

IN THE WAITANGI TRIBUNAL

WAI 3300

**Wai 762
Wai 2063
Wai 2377
Wai 2894
Wai 2604
Wai 2382
Wai 1531
Wai 1957
Wai 3131**

IN THE MATTER

of the Treaty of Waitangi Act 1975

AND

IN THE MATTER

of the Tomokia nga tatau o Matangireia
– Constitutional Kaupapa Inquiry (Wai
3300)

MEMORANDUM OF COUNSEL ON INQUIRY DESIGN

Dated: 14 March 2024

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Waitangi Tribunal

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Ministry of Justice
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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. This Memorandum of Counsel is filed by counsel on behalf of the following claimants participating in the Tomokia ngā tatau o Matangireia – Constitutional Kaupapa Inquiry (Wai 3300):
 - a. Te Urunga Aroha Evelyn Kereopa for and on behalf of herself, and members of Te Ihingārangi, a hapū of Maniapoto (Wai 762);
 - b. Bryce Peda-Smith for and on behalf of Nga Hapū o Whangaroa, Te Whānau o Rataroa, Ngāti Pakahi, Ngāti Uru and Te Tahawai hapū (Wai 2377);
 - c. Maria Knight for and on behalf of the late Roger Tichborne and Ngā Hapū o Tokomaru Ākau (Wai 2604);
 - d. Violet Eva Walker for and on behalf of herself, her whānau and Ngāti Rangi o Waiapu ki Tawhiti and Ngāti Kahu ki Whangaroa (Wai 2382);
 - e. Te Enga Harris for and on behalf of herself and the Harris whānau (Wai 1531).
 - f. Ryshell Griggs for and on behalf of herself and her whānau (Wai 3131);
 - g. Jasmine Cotter-Williams for and on behalf of herself and her whānau and Ngāti Taimanawaiti Iwi (Wai 2063)
 - h. Malcolm Kingi for and on behalf of himself, his whānau and Ngai Tahu o Mohaka Waikare (Wai 2894);
 - i. William Reihana for and on behalf of himself, his whānau, and members of Ngāti Tautahi ki Te Iringa (Wai 1957).

(“Claimants”)

2. By way of the Memorandum of Counsel and in accordance with Chief Judge Fox's Memorandum-Directions dated 1 March 2024¹, submissions are provided on inquiry design. Given the potential influence of Tomokia ngā tatau o Matengireia report ("**Pou report**")² on inquiry design, the Memorandum of Counsel is concerned therewith in the first instance. A set of thematic concerns with the Pou report are set out and then a set of particular concerns are discussed.

EXECUTIVE SUMMARY

3. The Pou stated, inter alia, that the wānanga concept should be "applied for the whole of the inquiry", that the wānanga takiwā should determine a constitutional framework and that there should be a 'shifting away' from the hearing of 'nawe' or grievances. It should be noted that the Waitangi Tribunal is bound by statute to inquire into claims. It cannot be convened as a wānanga for the sole purpose of considering relief in circumstances where the relevant claims have not been inquired into. The past conduct of the Crown vis à vis New Zealand's constitutional arrangements should be the subject of inquiry. Tikanga Māori is the foundation of any constitutional framework that results from that inquiry.

BACKGROUND

4. On 17 April 2023, Chief Judge Fox commissioned a panel of pou tikanga and pou ture (the "**Pou**") to produce a report on a tikanga and treaty compliant process for hearing claims by the Waitangi Tribunal.³
5. The Pou were directed to consider what an innovative tikanga and treaty compliant procedure might look like, while also maximising claimant and Crown participation in the Inquiry.⁴ It was made clear that the Pou should not

¹ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox prior to second inquiry planning wānanga*, dated 1 March 2024, Wai 3300, #2.5.11, at [12].

² Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Concerning next steps in the Constitutional Kaupapa Inquiry*, dated 15 December 2023, Wai 3300, #2.3.2, at [6].

³ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Concerning next steps in the Constitutional Kaupapa Inquiry*, dated 17 April 2023, Wai 3300, #2.3.1, at [7].

