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 COMMENCING WĀNANGA Ā-ROHE PHASE

1 Whiringa-ā-Nuku 2024

Purpose

1. This memorandum-directions confirms next steps for Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry (Wai 3300).

2. In particular, I:

   (a) commence and confirm the structure of the wānanga ā-rohe phase for the Wai 3300 inquiry; and

   (b) confirm the particulars for the first wānanga, which will be held from **Monday 2 to Tuesday 3 December 2024** at **a venue to be confirmed.**

3. An inquiry timetable with relevant milestones leading to the first wānanga is **attached** as **Appendix A.**

Background

4. On 17 April 2023, the Tribunal commissioned Pou Tikanga and Pou Ture Pākehā to develop a report on tikanga and ture pākehā to guide the inquiry procedure for the Wai 3300 inquiry (the Pou Report) (Wai 3300, #2.3.1).

5. The Pou Report proposed that, from the outset, the inquiry will take the form of a series of wānanga (Wai 3300, #6.2.2).

6. The Tribunal held two planning wānanga on 30 January 2024 and 7 March 2024 respectively, and sought written submissions regarding inquiry design from the Crown and claimant counsel (Wai 3300, #2.5.11 & #2.5.24) in March and April 2024. We also heard oral submissions on inquiry design at a judicial conference held on 26 April 2024 (Wai 3300, #2.5.17).

7. I summarised the submissions received in my memorandum-directions dated 11 July 2024, and indicated the Tribunal would consider these submissions and release our decision on next steps as soon as possible (Wai 3300, #2.6.11).

8. The Tribunal has considered the kōrero and submissions received and now confirms next steps in the wānanga ā-rohe phase of the Wai 3300 inquiry.

Purpose and structure of wānanga ā-rohe phase

Overview

9. I advise that the purpose of the wānanga ā-rohe phase is to:

   (a) Enable the claimants to provide evidence as to their principles of constitutionalism. I also direct the Crown to file a statement of principles in response. During the wānanga, the parties will be able to question each other regarding each principle to determine whether there are commonalities.

   (b) Confirm the themes for the inquiry.

10. The parties may seek agreement on the next steps needed to address these issues. This could include the provision of any relief or redress, or an agreed process for inquiring into any claim issues that remain unresolved following the completion of the wānanga ā-rohe phase.

11. I previously indicated a preliminary proposal for the Tribunal to hold several two-day wānanga between August and November 2024 (Wai 3300, #2.5.24 at [7]). I now confirm that the Tribunal is minded to hold four two-day wānanga in the following regions:

    (a) Northern region (venue to be confirmed). This may include the Tokerau and Waikato districts, from Kaitaia in the north, Te Kuiti in the south, Tauranga in the east and the Coromandel Peninsula.

    (b) Southern region (venue to be confirmed). This may include Te Waipounamu, Wellington, Palmerston North, and Bulls.

    (c) Eastern region (venue to be confirmed). This may include Hastings, Gisborne, Whakatāne, Rotorua, and Taupō.

    (d) Western region (venue to be confirmed). This may include Tūrangi, Taumaranui, New Plymouth and Whanganui.

Pre-wānanga preparatory processes

Participating claims

12. A preliminary list of claims for this inquiry is **attached** to this memorandum-directions as **Appendix B.**

13. A list of consolidated claims which have requested to participate in the Wai 3300 kaupapa inquiry is attached as **Appendix C.** As outlined in the Tribunal's *Guide to Practice and Procedure,* consolidated claims are not eligible to participate in other inquiries unless they request that the Chairperson grants permission for the claim to be aggregated into another inquiry. I direct the claims listed in **Appendix C** to indicate whether they seek aggregated status in the Wai 3300 kaupapa inquiry.

14. Parties listed who wish to participate in the first wānanga set down for 2 to 3 December 2024 should file a memorandum confirming their intention to do so by **5pm, Wednesday 16 October 2024.**

15. Other parties listed who do not wish to participate in the first wānanga should file a memorandum by **5pm, Wednesday 16 October 2024** to confirm:

    (a) whether they wish to participate in the wider Wai 3300 kaupapa inquiry; and

    (b) if so, confirm if they also wish to participate in the wānanga ā-rohe phase. Those wishing to participate in the wānanga ā-rohe phase should identify the region from which they will attend (i.e., a wānanga in the Northern, Southern, Eastern or Western region as per [11] above).

16. Due to the large number of inquiry participants, and to maximise opportunities for claimant engagement within this process, I expect that participating claimants will attend and participate in one wānanga only at the venue close to them.

17. I confirm that a letter (**attached** as **Appendix D**) has been sent out to the following organisations (or their representatives) to invite their participation:

    (a) Iwi Chairs Leadership Forum.

    (b) Kotahitanga.

    (c) Kiingitanga.

(d) New Zealand Māori Women's Welfare League.

(e) New Zealand Māori Council.

Statements of position and statements of tikanga principles/principles of constitutionality

18. As I have proposed at the 26 April 2024 judicial conference (Wai 3300, #4.1.5 at [36]), I confirm that, prior to each wānanga, participating claimants should file a **statement of position** that identifies their principles of constitutionalism. Such statement(s) may include principles such as:

    (a) mana atua;

    (b) mana ariki;

    (c) mana rangatira;

    (d) mana motuhake; and

    (e) ngā ritenga.

19. In response to the claimants at [17] above, the Crown should file its own statement of response with the principles of constitutionalism it relies on and which the Crown considers underpins the unwritten constitution of New Zealand.

Wānanga ā-rohe background paper

20. To assist parties' preparations for discussions at the wānanga, the Tribunal has prepared a high-level background paper that provides possible definitions on the proposed themes for inquiry, which will be the subject of discussion at the wānanga. This background paper has been placed on the Wai 3300 Record of Inquiry as document #6.2.18.

21. I note the background paper is not intended to provide authoritative definitions of the various themes. It is instead intended to provide a starting point to help facilitate conversation(s) between both claimant groups, and between claimants and the Crown.

Pre-wānanga hui

22. Some claimant counsel have previously indicated that pre-wānanga hui could be held between claimants (Wai 3300, #4.1.5 at [62] – [67]). Counsel suggested that such hui could be facilitated by an independent mediator, with the aim of identifying possible solutions in relation to each theme in advance of the Tribunal's wānanga ā-rohe.

23. The Tribunal sees benefit in the claimants holding pre-wānanga hui to, as far as possible, find common ground on their principles of constitutionalism, themes, issues, and possible forms of redress on claim grievances.

24. I further note that the Crown has confirmed it would reimburse claimants' reasonable costs to run and attend preparatory hui ahead of Tribunal events, including wānanga (Wai 3300, #3.2.3). I thank the Crown for this helpful indication.

Wānanga ā-rohe

25. As indicated, the Tribunal will facilitate wānanga ā-rohe that would enable parties the opportunity to jointly identify and articulate:

(a) The principles of constitutionalism that should underpin this inquiry.

(b) The themes that encompass the issues arising from the claims participating in this inquiry. The Tribunal has thus far identified a number of provisional themes, which are outlined in the background paper noted above (Wai 3300, #6.2.18). These themes and their definitions remain subject to any kōrero arising at the wānanga.

26. Wānanga discussions may also include any agreement on possible solutions and forms of redress that address the claim issues and grievances raised by the claimants. Solutions or relief may include any Crown actions, concessions, or acknowledgements that address claim grievances or allegations against the Crown. These solutions might also include any future-focused outcomes, such as expressing what a Tiriti/Treaty-compliant constitution might look like.

27. I stress the overarching purpose of each wānanga is for parties to articulate and, as far as possible, establish any points of agreement between the parties on the principles of constitutionalism, themes, claim issues and any possible redress, and identify more clearly any remaining issues between them.

Wānanga ā-rohe report

28. Following the wānanga, I confirm that Tribunal staff will produce a report capturing the principles, themes and remaining issues raised during each wānanga at the conclusion of the wānanga ā-rohe phase.

29. The wānanga ā-rohe report will form a tūāpapa or foundation of the inquiry and will be added to the record of inquiry.

Judicial conference

30. The release of the wānanga ā-rohe report will be followed by a judicial conference to discuss and hear submissions on relevant next steps.

31. Parties will have an opportunity to:

(a) Comment on or discuss the wānanga ā-rohe report, including corrections of any inaccuracies such as misspellings, typographical errors or missing words.

(b) Seek and/or confirm any agreement between parties on the provision of any solutions or relief to resolve thematic or claim issues. Parties may also consider formulating a joint statement of relief prior to the judicial conference that articulates the redress being sought.

32. Should claim grievances remain unresolved following discussions per [30](b) above, parties may make submissions on next inquiry steps. As I have previously stated (Wai 3300, #2.5.5 at [27]), such steps could include a conventional Tribunal inquiry process, which could involve:

(a) any possible inquiry phasing or staging;

(b) any research;

(c) any further interlocutory processes;

(d) hearings; and

(e) a subsequent Tribunal report with findings and possible recommendations.

Other procedural matters

Evidence

33. At the 26 April 2024 judicial conference, I indicated the Tribunal will not be hearing or testing evidence during the wānanga ā-rohe phase (Wai 3300, #4.1.5 at 37). The wānanga ā-rohe are distinct from a ngā kōrero tuku iho hearing process (Wai 3300, #4.1.5 at 75).

34. I also confirm that parties are permitted to present evidence to support their discussions and consideration of tikanga principles and/or constitutionality.

35. I further confirm that transcripts of the kōrero from the wānanga will be placed on the record of inquiry.

Participation and role of lawyers

36. Consistent with the Pou Report's recommendation for a tikanga-based inquiry approach driven by the spirit of consensus and a 'lesser reliance upon litigiously adversarial and legalistic' procedures (Wai 3300, #6.2.2 at 5), counsel may participate but only in a supportive role. This is consistent with counsel's submissions that the wānanga ā-rohe phase should enable participants to have an opportunity to be heard effectively while still allowing for effective legal representation (Wai 3300, #3.1.30; Wai 3300, #3.1.31; Wai 3300, #3.1.32 & Wai 3300, #2.6.11 at [28] – [31]).

37. I accordingly confirm that the Tribunal expects counsel to participate in a largely observational or supporting capacity during each wānanga. Counsel may seek leave to participate in discussions or kōrero at the wānanga provided they are instructed to do so by their clients.

38. Counsel will, of course, be able to assist in preparatory work for the wānanga ā-rohe phase, including the preparation and filing of statements of position of tikanga principles/principles of constitutionality and draft wānanga timetable.

Jurisdiction issues and the role of the Crown

39. The Tribunal considers the processes of the wānanga ā-rohe phase falls within its discretionary powers under s 5(9) of the Treaty of Waitangi Act 1975. This allows the Tribunal to regulate its procedure in such a manner as it sees fit and to adopt such aspects of te kawa o te marae as it sees appropriate.

40. Crown counsel have advised that the Crown's ability to agree to matters involving future-focused solutions may be limited, as such decisions are likely to be subject to Cabinet approval, Ministerial direction, or broad public support. Crown counsel have indicated it would be useful to have sufficient notice of the issues for discussion in order to adequately prepare and make the appropriate experts and officials available (Wai 3300, #3.1.33).

41. The Tribunal considers that the filing of claimants' statements of position relating to tikanga principles ahead of each wānanga will assist the Crown's preparations for and engagement in these discussions.

First wānanga and forward planning

42. As previously noted, the first wānanga for the Wai 3300 wānanga ā-rohe phase will be held from **Monday 2 to Tuesday 3 December 2024** at **a venue to be confirmed**.

43. Ahead of the first wānanga in December 2024, I direct that:

(a) Claimant groups seeking to participate in the first wānanga to be held from 2 to 3 December 2024 should file statement(s) of position on tikanga principles by **5pm, Monday 4 November 2024.**

(b) The Crown should file a statement of response to the claimants' statements at by **5pm, Monday 25 November 2024.**

44. I also direct that parties participating at the first wānanga should confer and file a joint draft timetable for this wānanga by **5pm, Friday 22 November 2024. Day 1** should start at 9am and end at 5pm**. Day 2** should start at 9am and finish at 3pm. The Tribunal will issue the final timetable by **27 November 2024.**

45. Finally, parties who wish to attend the first wānanga should indicate their intention to do so via e-mail to the Waitangi Tribunal's Registrar (WT.Registrar@justice.govt.nz) by no later than **12pm, Monday 25 November 2024.**

46. I confirm that the above milestones are reflected in the inquiry timetable in **Appendix A.**

47. Forward planning for subsequent wānanga, including future locations, dates and filing milestones, will be addressed in due course.

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-a-tara i te 1 o Whiringa-ā-Nuku 2024

Kaiwhakawā Mātua Dr C L Fox
Tumuaki
TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI