

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

Wai 3300

CONCERNING

te Treaty of Waitangi Act 1975

AND

Tomokia ngā tatau o Matangireia
– the Constitutional Kaupapa
Inquiry

**MEMORANDUM-DIRECTIONS OF CHIEF JUDGE DR C L FOX PRIOR TO
FIRST INQUIRY PLANNING WĀNANGA**

19 Hānuere 2024

Introduction

1. In my memorandum-directions issued on 15 December 2023 (Wai 3300, #2.3.2), I:
 - (a) released *Tomokia ngā tatau o Matangireia*, the pou's report on a tikanga and Treaty compliant process for hearing the claims of this inquiry, to parties (Wai 3300, #6.2.2) (the Pou Report); and
 - (b) set out the next steps in the inquiry, in particular, I scheduled two inquiry planning wānanga in January and March 2024.
2. This memorandum-directions:
 - (a) provides further clarity about the inquiry design that may, subject to further discussions with parties and subsequent deliberation, result from the proposals in the Pou Report; and
 - (b) confirms the agenda for the wānanga on 30 January 2024 (see **Appendix A**).

Inquiry design that may result from Pou Report

3. The panel and pou have discussed what the inquiry may look like in terms of the forward inquiry design based on the proposals in the Pou Report. The outcome of these discussions is set out below to provide further clarity to parties ahead of the first inquiry planning wānanga.
4. The panel and pou propose that this inquiry will proceed under the following broad stages:
 - (a) Inquiry planning wānanga.
 - (b) Regional wānanga.
 - (c) Next steps to be determined by the outcome of regional wānanga.
5. These stages are detailed below.

Inquiry planning wānanga

6. As previously indicated, initial inquiry planning wānanga will be used to discuss the Pou Report and to agree on an inquiry design with parties. We intend for the main contributions at this wānanga to come from parties. Accordingly, lawyers and the Tribunal panel will have observer status (with the exception of panel members Kevin Prime and Derek Fox who will facilitate the wānanga).
7. The first inquiry planning wānanga will be held on **30 January 2024** at the **Waitangi Treaty Grounds**. It will commence with a pōwhiri at **8.00am** which will take place at **Te Whare Rūnanga**. The wānanga will then move to **Tahuaroa Function Centre** and will conclude by **3.30pm**.
8. The agenda for this wānanga is **attached** to these directions as **Appendix A**.
9. I previously indicated that all parts of the inquiry planning wānanga, including the pōwhiri, would be livestreamed (Wai 3300, #2.3.2 at [10]). I now advise parties that, due to technical limitations, the pōwhiri will not be livestreamed. The audio of the pōwhiri will be recorded (but not livestreamed) while the remainder of the wānanga will be livestreamed as planned.

Regional wānanga

10. The Pou Report proposed that, from the outset, the inquiry will take the form of a series of wānanga. The pou also detail the rationale and advantages of this approach in their report (Wai 3300, #6.2.2 at pp 2, 5 & 6).
11. At a high level, the proposed regional wānanga will provide an opportunity for parties to decide the scope of the inquiry, what the claim issues are, and how these claim issues will be inquired into. The outcome of these wānanga will also determine the next stages of the inquiry.
12. It is proposed that the regional wānanga will adopt a thematic and future-focused approach. This may be contrasted with previous Tribunal practice and procedure, particularly in district inquires under the New Approach adopted in 2001, which have tended to be structured around, and focused on, responding to statements of claim and determining the corresponding historical Crown breaches (if any).

Thematic approach

13. The Pou Report notes that the claim issues before this inquiry are, by their nature, thematic issues that affect all tangata whenua and are not necessarily specific to any one inquiry district (Wai 3300, #6.2.2 at p 3).
14. The approach proposed will involve shifting the focus of the inquiry away from an emphasis on individual statements of claim associated Crown responses, and the more legalistic and adversarial approach that can sometimes result. The panel and pou are conscious of the role currently played by pleadings in Waitangi Tribunal inquiries. In particular, pleadings help determine the scope of the inquiry and play an important role in ensuring natural justice by detailing the claims the Tribunal must inquire into under s 6(2) of the Treaty of Waitangi Act 1975 and by alerting the Crown to the allegations it must respond to.
15. It is proposed that the regional wānanga will largely replace these roles played by pleadings by giving parties an opportunity to reach a consensus on what the themes of the inquiry are, how they are framed and to identify which claims fall under which theme.
16. To clarify, statements of claim will still play a role in this inquiry, but they are not intended to have the same influence on inquiry process as in previous inquiries.
17. The Pou Report provides a preliminary list of themes based on existing claims currently before the Tribunal that relate to constitutional issues (Wai 3300, #6.2.2 at p 3). These themes may be amended based on new statements of claim filed and/or the discussions at the wānanga.

Future-focussed approach

18. The Pou Report proposed a shift from a principally ture-based process to a more tikanga-based process. It explained the latter approach is less adversarial and reductionist in favour of a constructivist approach. In this sense, wānanga do not simply enable its participants to reach consensus or agreement but guide them to a point where māramatanga or enlightenment is achieved (Wai 3300, #6.2.2 at p 5).
19. It is proposed that the inquiry is not structured primarily to determine whether past Crown conduct constituted a breach of Te Tiriti o Waitangi/The Treaty of Waitangi. Rather the inquiry will first seek to enable parties to find common ground on what a Tiriti/Treaty-compliant constitution might look like today.

20. Accordingly, it is proposed that the regional wānanga will provide parties with an opportunity to identify the extent of agreement and disagreement under each theme, and to reach a consensus on possible solutions in relation to each theme and/or decide how each theme will otherwise be inquired into.

What will be discussed at regional wānanga

21. In summary, it is proposed that the regional wānanga will provide parties with an opportunity to reach a consensus on:

- (a) the themes of the inquiry, how they are framed or understood, and the extent of the disputes under each theme;
- (b) which claims fall under which themes and whether any claimants feel their claims are excluded by the inquiry;
- (c) the identification of possible solutions in relation to each theme; and/or
- (d) how each theme will be inquired into.

Other possible matters to be discussed prior to or at regional wānanga

22. The panel and pou also discussed how it may be necessary for claimants to determine among themselves the most effective way for them to participate at the regional wānanga. This might involve claimants clustering in some way, such as thematically or regionally, or nominating speakers for particular kaupapa.

23. The panel and pou also identified other possible matters that may be the subject of discussion. This includes:

- (a) how evidence is given and by whom;
- (b) how evidence is heard, who hears it, who records it and what happens to it;
- (c) how evidence is tested or cross-examined;
- (d) the role played by lawyers in the inquiry; and
- (e) how the Tribunal conveys what it has heard and seen, and how the Tribunal's report may be published.

Where and how many wānanga will be held

24. The Pou Report stressed the importance of the regional wānanga being held on marae and in wharehau and stressed that each wānanga should be guided by the tikanga and kawa of the hau kāinga within their respective takiwā or rohe (Wai 3300, #6.2.2 at pp 4-6).

25. It is proposed that parties will assist the Tribunal in determining how many regional wānanga will be required (which may be subject to the Tribunal's available resources) and on which marae they should be held.

Next steps in the inquiry

26. The Pou Report stated that, following the wānanga, '[i]t is then over to those overseeing the ture components of the inquiry to determine how those outcomes might be usefully considered' (Wai 3300, #6.2.2 at p 7).

27. The outcome of the regional wānanga will determine the steps that follow in the inquiry. The panel and pou identified some possible options that may follow, of which any or all may be adopted:

- (a) Where parties do find consensus on any issue, the Tribunal may direct parties to file a joint statement of relief that identifies possible or agreed recommendations.
- (b) The Tribunal may produce a report detailing the outcome of the wānanga (e.g. to confirm the themes of the inquiry, the areas of agreement and disagreement, and how any extant issues will be inquired into).
- (c) The Tribunal may conduct further interlocutories, commission research and/or hear evidence to determine any extant issues. How these inquiry phases are carried out may be informed by the outcome of the regional wānanga.

Me tuku atu te Kairēhita i tētehi kape o tēnei whakahau ki ērā ki te rārangi whakamōhio mō Wai 3300, Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry.

The Registrar is to send a copy of this direction to all those on the distribution list for Wai 3300, Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry.

WHAKAPŪMAUTIA ki Te Whanganui-ā-tara i te 19 o te Hānuere 2024



Kaiwhakawā Mātua Tuarua C L Fox

Tumuaki Pakirehua

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