

**TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI**

Wai 3300

**CONCERNING**

the Treaty of Waitangi Act 1975

**AND**

Tomokia ngā tatau o Matangireia  
– the Constitutional Kaupapa  
Inquiry

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**MEMORANDUM-DIRECTIONS OF CHIEF JUDGE DR C L FOX FOLLOWING  
INQUIRY DESIGN JUDICIAL CONFERENCE**

11 Hōngongoi 2024

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## **Purpose**

1. This memorandum-directions for Tomokia ngā tatau o Matangireia, the Constitutional Kaupapa inquiry (Wai 3300) addresses submissions received prior to, and matters raised during, the 26 April 2024 judicial conference.

## **Background**

2. Tomokia ngā tatau o Matangireia, the Constitutional Kaupapa inquiry (Wai 3300) commenced on 22 December 2022 (Wai 3300, #2.5.1). In directions commencing this inquiry, then Chairperson and then Chief Judge Wilson Isaac left questions of scope, claim eligibility and inquiry design for the Wai 3300 Tribunal panel to determine (Wai 3300, #2.3.1 at [2]).
3. To assist in determining the shape of the Wai 3300 inquiry, Tribunal staff undertook a review of existing claims, Tribunal commissioned research, and all previous Waitangi Tribunal findings relevant to issues before this inquiry (Wai 3300, #2.3.1 at [3]).
4. In addition, the Tribunal commissioned Pou Tikanga and Pou Ture Pākehā to engage as experts with the panel and parties to develop a document (or report) on tikanga and ture pākehā as to the procedure for the inquiry. This report was released on 15 December 2023 (Wai 3300, #6.2.2 & #2.3.2). The pou report was intended to act as a guideline for designing the Tribunal's inquiry process with claimants and the Crown (Wai 3300, #2.3.1 at [5]).
5. The pou report was discussed in two inquiry planning wānanga held in January and March 2024. The inquiry planning wānanga aimed to provide an opportunity for the claimants and the Crown to agree on inquiry design (Wai 3300, #2.3.1 at [8] & #2.5.5. at [6] – [9]).
6. On 1 March 2024, and following the two inquiry planning wānanga, I invited counsel to file written submissions on proposed inquiry design no later than 14 March 2024 (Wai 3300, #2.5.11 at [11] – [12]).
7. On 10 April 2024, I confirmed a judicial conference regarding inquiry design would be held at the Waitangi Tribunal Offices on 26 April 2024 (Wai 3300, #2.5.17).
8. Following the planning wānanga, the Tribunal received submissions on the design of the Wai 3300 inquiry prior to and during the judicial conference of 26 April 2024. On 18 April 2024, I invited parties to file any remaining submissions on inquiry design by no later than 23 April 2024 (Wai 3300, #2.5.24). These submissions, as well as those received pursuant to my directions at [4] above, were discussed at the judicial conference.

## **Submissions on inquiry design**

9. The Tribunal received five written submissions in response to my 1 March 2024 directions from the following parties:
  - (a) Geoffrey Melvin on behalf of the Crown (Wai 3300, #3.1.33).
  - (b) Ārama Ngāpō (NL Lawyers) on behalf of the Constitutional (Ruka) (Wai 3314) claim, the Constitutional (Wiri) (Wai 3330) claim, the Constitutional (Tana) (Wai 3328) claim, and the Constitutional (Messiter) (Wai 3331) claim (#3.1.30).
  - (c) Dr Season-Mary Downs (Tukau Law) on behalf of the Ngāti Hine Lands, Forests and Resources (Wai 682) claim, the Te Kapotai and Ngāti Pare Hapū (Wai 1464) claim, and the Waikare Inlet (Wai 1546) claim (#3.1.31).

(d) Darrel Naden (Tamaki Legal) on behalf of the Waimiha River Eel Fisheries (King Country) (Wai 762) claim, the Ngāti Pahaki (Aldrbridge) (Wai 2377) claim, the Marine and Coastal Area (Takutai Moana) Act (Margaret Ryland-Daigle and Roger Tichborne) (Wai 2604) claim, the Tahawai (Aldrbridge) (Wai 2382) claim, the Land Alienation and Wards of the State (Harris) (Wai 1531) claim, the Justice System (Griggs) (Wai 3131) claim, the Ngāi Tai Lands (Cotter-Williams) (Wai 2063) claim, the Disability and Rehabilitation Support Services (Kingi) (Wai 2894) claim, and the Maunga Kawakawa (Wai 1957) claim (#3.1.32).

(e) Janet Mason (Phoenix Law) on behalf of the Constitutional (Ruka) (Wai 3316) claim (#3.1.34).

10. The Tribunal received submissions in response to my 18 April 2024 directions from the following parties:

(a) Bryce Lyall and Hannah Swedlund on behalf of the Puketotara Block (Wai 421) claim, the Taraire 1E2 (Wai 593) claim, the Inland Kerikeri (Wai 869) claim, the Kauwhata, Rangi and Wharetotara (Wai 1383) claim, the Te Whiu and Kin Hapu (Wai 1890) claim, the Te Atatu Lands (Auckland) (Wai 914) claim, the Rongopopoia Hapu (Wai 1787) claim, the Upokorehe (Wai 1092) claim, and the Te Upokorehe Settlement (Wai 3272) claim (Wai 3300, #3.1.50).

(b) Neuton Lambert and Jack Alexander on behalf of the Ngāti Kahu Lands and Resources (Mutu) (Wai 2214) claim (Wai 3300, #3.1.44).

### **Discussions at the judicial conference**

11. The transcript for the 26 April 2024 judicial conference is on the Wai 3300 Record of Inquiry as document Wai 3300, #4.1.5. The agenda for the judicial conference was released on 24 April 2024 (Wai 3300, #2.5.26).

12. The following subsections summarise key matters raised at the judicial conference.

#### *Wānanga takiwā*

13. At the beginning of the judicial conference, Chelsea Terei-Tipene advised she was nominated to put forward a joint position on inquiry design on behalf of claimant counsel. On that basis, Mrs Terei-Tipene submitted that:

(a) Claimant counsel broadly support the themes outlined at [10] of the agenda, on the basis that they could be amended or added to as the inquiry progresses.

(b) There was 'openness' amongst claimant counsel for a claimant-led tikanga-based approach to the inquiry.

(c) Claimant counsel seek further clarification on the overall purpose and envisioned outcomes of the wānanga takiwā phase, and whether the inquiry would ultimately head towards a more 'traditional inquiry' process.

(d) The claimants' key concern is for their claims to be fully heard, and for the Tribunal to report on their specific claim issues. Claimant counsel seek to ensure that evidence would eventually be put before the Tribunal and tested. There is general agreement among counsel in relation to the wānanga takiwā approach, but that there may be some amount of adversarial interaction so that the Tribunal may inquire into the claims and make findings and recommendations in its final report.

(e) Claimant counsel seek clarification on the role of the Crown and the extent of its engagement in the wānanga takiwā process.

14. Ms Terei-Tipene understood the wānanga takiwā process as providing parties an opportunity to kōrero in relation to the scope of the claim issues and themes for this inquiry. Counsel suggested this would be followed by discussion on next steps and the design of the inquiry after the wānanga takiwā phase. Roimata Smail, similarly, understood the wānanga takiwā process as a first step in the inquiry, and that claimants will be provided an opportunity to advance evidence and legal arguments following the wānanga takiwā.

#### *Role of the Crown*

15. Geoffrey Melvin presented the Crown's position following Ms Terei-Tipene's submissions. I asked Crown counsel to clarify the extent of the Crown's ability to engage and agree to matters arising at the wānanga, particularly where the Crown is provided notice of matters for discussion. Mr Melvin advised that Crown officials would not be able to commit the Crown to particular constitutional decisions, however they may provide the Crown's perspective on certain issues if provided notice. Crown officials intend to attend the wānanga and present the Crown's perspective on the issues raised by the claimants and those which the Tribunal wishes to hear about.

16. Mr Lambert submitted that the Crown, being a party to the inquiry process, should have more than a passive role in the wānanga takiwā. I agreed, noting that the Crown must participate in the wānanga takiwā if the aim of the wānanga is to reach consensus.

17. Kelly Dixon from Dixon & Co sought clarity as to the level of participation of local government bodies in the wānanga takiwā. Counsel advised that their clients raise issues addressed by local bodies such as the Whangārei District Council and Far North District Council.

#### *Thematic approach*

18. Claimant counsel broadly supported the list of themes identified by the pou tikanga and developed during the inquiry planning wānanga, on the condition that they may be amended as the inquiry progresses and the issues are further scoped. Counsel questioned whether the wānanga takiwā would address the themes in their entirety, or whether each wānanga takiwā would address a specific theme or themes.

19. Crown counsel also indicated that the Crown would be able to participate in the wānanga takiwā based on the broad proposed inquiry themes. However, Crown counsel noted that this was subject to how the wānanga takiwā would proceed, including whether evidence will be presented at the wānanga takiwā.

20. On whether wānanga should be organised by theme or by region, Darrell Naden from Tamaki Legal indicated that he does not support thematic wānanga, as these might require some claimants to travel to a region in which they do not live to address a specific theme.

#### *Statements of position*

21. To facilitate productive kōrero at the wānanga takiwā, I suggested parties may prepare and file statements of position on the proposed inquiry themes before their commencement.

22. This suggestion was supported by several claimant counsel. Tara Hauraki submitted that statements of position would assist in focusing the claimants' responses for the wānanga, as well as enable the Crown to provide a targeted response to the claimants' positions.

Emma Whiley submitted that the statements of position should be filed following the filing of statements of claim and should be added to the record of inquiry.

23. Mr Melvin indicated the Crown could also prepare a high-level statement of position with respect to the proposed inquiry themes. Ms Whiley submitted that the Crown should respond to the claimants' statements of position prior to the wānanga, in order to ascertain the differences and similarities between the parties.

#### *Evidential and jurisdictional issues*

24. Tribunal member Dr Grant Phillipson clarified that the proposed wānanga takiwā will not be a ngā kōrero tuku iho hearing process where claimants provide oral evidence.
25. In my discussions with Crown counsel about the statements of position, I indicated that the statements of position would not be in the form of briefs of evidence, as evidence should be considered within a more formal and adjudicative Tribunal process.
26. Mr Naden noted that Tamaki Legal's clients wish to emphasise their preference for the kōrero at the wānanga takiwā to remain informal, as opposed to kōrero in the early oral evidence hearings for the Military Veterans Kaupapa Inquiry (Wai 2500) in which 'formal statements' were made.
27. Speaking to his written submissions on the jurisdiction of the Tribunal, Mr Naden expressed concern that the proposed wānanga format may not suffice, and that the wānanga takiwā should be held following an inquiry and report. Counsel submitted that the wānanga could inform the relief being sought by the claimants.

#### *Role of lawyers in wānanga takiwā*

28. Ihipera Peters from Kaupare Law submitted that their clients seek to have lawyers to support and enable the claimants to have a direct dialogue with the Crown at the wānanga takiwā. Ms Peters noted that counsel would adhere to the tikanga laid down by the claimants, as well as the tikanga of the haukāinga hosting the wānanga.
29. Ms Sykes submitted that the process will inevitably be adversarial in light of the power dynamics at play, and that lawyers have a role in navigating through these differences.
30. Tā Taihākurei Durie submitted that participants should be heard at the wānanga with or without representation from counsel. He suggested that the process should enable people to be heard while ensuring that they are well represented. Tā Durie proposed a supporting role for lawyers, whereby the Tribunal would 'hear from the people' in the wānanga, and counsel could seek leave from the panel should they wish to be heard on a particular matter. Tā Durie also noted the need for structure to avoid a situation where certain individuals or groups dominate a hui and dictate its outcomes.
31. Mr Naden submitted that lawyer participation at the wānanga takiwā could remain observational.

#### *Logistics and facilitation of wānanga takiwā*

32. Ms Sykes suggested that the wānanga takiwā should have break-out rooms to allow parties to have considered discussions on matters arising at the wānanga.
33. Mr Naden submitted that, in line with what was proposed by the Pou Tikanga, the wānanga moderators and speakers should be selected by the haukāinga hosting the wānanga. He

also noted the suggestion by the Pou that the haukāinga set the kaupapa for the wānanga (Wai 3300, #6.2.2 at p 6).

34. Georgina Whata from NL Lawyers submitted their clients from Ngāti Maniapoto seek for a wānanga takiwā to be held in their rohe so that Ngāti Maniapoto rangatahi may be included in the process.

#### *Pre-wānanga takiwā hui*

35. Ms Sykes submitted that preparatory hui should be held ahead of the wānanga takiwā to address any issues that may arise and where consensus may be found. Ms Sykes referred to the Māori Land Court Registrars who create 'safe spaces' to 'enable focused discussions' and suggested the Crown may fund an independent facilitator to attend the preparatory hui and assist claimants in their kōrero.

