

IN THE WAITANGI TRIBUNAL

Wai 2660

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Marine and Coastal Area
(Takutai Moana) Act Inquiry

MEMORANDUM-DIRECTIONS OF JUDGE M P ARMSTRONG

18 DECEMBER 2018

1. This memorandum-directions addresses issues concerning discovery raised by claimant counsel in the Marine and Coastal Area (takutai moana) Act Inquiry.

Joint memorandum on behalf of claimant counsel

2. On 30 November 2018, Chelsea Terei filed a joint memorandum on behalf of 17 claimant counsel seeking a process from the Tribunal regarding the filing of Crown discovery documents on the Wai 2660 record of inquiry. Counsel submit that claimant and Crown counsel have been unable to reach an agreement on the filing of the discovery material produced by the Crown.
3. It is now the preference of claimant counsel that all discovery documents are placed on the record. Counsel submit that the discovery is not too voluminous and note that it was not complete discovery, but a selection of documents that the Crown deemed relevant, therefore the discovery was already tailored. Counsel also seek a direction from the Tribunal requiring the Crown to identify a witness that can be cross-examined on the discovery.

Crown memorandum

4. On 10 December 2018, Crown counsel Geoffrey Melvin and Yasmin Moinfar-Yong responded to the joint memorandum. The Crown oppose the directions sought to place all discovery provided by the Crown on the record and that the Crown be required to identify a witness that can be cross-examined on the discovery documents. Crown counsel submit that there is no established practice for discovery material to be placed on the record of inquiry and no requirement under the normal rules of civil procedure and general practice for a witness to produce every document discovered and be available for cross-examination on its content.
5. Counsel submit that once discovery has been provided, the parties should be able to make use of whichever documents they seek to rely on for the purposes of the inquiry, but there should be no requirement to file all documents on the record of inquiry, effectively making them available to the public.
6. If this Tribunal is minded to grant the directions sought, the Crown seeks further directions that the discovered documents not be made available to the public, but only to the claimants whose claims have been consolidated and aggregated into the inquiry.

Decision

7. I agree with the Crown. There is no requirement for all discovery to be placed on the record. Once discovery has been completed, it is for the parties to determine which documents they want to produce in the inquiry. This can be filed as part of claimant evidence or in cross-examination bundles. There is no benefit to filing all discovered documents on the record. Counsel need to refine what documents are required, and are most relevant, to the matters in issue, to ensure we have an efficient and effective record of inquiry.
8. There is also no requirement for the Crown to produce a witness to be cross-examined on the discovered documents. Given the extent of any discovery, it is not clear whether there is a single witness who would be capable of doing this. Claimant counsel are entitled to cross-examine Crown witnesses and can put discovered documents to those witnesses. If claimant counsel seek to question a Crown official who is not giving evidence, they can apply for a summons requiring that person to attend and give evidence

during the inquiry, though attempts should first be made to resolve this by consent between claimant and Crown counsel. The direction sought by claimant counsel is not necessary or appropriate.

9. The request by claimant counsel is declined.

The Registrar is to send this direction to all those on the notification list for Wai 2660, the Marine and Coastal Area (Takutai Moana) Act Inquiry.

DATED at Whangārei on this 18th day of December 2018



Judge M P Armstrong
Presiding Officer

WAITANGI TRIBUNAL