⁴ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Concerning next steps in the Constitutional Kaupapa Inquiry*, dated 17 April 2023, Wai 3300, #2.3.1, at [7].

be restricted by existing Tribunal process and practice when formulating the proposed hearing procedure.⁵

6. On 15 December 2023, the Waitangi Tribunal released the Pou report.⁶ At the same time, her Honour announced that two inquiry planning wānanga would be held—one at the Waitangi Treaty Grounds on 30 January 2024 and another at Waipatu Marae, Hawkes Bay, on 7 March 2024.⁷
7. It was stated that at the inquiry planning wānanga, the Pou would present their report to the parties, hear the parties' feedback on the report and make any desired changes to the proposed inquiry process through consensus building.⁸ The role of lawyers and that of the Inquiry Panel was limited to that of observers.⁹
8. It was emphasised that the Pou report was not determinative of inquiry design. The Waitangi Tribunal will take, where possible, the respective parties' views into account on the matter.¹⁰ It was noted that the initial part of the inquiry would proceed in three stages:¹¹
 - a. Inquiry planning wānanga;
 - b. Regional wānanga; and
 - c. Next steps to be determined by the outcome of the regional wānanga.

⁵ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Concerning next steps in the Constitutional Kaupapa Inquiry*, dated 17 April 2023, Wai 3300, #2.3.1, at [6].

⁶ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Concerning next steps in the Constitutional Kaupapa Inquiry*, dated 15 December 2023, Wai 3300, #2.3.2, at [6].

⁷ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Concerning next steps in the Constitutional Kaupapa Inquiry*, dated 15 December 2023, Wai 3300, #2.3.2, at [9].

⁸ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Concerning next steps in the Constitutional Kaupapa Inquiry*, dated 15 December 2023, Wai 3300, #2.3.2, at [8].

⁹ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Concerning next steps in the Constitutional Kaupapa Inquiry*, dated 15 December 2023, Wai 3300, #2.3.2, at [13].

¹⁰ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Concerning next steps in the Constitutional Kaupapa Inquiry*, dated 15 December 2023, Wai 3300, #2.3.2, at [12].

¹¹ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Prior to First Inquiry Planning Wānanga*, dated 19 January 2024, Wai 3300, #2.5.5, at [4].

9. On 19 January 2024, prior to the Wānanga Tuatahi, her Honour provided guidance on the wānanga-based inquiry design set out in the Pou report.¹²
10. On 30 January 2024, the Wānanga Tuatahi was held at the Waitangi Treaty Grounds.
11. On 1 March 2024, prior to the Wānanga Tuarua, her Honour invited counsel to file written submissions on inquiry design by no later than **5pm, Thursday 14 March 2024**.¹³
12. On 7 March 2024, the Wānanga Tuarua was held at Waipatu Marae.

POU REPORT ANALYSIS

Thematic concerns

13. The Claimants raise the following thematic concerns with the Pou report and associated commentary.

Tribunal shall inquire

14. An inquiry planning wānanga powerpoint was distributed prior to the inquiry planning wānanga ("**wānanga powerpoint**"). It is apparent from the wānanga powerpoint extract below that the Pou seem intent on utilising the wānanga concept for the purposes of Tribunal relief and not for the purposes of Tribunal inquiry.¹⁴

It is proposed the wānanga takiwā will give parties an opportunity to reach a consensus and find common ground on what a Tiriti/Treaty compliant constitution might look like today.

This means that the focus of the wānanga takiwā will not be on past Crown conduct – although, if no consensus is reached on a way forward, a focus on past Crown conduct may be necessary in the following phase after all wānanga takiwā are complete.

¹² Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Prior to First Inquiry Planning Wānanga*, dated 19 January 2024, Wai 3300, #2.5.5.

¹³ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Prior to First Inquiry Planning Wānanga*, dated 19 January 2024, Wai 3300, #2.5.5, at [11-12].

¹⁴ Waitangi Tribunal, *Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry (Wai 3300) Inquiry planning wānanga, Afternoon session*, Wai 3300, #2.5.11(b), at 9.

The relief referred to concerns the formulation of a ‘Tiriti/Treaty compliant constitution’.

15. At the Wānanga Tuatahi, Professor Meihana Durie (Junior) stated the following:¹⁵

Giving a greater emphasis to the claimants, our iwi, our hapū, our whānau, your kōrero your narratives without having to navigate the space that a lawyer navigates and giving greater, not just cognisance, but I think greater prominence to your kōrero, and **also shifting away from focussing on just the nawe grievance and just the issues using the wānanga as a medium to identify what the solutions might be.**

(emphasis added)

16. In the Preamble to the Treaty of Waitangi Act 1975, it is stated that the Waitangi Tribunal was “established to make recommendations on claims relating to the practical application of the principles of the Treaty ... ”.¹⁶ Section 5(1)(a) of the 1975 Act states the functions of the Tribunal shall be “to inquire into and make recommendations upon, in accordance with this Act, any claim submitted under section 6 ...”.¹⁷ The following is stated in s 6(2) of the 1975 Act:

(2) The Tribunal must inquire into every claim submitted to it under subsection (1), unless—

(a) the claim is submitted contrary to section 6AA(1); or

(b) section 7 applies

17. In light of the Preamble, s 5(1)(a) and s 6(2) of the 1975 Act, a “shifting away” from addressing grievances or claims by the Waitangi Tribunal would be outside of the Tribunal’s jurisdiction. The Waitangi Tribunal was established to inquire into and make recommendations about any claim submitted under section 6. It was not established to convene wānanga for the determination of relief in circumstances where no inquiry has occurred.

¹⁵ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 80, per Professor M Durie (Junior).

¹⁶ Treaty of Waitangi Act 1975, Preamble.

¹⁷ Treaty of Waitangi Act 1975, s 5(1)(a).

18. Furthermore, every claim submitted to the Waitangi Tribunal must be inquired into. This is a task that cannot be forsaken. That having been said, it is plain and apparent that the Waitangi Tribunal is relief or solutions focused but any relief is always provided subsequent to the convening of a mandatory inquiry.
19. The Pou propose “[e]mbracing the wānanga concept for the whole of the inquiry, ...”, and not just say for the purposes of the inquiry planning wānanga and/or the regional wānanga. It is submitted that the process of wānanga may be applicable for the purposes of determining inquiry design by way of the inquiry planning wānanga and/or the regional wānanga. However, applying the “wānanga concept for the whole of the inquiry” would not be in keeping with the abovementioned statutory provisions.
20. During the Wānanga Tuatahi, concerns were raised by Bryce Smith,¹⁸Annette Sykes¹⁹ and Huhana Lyndon²⁰ about whether or not the inquiry would examine past Crown conduct. Chief Judge Fox stated as follows in response to Mr Smith and vicariously in response to Ms Sykes and Ms Lyndon:²¹

He whakaaro anō tā te kaituhi. He rerekē te whakaaro o te Tarapiunara. He also has different views. The Tribunal has a different view from that, ...

Her Honour’s response was that the Tribunal has a different view to that expressed in the New Zealand Herald and thus it was inferred that past Crown conduct would be the subject of inquiry, and perhaps the primary subject of inquiry.

¹⁸ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 41 per A Sykes.

¹⁹ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 51 per H Lyndon.

²⁰ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 85 per B Smith, A Sykes and H Lyndon.

²¹ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 41. A similar affirmation was made by Chief Judge Fox to Ms Lyndon – see Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 85.

21. It seems apparent that her Honour will convene an inquiry into the Crown's past conduct vis à vis its assumption of sovereignty and, admittedly, the Pou are alive to this prospect but that is only if "no consensus is reached on a way forward" at the wānanga takiwā and even then, according to the Pou, "a focus on past Crown conduct *may* be necessary".²² However, given the illegality that would arise should the Tribunal not inquire into the Claimants' claims and given the expressed views of her Honour Chief Judge Fox about Tribunal inquiry, it must be that past Crown conduct will be inquired into even if a consensus is reached at the wānanga takiwā about a constitutional framework.
22. Given the above circumstances, it may be prudent for the wānanga takiwā to be held vis à vis a constitutional framework once the inquiry into past Crown conduct has been held. It is not clear how an appropriate constitutional framework can be properly arrived at without a cultivated understanding of New Zealand's present constitutional arrangements and the development thereof. Whilst it is proposed that post-hearing wānanga takiwā be held for discerning a constitutional framework, it is proposed below that wānanga takiwā be held in the interim for the purpose of inquiry design.

Te tūāpapa o te wharenuī

23. The overarching design of the inquiry is said by the Pou to be based on the concept of the wharenuī.²³ Tikanga and kawa are defined in the Pou report and a shift from a ture-based process to a tikanga-based process was heralded. Although the shift to a tikanga-based process is welcomed, the Claimants go further and maintain that the wharenuī's tūāpapa or foundation should be tikanga Māori. The failure to place tikanga Māori at the tūāpapa of the wharenuī was raised as a concern by counsel at the Wānanga Tuatahi.²⁴ There was no response from the Pou at the time and so we raise the concern again.

²² Waitangi Tribunal, *Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry (Wai 3300) Inquiry planning wānanga, Afternoon session, Wai 3300, #2.5.11(b), at 9.*

²³ Waitangi Tribunal, *Tomokia ngā tatau o Matangireia*, dayed 15 December, Wai 3300, #6.2.2., at 3.

²⁴ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 18 per A Sykes.

Kaupapa reality

24. At the Wānanga Tuatahi,²⁵ counsel asked “how do we get power from an abuser?”²⁶ The concern being that the Pou report’s inquiry objectives do not address the severe power imbalance in Aotearoa. The whareniui kaupapa discussed above is appealing but the notion of shared maihi and transformative constitutional change will not occur since the Crown is unwilling to share power. The values exhibited by the Claimants’ tīpuna when signing Te Tiriti²⁷ have not been reciprocated and so the worth of proceeding in the manner proposed is queried.

Claim outcomes informing the constitutional framework

25. It is further submitted that wānanga takiwā concerning the constitutional framework should be a post-hearing event because of the effect that claim findings by the Tribunal could have.
26. The Claimants claim that the Crown is an illegitimate sovereign because the Crown acquired de facto sovereignty by way of extreme violence and oppressive conduct.²⁸ The evidence and case law in support of the Crown illegitimacy claim is particularised in the Claimants’ statements of claim.²⁹ A Tribunal finding in favour of the Claimants’ claims should have a significant effect on any constitutional framework arrived at. For this kind of reason as well, wānanga takiwā concerning the constitutional framework should be delayed.

²⁵ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 51, per A Sykes.

²⁶ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 54 per A Sykes.

²⁷ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 51, [24] per A Sykes.

²⁸ *Sallah v Attorney-General of Ghana* (Constitution Case No.8 1972); *Jilani v Government of the Punjab* [1972] PLD 139 (SC Pakistan) (unreported); *Bhutto v Chief of Army Staff* [1977] PLD 657 (SC Pakistan); *Vallabhaji v Controller of Taxes* (1981) 7 CLB 1249 (CA Seychelles); *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 (CA Grenada); *Republic of Fiji v Prasad* [2001] 2 LRC 743 (CA Fiji).

²⁹ *Fourth Amended Statement of Claim for Wai 2377* dated 11 August 2023, Wai 3300, *Thirteenth Amended Statement of Claim for Wai 762* dated 14 August 2023, Wai 3300, *Ninth Amended Statement of Claim for Wai 1531* dated 28 September 2023, Wai 3300, *Seventh Amended Statement of Claim for Wai 2382* dated 3 October 2023, Wai 3300, *Second Amended Statement of Claim for Wai 2604* dated 21 December 2023, Wai 3300.

27. It may come as a surprise to some that “the creation of New Zealand as a separate colony actually followed on from its incorporation into the British Empire as a dependency of New South Wales” (“**settlement thesis**”).³⁰ In other words, the Treaty of Waitangi and Hobson’s proclamations of 21 May 1840 are **not** the fount of the Crown’s law-making capacity in Aotearoa. In his legal text *Constitutional and Administrative Law*, Joseph refers to other historians, academics and lawyers who either support or acknowledge the settlement thesis.³¹ Its legality is questioned by the Claimants. Joseph makes it clear that British rule by settlement was “contingent upon the free consent of Maori”.³² No such consent was sought in 1839 let alone provided.
28. Should the Crown revert to the settlement thesis as the fount of its sovereign power because the cession treaty is not available in that regard, and should the Waitangi Tribunal find in favour of the Claimants’ claim that settlement cannot be a basis for Crown rule, any constitutional framework arrived at as a result of the wānanga takiwā should reflect and/or address any mis-placed reliance on the settlement thesis by the Crown. Or, in the event that the settlement thesis remains valid despite the Claimants’ complaint, any constitutional framework devised at the wānanga takiwā should be suitably reflective thereof.
29. The outcome of inquiry by the Tribunal into other claim issues raised by the Claimants could likely affect the constitutional framework that is to be devised. Governor Hobson claimed that “**universal adherence** of the native chiefs to the Treaty of Waitangi” (emphasis added) was achieved and thus he could proclaim Crown sovereignty over the ceded North Island and over the discovered South Island.³³ The truth of the matter is that at the time of Hobson’s 1840 proclamations, ‘universal adherence’ had not been achieved and so the proclamations were invalid. The consequences of a Tribunal

³⁰ Williams, D.V., *The Annexation of New Zealand to the New South Wales in 1840: What of the Treaty of Waitangi?*, Australian Journal of Law and Society, Vol 2, No. 2, 1985, at 41.

³¹ Joseph, Philip A., *Constitutional and Administrative Law*, 4th ed. At 60.

³² Joseph, *Constitutional and Administrative Law*, 4th ed., page 48. Doctor McHugh also noted the need for Maori consent—see *Brief of Evidence of Dr P G McHugh*, Wai 1040, #A21, paragraph 155.

³³ Hobson to Russell, 25 May 1840, CO 209/6: 146 at 150, cited in the *Brief of Evidence of Paul McHugh*, Wai 1040, #A21, paragraph 128.

finding that is adverse to ‘universal adherence’ would have far reaching consequences for any constitutional framework.

Particular concerns

30. In the preceding section, various overarching and thematic concerns with the Pou report were set out. We now turn to discuss a number of particular concerns with what is being proposed.

Consensus outcomes

31. The following is stated in the Pou report:³⁴

Rather, wānanga embody tikanga-centred processes that imbue within all participants a commitment to a *transformative process*, thus taking participants through the associated phases of *Te Kore ki Te Pō ki Te Whaiāo ki Te Ao Mārama*. Frameworks that deliberately draw upon tikanga, kaupapa, and wānanga in essence acknowledge potentiality and the processes needed to arrive at a point where māramatanga, or enlightenment, is sufficient for a transformative outcome to have emerged.

32. Whilst the concept of consensus-based agreement is laudable, it is difficult for the Claimants to see the Crown agreeing, by way of a consensus, to the Claimants’ illegitimacy claim or to the claim that Hobson’s 1840 proclamations were not valid. It is understood that Crown agreement in these respects, and numerous others, would be required before the parties can move to a consensus-derived constitutional framework. Given the nature and tenor of both oral and written submissions made to date by Crown counsel on constitutional matters in various Waitangi Tribunal inquiries, including inquiries held in the Urewera, Te Rohe Pōtae, Northland and Taihape, the prospect of any consensus arising from the wānanga takiwā are, with respect, dim to nil.
33. Furthermore, the term “consensus” is not defined in the Pou report. To some it can mean “general agreement” and yet for others a consensus means

³⁴ Waitangi Tribunal, *Tomokia ngā tatau o Matangareia*, dated 15 December 2023, Wai 3300, #6.2.2., at 5.

100% agreement.³⁵ The failure to define “consensus” is symptomatic of a dearth of procedural detail in the Pou report. It is acknowledged that the document is posited at a higher, conceptual level, and so detail of this nature was omitted for that reason. But that leaves the Claimants with a dilemma nevertheless because the Pou report is such an influential document on how this most important of inquiries is to be run and yet key information has not been provided.

One lawyer

34. It was proposed by the pou tikanga at the Wānanga Tuatahi that all claimants be represented by one lawyer because that would be “the quickest way to do it”.³⁶ The Claimants are strongly opposed to being represented by anyone other than their chosen counsel. The suggestion in this regard gives them great cause for concern. Some of the Claimants spoke against the prospect of other legal representation at the Wānanga Tuarua.³⁷
35. In any event, in light of the 187 claims³⁸ that have been filed to date relating to constitutional issues (and growing), it would be logistically impossible for a single lawyer to adequately represent all claimants in this inquiry, especially if the Tribunal should go to hearing. In fact, the demands on a single lawyer would be so great that any such undertaking would likely amount to professional negligence. At the risk of belabouring a point, that lawyer would need to meet regularly with all of the claimant groups to take instructions, prepare and/or peruse all of the various claimant groups’ documentation at all stages throughout the proceeding, find the time to prepare for and contend constructively in favour of each of the claimants groups’ *take* where they may differ from one another, and ensure that any such contentions made are always consistent with all claimant groups’ claim interests.

³⁵ See definition of “consensus” contained in the Oxford University Press, *Oxford English Dictionary*, Copyright 2023, accessed at <https://www.oed.com/dictionary/consensus_n?tab=factsheet#8579942>.

³⁶ Waitangi Tribunal, *Transcript of Wānanga Tuatahi held at the Waitangi Treaty Grounds, Waitangi*, Tuesday 30 January 2024, Wai 3300, #4.1.1, at 63-64, per Associate Professor Linda Te Aho.

³⁷ Maria Knight (Wai 2604), *Constitutional Wānanga Tuarua*, 6 March 2024, Waipatu Marae

³⁸ Waitangi Tribunal, *Inquiry planning wānanga powerpoint*, dated 1 March 2024, Wai 3300, #2.5.11(c), at 3.

36. If one lawyer is appointed nevertheless, it would be useful for any such lawyer to have practiced at the treaty bar for an appreciable number of years. As such, locating a senior treaty lawyer who would not be conflicted by such an undertaking as that which has been proposed would also be impossible. For this reason too, a single lawyer cannot represent all of the claimants. It is for this reason in particular that earlier proposals for the appointment of general counsel in various, earlier Tribunal inquiries have been rejected.

A quality Tribunal report entails evidence testing

37. The Claimants are concerned for the value of the Waitangi Tribunal's report if the testing of evidence is hampered or prevented altogether by the wānanga-based hearing approach being proposed. As we know, a failure to test the veracity of evidence would open the Tribunal up to criticism about the reliability of its findings.
38. As discussed, the Pou propose "[e]mbracing the wānanga concept for the whole of the inquiry, ...",³⁹ and not just say for the purposes of the inquiry planning wānanga and/or the regional wānanga. Given the nature and content of the proposed wānanga concept as it is described in part in paragraph 29 above, it is difficult to see how parties can cross-examine witnesses without transgressing the wānanga concept that has been laid down. We have alluded already to how contentious the Claimants' claims will be to the Crown. There is a high likelihood that the testing of evidence vis à vis the Claimants' claims will not be conducive to consensus-based outcomes.
39. On the other hand, it may be imposed that any cross-examination to be carried out is to be conducted in accordance with the wānanga concept that has been proposed. Evidence can only be tested if it results in consensus-based outcomes. Given the contentious nature of the Claimants' claims, the testing of evidence that is anathema to the Claimants' claim interests will not be conducive to consensus-based outcomes. And likewise, the Crown's

³⁹ Waitangi Tribunal, *Tomokia ngā tatau o Matangareia*, dated 15 December 2023, Wai 3300, #6.2.2., at 6.

cross-examination of the Claimants' witnesses is unlikely to result in agreement.

40. In any event and although the testing of evidence was proposed for discussion in the wānanga powerpoint,⁴⁰ we are in the dark with how it is proposed that evidence be tested.

Extant regional specific issues

41. It is inferred in the Pou report that a thematic approach to the inquiry counts against regional specific issues:⁴¹

The shift to a Constitutional Kaupapa Inquiry which by nature is thematic, inquires upon issues that affect tangata whenua and that are not necessarily specific to any one district.

It is accepted that the claimant community will share many claim issues but it is also envisaged that some claimant community members will promulgate claim issues that are regionally specific.

42. As discussed, there are numerous non-signatory hapū. They present distinct constitutional issues that have seldom been examined. The Crown proclaimed sovereignty over Waitaha and Kāti Mamoe hapū of Te Waipounamu on the basis of discovery. The clear inference being that, according to the Crown, Te Waipounamu was terra nullius. It is submitted that the Kīngitanga is in a distinct constitutional space because, arguably, the Kīngitanga was and always has been about Māori nationalism. Its nationalism roots, the war in the 1860s, the aukati that resulted and the continued existence of the Kīngitanga count against acquiescence to Crown rule. Some hapū representatives signed the English text of the Treaty of Waitangi at Kāwhia. There must be constitutional consequences as a result.

⁴⁰ Waitangi Tribunal, *Inquiry planning wānanga powerpoint*, dated 1 March 2024, Wai 3300, #2.5.11(c), at 14.

⁴¹ Waitangi Tribunal, *Tomokia ngā tatau o Matangareia*, dated 15 December 2023, Wai 3300, #6.2.2., at 3.

43. We have discerned some regionally specific constitutional law-related claims issues in the preceding paragraph. There are likely to be more.

Comparatively informal Tribunal

44. The following was stated in the Pou report:⁴²

The judicial system, on the other hand, seeks to emphasise legal processes where contention, doubt, or a lack of sufficient evidence in legal terms can influence final outcomes. Legalistic and adversarial approaches, over time and on occasion, have tended to diminish the weighting and importance of whānau, hapū, and iwi oral traditions and narratives.

45. Although the Waitangi Tribunal is not specifically referred to, it seems reasonable to assume that the statement concerns the Waitangi Tribunal as well. It is claimed that the Waitangi Tribunal diminishes the importance of oral traditions and thus, the wānanga proposal is warranted. We note that no information is cited in support of the position taken as it relates to the Waitangi Tribunal.
46. In counsel's experience, the Waitangi Tribunal goes to great lengths to preserve the oral traditions. The utmost respect is paid to all kaikōrero. One measure of the respect shown can be drawn from the presentation of opening and closing submissions by counsel, which are regularly curtailed so that the maximum amount of hearing time is available for the presentation of evidence by tangata whenua witnesses.
47. Ngā Kōrero Tuku Iho is now a standard feature of the Tribunal inquiry. Devised by Judge Ambler during the Te Rohe Pōtae inquiry, evidence and other information is provided by speakers in a very relaxed marae setting prior to the onset of hearings. Speaking notes may be relied on but not always, speakers are simply asked to speak to their claim issues and there is no cross-examination. However, there may be questions from Tribunal

⁴² Waitangi Tribunal, *Tomokia ngā tatau o Matangareia*, dated 15 December 2023, Wai 3300, #6.2.2., at 5.

panel members. An audio record is transcribed and added to the record of inquiry.

48. As we know, Waitangi Tribunal hearings are usually held in the familiar setting of the marae. The marae setting encourages participation by tangata whenua. It is designed to relax the witness and elicit evidence.

WĀNANGA TAKIWĀ DESIGN

49. The proposal for the next stage of the Inquiry is a series of regional wānanga to be held across the motū. At the wānanga takiwā, parties will be given the opportunity to:⁴³

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.

The Claimants support wānanga takiwā for the purposes set out above.

50. A regional approach would serve a very practical function for the claimants. It would ameliorate the burden on them to have to undertake extensive travel to attend the wānanga. A regional approach would also ensure that region-specific themes for the Inquiry can be more readily delineated by the Tribunal.

Scope of wānanga takiwā

51. In Memorandum-Directions dated 19 January 2024, her Honour outlined the scope of the regional wānanga to include, inter alia, the values of constitutionality, the themes of the inquiry and how they are framed, which claims fall under which themes, possible solutions, and how these claim issues should be investigated.⁴⁴ As discussed, comments made by the Pou at the Wānanga Tuatahi varied in important respects from the

⁴³ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Prior to First Inquiry Planning Wānanga*, dated 19 January 2024, Wai 3300, #2.5.5, at [11].

⁴⁴ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Prior to First Inquiry Planning Wānanga*, dated 19 January 2024, Wai 3300, #2.5.5, at [11].

above-mentioned scope and they have been addressed accordingly. The Claimants are agreeable with the proposed scope of the wānanga takiwā.

52. The following topics were flagged as additional topics for discussion by the Claimants at the regional wānanga:⁴⁵
- (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 nature of the Tribunal's responsibility to listen, to see, at to hear evidence;
 - (e) How the Tribunal conveys what it has heard and seen and how the Tribunal's report will be published.
53. It is appropriate for the Claimants to consider and discuss the above-mentioned topics. However, they concern the more technical elements of Tribunal practice and procedure. We note that very little to no specific feedback was provided by the Claimants in these respects at the inquiry planning wānanga.

Protocol for wānanga takiwā

Kaupapa for the wānanga takiwā

54. In the Pou report it was proposed that “[t]he home people will set the kaupapa of the wānanga from the outset by inviting selected speakers from the marae to open the kōrero.” A concern arises with this proposal. The Claimants would prefer that there be agreement amongst all claimants with regard to the wānanga kaupapa and prior to convening the wānanga. Pre-ordained kaupapa would ensure that the claimants, Tribunal, hau kāinga, and wānanga moderator (if any) are clear about the scope of the wānanga. It will also assist with focusing the kōrero of participants at the wānanga.

⁴⁵ Waitangi Tribunal, *Inquiry planning wānanga powerpoint*, dated 1 March 2024, Wai 3300, #2.5.11(b), at 14.

55. As a general observation, discussion at the Wananga Tuatahi and Tuarua ranged across numerous topics. Focus on the wānanga issues was diluted at times and so, it appeared, there were few substantive outcomes.

Moderators

56. The current wānanga takiwā design means there will be heavy reliance on the hau kāinga for guidance. The Tribunal may wish to consider appointing a moderator to assist the hau kāinga with facilitating the wānanga. It is important to keep kaikōrero on task so that the specific feedback that is sought is gathered.

Terms of Engagement

57. The Pou report explains that terms of engagement will be made clear during the opening korero of each wānanga.⁴⁶ It would be preferred that the terms of engagement are set by the hau kāinga prior to the wānanga takiwā to reduce the risk of any breach. It would help if the hau kainga reiterated the terms of engagement when the wānanga takiwā begins.

Speaker selection process

58. It is submitted that the hau kāinga should select speakers for the wānanga but there should also be liaising with the Tribunal and claimant counsel regarding other selected speakers.
59. Furthermore, it is important that all claimants have the opportunity to participate and present their kōrero.

Wānanga takiwā locations

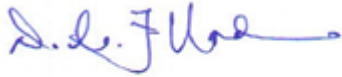
60. On 19 January 2024, her Honour advised that parties could assist the Tribunal in determining how many regional wānanga would be held and on which marae they would be held.⁴⁷ A possible approach would be to hold

⁴⁶ Waitangi Tribunal, *Tomokia nga tatou o Matangireia* dated 15 December 2023, #6.2.2 at 6.

⁴⁷ Waitangi Tribunal, *Memorandum-Directions of Chief Judge Dr C L Fox Prior to First Inquiry Planning Wānanga*, dated 19 January 2024, Wai 3300, #2.5.5, at [25].

wānanga takiwā in the regions often used by the Waitangi Tribunal for Kaupapa Inquiry hearings to date.

DATED this **14th** day of **March 2024**



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