#### *Claim participation and eligibility*

36. Crown counsel advised that the Crown had not yet conducted a thorough claim-by-claim analysis with respect to eligibility issues, in part to avoid an overly adversarial approach. Counsel requested the Tribunal and counsel to consider whether such a claim analysis was necessary or desirable at this stage, prior to the wānanga takiwā.
37. Several claimant counsel sought a further opportunity to file statements of claim for this inquiry.
38. In addition, to assist in ascertaining eligible claims for inclusion in this inquiry, I suggested that claimant counsel could, at the time of filing particularised statements of claim, indicate whether their claims have been extinguished by settlement legislation.

#### *Te Paparahi o Te Raki*

39. Janet Mason referred to the findings of stage one of Te Paparahi o te Raki District Inquiry (Wai 1040) and reiterated that the Crown must address the issue of sovereignty before any consensus can be reached at the wānanga takiwā.
40. Crown counsel sought further clarification regarding whether this Tribunal will revisit the stage one findings and whether the Tribunal would hear similar claims brought by non-Te Raki claimants during the Wai 3300 inquiry.
41. Linda Thornton submitted that a number of district inquiries have made contrary findings to the Te Raki inquiry and sought clarification as to the effect of those inquiries on the Constitutional inquiry.
42. Ms Whiley submitted that the Letter of Transmittal for stage two of Te Paparahi o te Raki District Inquiry (Wai 1040) notes the Tribunal has not identified precisely when the Crown acquired sovereignty, or its legitimacy in a contemporary context. She suggested such questions could be addressed during the Wai 3300 inquiry.
43. Mr Naden suggested the Wai 3300 inquiry could consider the constitutional legitimacy of the Crown as the Te Paparahi o te Raki District Inquiry (Wai 1040) inquiry did not do so.
44. Ms Peters submitted the Wai 3300 inquiry should address the gap between the findings of stage one of Te Paparahi o te Raki District Inquiry (Wai 1040) and the topics canvassed in *Matike Mai*. She said the Crown should explain whether they agree with the Wai 1040 findings that iwi and hapū hold mana motuhake and rangatiratanga within New Zealand.

#### *Historical or contemporary inquiry*

45. Ms Mason sought clarification regarding whether the Wai 3300 inquiry will be a historic or contemporary inquiry. Ms Mason said she has clients who have settled their claims and questioned whether any settlement included an acceptance of the Crown's authority to govern over claimants.
46. Mr Naden submitted that the Ngāi Tai Lands (Cotter-Williams) (Wai 2063) claimants 'partially settled' under the Ngāi Tai Claim Settlement Act 2012 but that they should nevertheless participate in the Wai 3300 inquiry as both contemporary and historical claimants.

#### *Funding*

47. Ms Terei-Tipene submitted that claimants want to fully engage in the wānanga takiwā process but see resourcing and funding as a significant concern.
48. Josey Lang from Te Kāhui Rau Rikiriki, the Crown's inquiry response team, submitted that the Crown's interim common claimant funding policy directs lead agencies responsible for responding to a kaupapa inquiry to provide funding assistance for claimant participation. Ms Lang said the funding would cover actual and reasonable costs for claimants to hold preparatory hui including expenses incurred through travel, hiring of audio-visual equipment, catering, and accommodation. Ms Lang said a fact sheet and funding form would be provided to claimants once the time and location of the wānanga takiwā was established.
49. Ms Lang submitted that the Tribunal may attend events such as preparatory hui if invited by claimants.

#### **Crown memorandum dated 15 May 2024**

50. On 15 May 2024, the Crown filed a memorandum to clarify points made during the 26 April 2024 judicial conference regarding the Ministry of Justice's claimant funding scheme. The Crown submits the scheme is designed to support claimants who are participating in the Wai 3300 inquiry and cannot be used to cover hosting costs for Tribunal events such as judicial conferences, hearings, or the proposed wānanga takiwā.
51. However, the scheme does include funding for the actual and reasonable costs for claimants to hold preparatory hui for themselves and claimant witnesses to meet and prepare for Tribunal events.

## Next steps

52. The Tribunal is considering next steps and will release its decisions on next steps as soon as possible.

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 11 o te Hōngongoi 2024.



Kaiwhakawā Mātua C L Fox  
Tumuaki

**TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI**