main points of their questioning. These factors did not adversely affect either the quality or the quantity of the information conveyed to us. Further, we believe they contributed to a level playing field, since had there been no restrictions, the better resourced participants may have been able to take up an undue share of the hearing time.

Counsel assisting the Commission also made some closing remarks regarding the historical nature of the process and the importance of the resultant report:

On some occasions reports of Commissions have been pigeonholed. I know that this will not happen, and cannot be allowed to happen, to the report which this Commission will produce.

Copies of the closing statements were placed on the Commission's website.