TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

Wai 3327

E PĀ ANA KI
CONCERNING

Te Treaty of Waitangi Act 1975

Ā,
AND

Te Reo i te Kāwanatanga Ruku Tātari Ohotata
Te Reo in the Public Sector Urgent Inquiry

HE PĀNUI WHAKAHAU O TE KAIWHAKAWĀ WILLIAMS
MEMORANDUM-DIRECTIONS OF JUDGE WILLIAMS

7 Haratua 2024

Purpose

1. We have had an influx of memoranda filed recently by claimant counsel and the Crown. This memorandum-directions addresses the following matters:

    (a) Submissions received on the Statement of Issues (SOI);

    (b) The Tribunal's position on discovery matters to date;

    (c) A memorandum from co-ordinating counsel seeking amendments to the inquiry timetable; and

    (d) The Crown's memorandum received on 7 May 2024.

2. An updated inquiry timetable is attached at **Appendix A,** as a result of the requests sought and these directions.

Statement of Issues

3. Following the 5 April 2024 judicial conference, on 18 April 2024, I directed parties to confer and file a draft joint Statement of Issues (SOI) by 19 April 2024. This draft SOI was to be informed by discovery, that was scheduled for completion by 15 April 2024. The Crown was also directed to confirm the lead agency for this inquiry, and any information on claimant funding guidelines to assist inquiry participants by the same date (Wai 3327, #2.5.6 & #2.5.6(a)).

4. On 18 April 2024, the Crown contacted the Registrar about a memorandum dated 15 April 2024. As this Crown memorandum, filed on 4 April 2024, had also been filed to an incorrect distribution list it had not been processed by the Tribunal prior to my memorandum-directions of 18 April (Wai 3327, #2.5.6).

5. In any event, the Crown indicated that, due to the volume of documents requiring review, there had been delays in disclosure (Wai 3327, #3.1.14). Counsel accordingly sought an extension to file an agreed statement of issues by 24 April 2024.

6. This extension was granted in my memorandum-directions of 19 April 2024 (Wai 3327, #2.5.7).

Submissions from co-ordinating counsel

7. On 26 April 2024, a memorandum was filed by co-ordinating counsel for this inquiry (Wai 3327, #3.1.16), in which counsel note there are still outstanding issues in relation to disclosure. Counsel advised that parties require further time to reach an agreement on this matter. Counsel indicate that directions will be sought if agreement cannot be reached in a timely manner.

8. Counsel also submit that given the delays in discovery that the Statement of Issues need to be drafted in the broadest possible terms and as such they seek leave to file submissions on further amendments to the Statement of Issues, should these be required after the issue regarding discovery is resolved.

9. In terms of the Statement of Issues, Counsel note there are two outstanding points of disagreement, which they refer to in their memorandum.

Crown submissions

10. On 30 April 2024, the Crown filed a memorandum providing their response to the draft Statement of Issues, and an update on discovery matters (Wai 3327, #3.1.17).

Joint memorandum of counsel

11. On 2 May 2024, Kahui Legal filed a joint memorandum of counsel (Wai 3327, #3.1.18). in response to the Crown's submissions and provide an updated draft Statement of Issues.

Decision

12. This direction sets out the Tribunal's position on the Statement of Issues and Discovery.

13. Rather than engage in further debate and delay I have directed what shall be comprised as the final Statement of Issues (TSOI). I now direct the Registrar to add it to the record of inquiry as document Wai 3327, #1.4.3.

14. As I indicated at the judicial conference, the Statement of Issues is not binding on parties. The development of a Statement of Issues is to allow the parties to collaborate and identify, based on the pleadings, areas of agreement and disagreement between claimants and the Crown with view to focussing the inquiry and guiding the evidence to be led.

15. Where there is no agreement then we must return to the pleadings. I note that this was the approach adopted by the Court of Appeal in *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council*[1]*.* Whilst we do not propose to list all the relevant pleadings, we have used them as a guide to our decision in determining a final Statement of Issues.

16. However, in summary I point out the following. Regarding the Crowns proposal to delete 'current' and insert 'from 23 November 2023' in issue 3, I see no need to do that. I agree that the words 'if any' should be added to make the issue more neutral. Therefore issue 3 reads;

> *3. What are the current policies, practices, acts and omissions of the Crown (if any) to limit the status and use of te reo Māori and its customs in the public sector?*

17. The Crown's proposal to remove reference to breaches of legislation from paragraph [4] is declined. It is an appropriate exercise of the Tribunal's jurisdiction to provide views on whether the Crown has acted in accordance with its own legislation or not. Section 6 of the Treaty of Waitangi Act 1975 refers to claims being made on the basis that Māori are or are likely to be prejudicially affected. Claims within this inquiry plead that the Crown are in breach of specific legislation and its obligations therein. As such reference to breaches of legislation being a breach of Te Tiriti and its principles are appropriate and are likely to be an issue.

18. It is for the claimants to lead evidence that they are or will be prejudicially affected by the Crown acting or failing to act in accordance with its legislative obligations and that those actions or inactions are, was or will be inconsistent with Te Tiriti and its principles. I do not propose to restrain claimants from doing that. I also consider it to be consistent with the intended focus of the inquiry. Whether we determine that those breaches are a breach of Te Tiriti is a matter for the Tribunal.

19. I have therefore re-worded issue 4 provided by claimant counsel to say:

> *4. Are the Crown's current policies, practices, acts and omissions consistent with its legislative and Te Tiriti/Treaty obligations in relation to the status and use of te reo and its customs in the public sector?*

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1 *Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2024] NZCA 134**,** CA69/2023, para 13

20. Issue 5 will read;

> *5. In light of the above, has the Crown breached its Te Tiriti/ Treaty obligations in relation to the status and use of te reo and its customs in the public sector?*

Discovery

21. On 25 March 2024, claimant counsel sought 10 categories of discovery from the Crown (Wai 3327, #3.1.5(a)). The Crown noted they provided that request to the relevant Crown departments the following day, and outlined its discovery process (Wai 3327, #3.1.17) at [10] – [13]).
22. The Crown has provided five tranches of documents as follows:
    a. 15 April 2024: Tranche one – 51 documents
    b. 16 April 2024: Tranche two – 36 documents
    c. 17 April 2024: Tranche three – 81 documents
    d. 24 April 2024: Tranche four – 64 documents
    e. 29 April 2024: Tranche five – 17 documents
    f. 6 May 2024: Tranche six – 5 confidential documents
23. Crown counsel have indicated that tranches three and four both contain documents over which confidentiality is asserted. Counsel submits that the unredacted version of these tranches were provided to claimant counsel in full, save for redactions due to assertions based on irrelevance and privilege. The Tribunal also received the unredacted versions of tranche 3 and 4 on 7 May 2024.
24. Crown counsel proposed disclosure of the confidential documents on the following conditions (Wai 3327, #3.1.17 at [15]):
    a. documents should remain confidential between the Crown, the Tribunal panel and claimant counsel. Pending further order of the Tribunal, the parties will not copy or distribute the documents or any information contained within them to any person without the permissions of Crown counsel, including claimants;
    b. documents should not form part of or be filed to the public record of inquiry. The Crown reserves the ability to seek confidentiality orders under Appendix F of the Tribunal's Guide to Practice and Procedure if required;
    c. disclosure does not constitute waiver of any form of confidentiality over the information against any other person.
25. The Crown explain that the purpose of its procedure was to ensure that any applications for confidentiality could be assessed by all parties as quickly as possible, with applications for confidentiality to be made by consensus where possible, and resolved efficiently where they could not be agreed. The Crown indicate it presently seeks directions that those documents not form part of the record of the inquiry pending resolution of the Crown's confidentiality claims.
26. The Crown also refer to a letter sent to claimant counsel on 24 April 2024, attached as Appendix 1 of their memorandum (Wai 3327, #3.1.17(a)). The letter sets out that the production of draft Cabinet papers or material that has not yet been considered by Cabinet. The Crown submit that this raises significant issues of Cabinet confidentiality as well as issues of utility and relevance, given the iterative nature of the development of this material.

27. The Crown otherwise apply redactions only for irrelevance and privilege. Ten documents were not disclosed as counsel assessed them as being fully privileged.

Tribunal position

28. I agree with Crown counsels disclosure proposal outlined in paragraph 24. If counsel cannot reach agreement as to whether the confidentiality sought for all or some of the documents is appropriate then the Crown or claimant counsel should apply for directions from the Tribunal.
29. As this is time sensitive, I suggest that parties take a practical approach to resolving the issue.

Inquiry timetable request

30. On 3 May 2024, Co-ordinating counsel filed a memorandum seeking an extension of time for the parties to file their evidence due to the delays in discovery and to file written submissions after the close of the hearing week (Wai 3327, #3.1.19).
31. The extension of one working day to file evidence is granted as per co-ordinating counsels memorandum.
32. In terms of the variation sought to my directions regarding the filing of written closing submissions, I grant the request to file written closing submissions one week after the close of the hearing on the following basis;
    a. That counsel will file a synopsis of their oral closing submission on the day that they are to present their oral closings. This is so that the Tribunal panel members can understand where counsel propose to take them in their oral closings;
    b. That there will be no separate filing date for reply submissions. They are to be incorporated within the written closing submissions filed by counsel.
33. Attached to this direction is the updated inquiry timetable.

Memorandum for the Crown filed 7 May 2024

34. On 7 May 2024, Crown counsel filed a memorandum indicating witnesses it wishes to call and addressing procedural issues around the summons, applications for confidentiality orders, and timetabling (Wai 3327, #3.1.20).
35. I note the witness indications provided by the Crown. I am concerned at the proposed delay in identifying the appropriate witness to give evidence on behalf of Te Taura Whiri. The Crown are to liaise with claimant counsel about who their witness from Te Taura Whiri shall be and whether the summons is still required. If a satisfactory position cannot be reached, claimant counsel may file a memorandum with the Tribunal seeking to progress its summons application **by 5pm, Monday 13 May 2023**.
36. Crown counsel shall have the opportunity to file its position and any submissions on the issue within two days of claimant counsels memorandum being filed. We will then make a decision on the papers unless counsel want to specifically be heard on the matter.

Me tuku atu te Kairēhita i tētehi kape o tēnei whakahau ki ērā ki te rārangi whakamōhio mō Wai 3327,Te Reo i te Kāwanatanga Ruku Tatari Ohotata.

The Registrar is to send a copy of this direction to all those on the distribution list for Wai 3327, the Te Reo in the Public Sector Urgent Inquiry.

WHAKAPŪMAUTIA ki Whangārei i te 7 o Haratua i te tau 2024.

Kaiwhakawā Williams
Tumuaki Pakirehua
TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI