BEFORE THE WAITANGI TRIBUNAL

WAI 3300
WAI 1194
WAI 1212
WAI 2494
WAI 2872

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	Tomokia ngā tatau o Mātangireia **(WAI 3300**)
AND	
IN THE MATTER OF	a claim by **Colleen Skerrett-White, Timitepo Hohepa**, and **Te Ariki Derek Morehu** on behalf of **Ngāti Te Rangiunuora** who are supported by **Ngāti Pikiao (Wai 1194 and Wai 1212)**
AND	
IN THE MATTER OF	a claim by **Pita Tipene, Moana Maniapoto, George Laking, Veronica Tawhai, Donna Kerridge** and **India Logan Riley** on behalf of **Ngā Toki Whakarururanga (WAI 3342)**

JOINT CLOSING SUBMISSIONS

Dated on this 22nd day of May 2024

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AND

IN THE MATTER OF	a claim by **Donna Awatere-Huata** of Ngāti Porou, Ngāti Whakaue and Ngāti Hine, on behalf of herself and all Māori **(WAI 2494)**

AND

IN THE MATTER OF	a claim by **Dr Leonie Pihama, Angeline Greensill, Mereana Pitman, Hilda Halkyard-Harawira** and **Te Ringahuia Hata (WAI 2872)**

Table of Contents

Introduction ... 2

The Tribunal's Statement of Inquiry ... 3

Te Tiriti o Waitangi ... 3

The Tribunal's Obligations ... 7

The Tribunal's Methodology ... 10

Te Tiriti o Waitangi principles ... 12

(i) Te mātāpono o te tino rangatiranga ... 13

(ii) Te mātāpono o te kāwanatanga ... 14

(iii) Te mātāpono o te whakaaronui tētahi ki tētahi: the principle of mutual recognition and respect ... 16

(iv) Te mātāpono o te houruatanga: the principle of partnership ... 17

(v) Te mātāpono o te mataporore moroki; the principle of active protection ... 17

(vi) Te mātapono o te whakatika; the principle of redress ... 17

The Treaty Principles Bill ... 18

Treaty Clauses Review ... 24

Prejudice ... 28

Findings ... 31

Recommendations ... 31

TĒNĀ E TE TARAIPIUNARA

Introduction

1. These closing submissions are filed for and on behalf of the following claims and claimants:

   a) **Wai 3342;** Pita Tipene, Moana Maniapoto, Donna Kerridge, George Laking, India Logan-Riley and Veronica Tawhai for and on behalf of Ngā Toki Whakarururanga **(Ngā Toki Whakarururanga);**

   b) **Wai 1194** and **Wai 1212** – a claim by Colleen Skerrett White, Timitepo Hohepa and Te Ariki Morehu for and on behalf of Ngati Rangiunuora and supported by Ngati Pikiao Koeke **(Ngāti Pikiao)**;

   c) **Wai 2494** – a claim Donna Awatere Huata for and on behalf of herself, her whānau and iwi of Ngati Porou, Te Arawa and Ngati Hine; and

   d) **Wai 2872** - a claim by Leonie Pihama, Angeline Greensill, Mereana Pitman, Hilda Halkyard-Harawira and Te Ringahuia Hata.

   ("**the Claimants**")

2. These closing submissions are to be read in conjunction with the joint opening submissions for the claimants,[1] the Affidavit[2] and Exhibits[3] of Colleen Skerrett-White dated 24 January 2024, the Affidavit[4] and Exhibits[5] of Elizabeth Jane Kelsey dated 30 April 2024 and her opening remarks of 10 May 2024,[6] and the Brief of Evidence of Max David Noble Harris dated 1 May 2024[7] and his opening remarks of 10 May 2024.[8]

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[1] Wai 3300, #3.3.5 *Joint opening submissions* dated 2 May 2024.
[2] Wai 1194, #A1 *Affidavit of Colleen Skerrett-White* dated 24 Jan 24.
[3] Wai 1194, #A1(a) *Index to the appendices to the affidavit of Colleen Skerrett-White* dated 24 January 2024.
[4] Wai 3300, #A15 *Affidavit of Elizabeth Jane Kelsey* dated 30 April 2024.
[5] Wai 3300, #A15(a) *Appendix A: Index and exhibits to the affidavit of Elizabeth Jane Kelsey* dated 30 April 2024.
[6] Wai 3300, #A15(b) *Opening statement of Professor Jane Kelsey* dated 10 May 2024.
[7] Wai 3300, #A9 *Brief of Evidence of Max David Noble Harris* dated 1 May 2024.
[8] Wai 3300, #A9(b*) Opening statement of Dr Max Harris* dated 10 May 2024.

The Tribunal's Statement of Inquiry

3. The Tribunal issued two principal questions, with a number of sub-questions.

    (i) *Is the Crown's policy and the process it has undertaken, in relation to the Treaty Principles Bill,* ***consistent with te Tiriti o Waitangi and its principles****?*

    (ii) *Is the Crown's policy and the process it has undertaken, to "conduct a comprehensive review of all legislation (except when it is related to, or substantive to, existing full and final Treaty settlements) that includes 'The Principles of the Treaty of Waitangi' and replace all such references with specific words relating to the relevance and application of the Treaty, or repeal the references"* ***consistent with te Tiriti o Waitangi and its principles****?*

4. These closing submissions first address the common reference point of te Tiriti o Waitangi, the Tribunal's obligations in this constitutional kaupapa inquiry, and the relevant principles for the Tribunal's exercise of its jurisdiction, as well as how these relate to both the proposed measures. They then consider the Treaty Principles Bill and the Treaty Clauses Review separately to address the Tribunal's sub-questions on each. The final sections consider prejudice, findings and recommendations.

Te Tiriti o Waitangi

5. The Tribunal's reference point to assess the Crown's actions is Te Tiriti o Waitangi itself.

6. Te Tiriti has long been regarded as a "kawenata tapu" or sacred covenant or compact, not to be broken or desecrated. The evidence of tangata whenua experts Professor Margaret Mutu, Mr Hone Sadler, Mr Kipa Munro, Mr Pita Tipene and Ms Natalie Coates acknowledge Te Tiriti as such, and resist any notion that it is a mere source of property rights,[9] or just one of this nation's founding documents. It is a sacrosanct marker of a relationship between two sovereign nations that established the limited terms for the Crown's presence in Aotearoa and would never allow for unilateral changes to be imposed upon it, such as those of the current coalition government that make it "barely recognisable".[10]

[9] Wai 3300, #A14 *Brief of Evidence of Professor Margaret Mutu* dated 29 April 2024.
[10] Wai 3300, #A4 *Brief of Evidence of Hone Pereki Sadler* dated 30 April 2024.

7. He Whakaputanga o te Rangatiratanga o Nu Tireni expressed the mana held by the rangatira individually and in a collective capacity, "that they were an independent and sovereign nation". Te Tiriti o Waitangi took that further and "provided the framework in which the British and Māori would co-exist and apply rangatiratanga alongside kāwanatanga and grow as a nation".[11]

8. The Crown's limited authority of kāwanatanga under Te Tiriti sits alongside, not above, rangatiratanga. Through te Tiriti, the Crown was granted the right to exercise authority over British subjects, and thereby keep the peace and protect Māori interests, within Aotearoa. Professor Mutu emphasised in her evidence the momentous honour of this very limited authority bestowed on Queen Victoria.[12] The Crown has systematically abused that honour.

9. Both of the Coalition Government's proposals do violence to these understandings:

   (i) The Treaty Principles Bill aims to rewrite the Tiriti relationship agreed to in 1840, and literally Te Tiriti o Waitangi itself, by eliminating rangatiratanga altogether for the purposes of the Crown's exercise of its assumed rights of "government";

   (ii) The review of Treaty clauses in legislation aims to purge the statute book of references to the "principles of the Treaty", and potentially to references to the Treaty or te Tiriti, aside from Treaty settlement legislation.

10. The constitutional change that is being contemplated in these proposals disfigures Te Tiriti and Te Tiriti relationships; and it dishonours the people, communities and work that contributed to He Whakaputanga and Te Tiriti, and all those who have worked tirelessly to uphold Te Tiriti. Mr Kipa Munro's testimony reminds that the process of defending Te Tiriti against racist attacks and political assaults has aged his peoples of Te Tai Tokerau. It saps lives, it takes time away from people to live

[11] Wai 3300, #A11 *Kōrero Taunaki a Pita Tipene* at [6] and [11].
[12] Wai 3300, #A14 at [14].

their lives and to thrive.[13] These initiatives will do the same. They will set us back decades as a country if allowed to proceed.

11. Whenever such laws are made and Te Tiriti is not at the centre, Māori are losing. And each time the standard for honouring Te Tiriti is lowered even further, it is made even harder to get to the authentic, Te Tiriti-compliant position. Mr Pita Tipene likened it, in his oral evidence, to the 5th floor of a 20 floor building when the only way is down.[14]

12. In his brief of evidence, Dr Max Harris makes the following statement:

> *Relatedly, the Treaty Principles Bill and the Treaty clause review contort the very concept of the Treaty principles that is meant to be the touchstone for the Tribunal. One policy or act of the Crown's, the Treaty Principles Bill, reinterprets and redefines the principles in a way that shows no fidelity or respect for the original treaty. The other policy or act of the Crown seeks to eliminate or whittle down the Treaty principles as they appear across the statute book. One policy or act drills deep into the foundations of New Zealand's constitutional order to tamper with those foundations. The other policy or act spreads a net across the landscape and aims to drag and catch all references to the principles, so that they can be lifted off that landscape. It is worth returning to Casey J's words about what the principles are: an account of the Treaty's "terms understood in the light of the fundamental concepts underlying them"; precepts that call for an assessment of the relationships the parties hoped to create by and reflect in Te Tiriti o Waitangi. It can hardly be said that Treaty or Te Tiriti relationship are being assessed, let alone respected, where one side is unilaterally seeking to redefine the terms of the Treaty. Where proposed principles lose any plausible or defensible connection to the terms of the text the Crown cannot be said to upholding the principles at all.*[15]

[13] Wai 3300, #4.1.6 *Wai 3300 Transcript - Tomokia ngā tatau o Matangireia - the Constitutional Kaupapa Inquiry: Treaty Principles Bill Urgent hearing held at Waitangi Tribunal Offices, Wellington, Thursday 9 May 2024 - Friday 10 May 2024, 17 May 24* at page 234 lines 4-10.
[14] Wai 3300, #4.1.6 Transcript page 14 lines 4-6.
[15] Wai 3300, #A9 at [101].

13. Dr Harris also spelt out the violence being done to te Tiriti with reference to te Tiriti principles, in his opening remarks to the Tribunal:[16]

a. *Tino rangatiratanga is redefined by the Bill: the Bill, almost definitionally, contradicts tino rangatiratanga. It denies Māori voice, interfering with the right of Māori to continue to organise and live as Māori.*

b. *There is no active protection when tino rangatiratanga is expunged from New Zealand law and policy through the Bill and when no process for safeguarding Māori interests is flagged by the Treaty clause review.*

c. *There are clear breaches of principles of good faith and the duty of the Crown to be reasonably informed, including the failure by the Crown to inform itself in setting out its commitment to the Treaty Principles Bill.*

d. *There is a breach of Te Tiriti's preamble, with its reference to the Crown being anxious to protect the just rights and property of Māori.*

e. *There is a structural breach of Te Tiriti o Waitangi in the sense that these initiatives reach into the heart of Te Tiriti itself. These initiatives involve the Government tampering with the foundation of its own legitimacy, a little like the mythical snake eating its own tail.*

14. As Dr Harris noted, these measures are unprecedentedly ill-informed and irreversible in their damaging effects. The Tribunal must recommend they are abandoned. We are at a fork in our constitutional road and there are generational decisions to be made about which route is taken. There is growing awareness of Matike Mai, Te Tiriti o Waitangi, and He Whakaputanga, among at least some younger people and communities. A positive route could lie ahead if our community

[16] Wai 3300, #A9(b) at [11].

resists taking a wrong turn. The Tribunal can play its part in ensuring the right turn is taken.

15. Professor Kelsey described this in her oral evidence as a constitutional moment.[17] Hostile political forces have been emboldened by international developments to seize the opportunities created by MMP and coalition negotiations to advance assaults on te Tiriti that are more brutal than we have seen for many years. If allowed to succeed, they will open the door to more, even bolder assaults on Te Tiriti o Waitangi and Māori.

16. This puts a heavy responsibility on the Tribunal, especially in this constitutional kaupapa inquiry, to make strong and definitive findings that reinforce the fundamental relationship of rangatiratanga to kāwanatanga and advance an approach to decision-making and law making in Aotearoa that genuinely reflects Te Tiriti and recognises the centrality of tikanga Māori as the first law of this land.

The Tribunal's Obligations

17. This urgency hearing is part of the broader Wai 3300 Constitutional Kaupapa inquiry. The issue before the Tribunal is not whether the Crown has followed its own rules and procedures or its various versions of Treaty principles that bear no resemblance to te Tiriti o Waitangi. The Tribunal needs to determine whether the acts and omissions of the Crown breached its obligations under Te Tiriti o Waitangi and its principles of rangatiratanga, kāwanatanga, recognition and mutual respect, active protection, equity and redress.

18. For the purposes of the inquiry, the Crown is constituted by the Coalition Government (with members of the National, Act and New Zealand First political parties forming that Coalition), as well as the state sector officials.

19. When making that assessment, the Tribunal must recall the gravitas of what the Crown has proposed: two measures that constitute direct, deliberate, unilateral

[17] Wai 3300, #4.1.6 Transcript page 252 line 20 to page 253 line 7.

assaults on the kawenata tapu of Te Tiriti o Waitangi itself through a process initiated and conducted for political and ideological purposes in the utmost bad faith.

20. The Tribunal's findings need to directly confront the enormity of the breach. This is not simply a matter of poor process and lack of engagement. Nor is the breach confined to one hapū or taonga. Ms Coates[18] and Dr Harris[19] both described it as "structural", going to the core of the constitutional relationship between rangatiratanga and kāwatananga established through te Tiriti.

21. It cannot be suggested that the Tribunal's inquiry is premature pending the outcome of Cabinet decisions on both measures, and hence outside its mandate. The Tribunal's jurisdiction and its past practice are set out in full in Dr Harris's brief of evidence;[20] that has included inquiries into potential prejudice and possible inconsistency with Te Tiriti principles. The claimants say that these measures have already caused prejudice, even without their formal completion, and it is untenable to suggest that there cannot be effective inquiry until Cabinet has made definitive decisions that would be even more difficult to reverse than the current coalition commitments.

22. What happens next will depend on the fickle vagaries and power plays of coalition politics, which to date been overly influenced by the very minor parties of ACT and New Zealand First that demanded these two commitments in their Coalition Agreements with the National Party. They will determine the content, timing, process and outcomes secretly in Cabinet, and these can change overnight to achieve the Coalition Agreement's objectives.

This Tribunal cannot afford to rely on the officials' current indicative timelines or speculate that a different outcome might emerge that mitigates the obvious prejudice. The evidence to date says it must anticipate and respond to a worst case scenario. This Government has already established a pattern of bad faith. The

[18] Wai 3300, #4.1.6 Transcript page 189 line 14.
[19] Wai 3300, #A9 at [100].
[20] Wai 3300, #A9.

Crown introduced legislation to repeal section 7AA of the Oranga Tamariki Act 1989 immediately after the release of the Court of Appeal decision against the Crown over the Waitangi Tribunal's authority to summons the relevant Minister of the Crown. Likewise, the Coalition Government introduced the legislation to require referenda on the Māori Wards at local government the same day as the Tribunal released its report that the proposed Bill would breach the Crown's Tiriti obligations.

23. In determining its recommendations, the claimants urge the Tribunal to resist the temptation to look for compromises that could give the Crown, via the Coalition Government, the opportunity to further advance its assault on Te Tiriti. These two measures signal the Coalition's contempt for Te Tiriti o Waitangi. If they are not stopped now, what is next on the agenda?

24. Māori witnesses spelt out the harm this is already causing,[21] compounding 184 years of formal, state-backed colonisation. Even Crown officials also acknowledged the distress this is already causing to Māori communities. The Chief Executive of Te Arawhiti, Lillian Anderson, said: "I know the coalition agreement announcement around the review along with other announcements in the coalition agreement have caused great distress in Māori communities, that is very clear to me."[22]

25. Māori witnesses, along with Professor Kelsey[23] and Dr Harris,[24] stressed the risks of legitimising similar attacks that will cause profound damage to Māori, the promise of Te Tiriti, and the peace, security and wellbeing of Aotearoa New Zealand.

26. Beyond recommending the termination of both proposals, the Tribunal needs to lay the positive foundations for subsequent constitutional transformation whose process and outcomes respect the relationship of rangatiratanga and kāwanatanga

[21] See the evidence of Professor Margaret Mutu (#A14), Hone Sadler (#A4), Kipa Munro (#A3), Pita Tipene (#A11) and Natalie Coates (#A6).
[22] Wai 3300, #4.1.6 Transcript, page 52, lines 28-30.
[23] Wai 3300, #A15.
[24] Wai 3300, #A9.

and the tapū of te Tiriti o Waitangi and He Whakaputanga o te Rangatiratanga o Nu Tireni.

The Tribunal's Methodology

27. The Statement of Issues refers to principles that are derived from Te Tiriti. That is critically important, especially in the constitutional kaupapa inquiry. Our Statement of Claim and evidence address the need for the Tribunal's methodology and jurisprudence, sourced in the Treaty of Waitangi Act 1975, to give precedence to Te Tiriti o Waitangi and principles drawn from it, rather than the English version - what Professor Mutu describes as Hobson's draft that was never accepted by Māori.[25]

28. Professor Kelsey gave evidence from an academic perspective on the contemporary concept and use of Treaty "principles". The term "principles" appeared to be used interchangeably by Māori in the past to reflect the wairua of Te Tiriti itself. Their introduction by the Crown into legislation through the Treaty of Waitangi Act 1975 was viewed with suspicion: for example, Ngā Tamatoa questioned "which and whose principles".[26] Their challenge that these could see "blatantly Pakeha principles" carried through into legislation proved prescient as the "principles of the Treaty" evolved during the 1980s into an ideological device used by the Crown to avoid its obligations under Te Tiriti.

29. For Ngāti Hine, Pita Tipene was crystal clear in his oral evidence that the only legitimate reference point is Te Tiriti, not the principles:

> *... there is no such thing as Treaty principles and I understand fully that we've been living with them for a while now, but just by agreeing that the Treaty principles are the basis of the Honour of te Tiriti o Waitangi is already undermining it. ... As far as we're concerned in Ngāti Hine our tūpuna signed Te Tiriti o Waitangi. They didn't sign the Principles or the Treaty of anything else.* [27]

[25] Wai 3300, #A14 *Brief of evidence of Margaret Shirley Mutu* dated 29 Apr 24.
[26] Wai 3300, #A15 at [35].
[27] Wai 3300, #4.1.6 Transcript page 137 lines 3-6.

30. In similar vein, Hone Sadler said: "I have never bothered to engage in any debate or for that matter discussion on Treaty principles, as they are contrived out of context and with another agenda."[28]

31. The Tribunal is caught in a contradiction between Te Tiriti and the "principles". It is required to determine the meaning and effect of both the texts annexed to the Act, to examine complaints of breaches of Treaty "principles" and to recommend redress. At the same time, it is a creature of the Crown, which has resulted in self-censorship and vacillations in Tribunal jurisprudence on the "principles" when it has come under pressure.[29] What the Crown is currently doing with the Treaty Principles Bill is proving right those longstanding critics of the principles, who regard the "principles" as a device to water down Crown Te Tiriti obligations.

32. Professor Kelsey identified three distinct phases of Tribunal jurisprudence over its almost 50-year history:[30]

   (i) The reports on the initial inquiries into the *Motunui* outfall, *Kaituna River* and *Manukau Harbour* accorded priority to Māori understandings of Te Tiriti and said there was no cession of sovereignty by Māori.

   (ii) In the second phase, following the *Lands case*, the Tribunal retreated from that approach and subordinated its methodology and jurisprudence to the Court of Appeal's Treaty "principles", which emphasised the Crown's supreme right to govern and referred to a cession of sovereignty.

   (iii) More recently, several Tribunal reports, notably *Te Urewera, Te Rohe Potae,* and *Te Raki,* have reverted to the methodology that sources the principles primarily from the Te Tiriti, and confirmed that there was no cession of sovereignty.

[28] Wai 3300, #4.1.6 Transcript page 77 lines 7-9.
[29] Wai 3300, #A15.
[30] Wai 3300, #A15 at [116] – [145].

33. In the context of a constitutional kaupapa inquiry it is essential that the Tribunal does not capitulate under pressure, including threats to its very existence, and remains true to its mandate as it has done implicitly by adopting Te Tiriti and its principles as the reference point for this urgency inquiry.

34. The Tribunal has been validated in that position by the Court of Appeal's recent recognition of its critical and unique constitutional role and responsibility in *Colleen Skerret-White and others v Minister for Children*:[31]

> There is no doubt about the importance of the Tribunal in our constitutional arrangements. The Tribunal's significance was well captured by the Solicitor-General's submission to this Court that it "is a critical part of our constitutional architecture". And we agree with her further observation that the role it fulfils is an important way in which the Treaty is recognised as a major source of this country's constitutional makeup. ...
>
> The Supreme Court has described the Tribunal's jurisdiction in relation to historical Treaty claims as unique in Aotearoa New Zealand's legal and constitutional framework. This is not a historical Treaty claim, but the same words are apt to describe other aspects of the Tribunal's jurisdiction which require it to inquire into claims about whether policies proposed to be adopted by the Crown are inconsistent with the principles of the Treaty.

Te Tiriti o Waitangi principles

35. While maintaining the primacy of Te Tiriti itself, the claimants recognise the Tribunal is required to engage with "principles" and identify the following as relevant for this inquiry:

(i) Te mātāpono o te tino rangatiranga;
(ii) Te mātāpono o te kawanatanga;
(iii) Te mātāpono o te whakaaronui tētahi ki tētahi, the principle of mutual recognition and respect;
(iv) Te mātāpono o te houruatanga, the principle of partnership;

[31] [2024] NZCA 160, at [36].

(v) Te mātāpono o te mataporore moroki; the principle of active protection; and

(vi) Te mātapono o te whakatika; the principle of redress.

36. Each of these is now briefly addressed with reference to the Crown's breaches of its substantive and process obligations.

(i) Te mātāpono o te tino rangatiranga

37. According to the Tribunal in *Te Paparahi o te Raki*: [32]

> Rangatira expected that, in accordance with te Tiriti, their authority would continue to be recognised and respected and they would continue to exercise their rights and responsibilities to their hapū in accordance with tikanga.

38. The substance and process of both the proposed measures positively deny the authority of rangatiratanga, the place of tikanga as the first law of Aotearoa, and the status of Te Tiriti as an international treaty between two sovereign nations.

39. The unilateral actions proposed by the Crown seeks to effectively remove its constitutional obligations to recognise rangatiratanga under Te Tiriti from the exercise of its assumed right of government in Aotearoa New Zealand through legislation, policy directives, Crown agencies, delegated bodies, courts, Waitangi Tribunal, and other arenas. The meaning of rangatiratanga is twisted and disfigured in the second proposed "principle" in circulated versions of the Treaty Principles Bill.

40. The processes adopted for both measures have systematically denied Māori a voice at any stage of the process. Māori, as one party to Te Tiriti, have not sought either of these measures, they have been excluded from decisions on whether or not they should proceed, and they have had no input appropriate processes or their proposed implementation. Any involvement would occur only after the Crown has made the decisions in Cabinet.

[32] Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2022) at 2.4.1.

(ii) Te mātāpono o te kāwanatanga

41. The Report on Stage Two of *Te Raki* reiterated the Stage One finding there was no cession of sovereignty and Te Tiriti conferred a limited function on kāwanatanga. The expectation outlined above was that rangatiratanga and kāwanatanga would co-exist and operate to advance the wellbeing of the nation. The *Te Raki* Report observed how:

> As the treaty relationship unfolded …, it was characterised by the Crown overstepping the bounds of kāwanatanga, in conjunction with continual erosion of Māori tino rangatiratanga. [33]

42. Crown has continued systematically and deliberately to overstep that limited authority, taking its excess to an extreme with these measures.

43. There is no pretence of co-existence and constraint on kāwanatanga. The Crown is exercising unbridled power. The Coalition Agreement that underpins the two proposals is the result of political horse-trading between three minority political parties to form a Coalition Government. That Government is consciously proposing to use its temporary majority in Parliament to permanently rewrite the constitution of this nation in ways that cause serious violence to the kawenata tapu of Te Tiriti.

44. Senior public officials are in an invidious position as servants of the Crown. They claim a stewardship role in relation to the Constitution, including Te Tiriti; at the same time, they see it as their duty to serve the Government of the day and the Crown Minister who is directing their work.[34] Once Ministers make a decision, the officials' role is to advise on ways to implement the decisions.

45. They might advise Ministers on the risks associated with their proposed pathways, albeit in euphemistic terms such as that a pathway is "novel".[35] When fundamental

[33] At [xxiv].
[34] Rajesh Chhana, Wai 3300, #4.1.6 Transcript page 119, line 1-2 and page 159 line 16.
[35] Andrew Kibblewhite, Wai 3300, #4.1.6 Transcript page 101 line 32.

constitutional arrangements are threatened, euphemisms are profoundly inadequate. Officials must be frank. Officials hinted that they have raised Tiriti matters in their oral advice, but their advice on paper was limited to ways the pre-determined decisions in the Coalition Agreement can be implemented. The scope for advice was reduced to mitigating Tiriti breaches and damage to Crown-Māori relations.[36] Their briefings did not challenge the unconstitutionality of the two measures as non-compliant with te Tiriti.

46. None of the Crown officials considered it their role as independent public servants to defend Te Tiriti against this assault. That interpretation of their responsibilities enables the Crown under any government to pursue whatever policies it determines, irrespective of its (un)constitutionality even on Westminster terms. The precedent this sets for the future is frightening.

47. The issue here is not the commitment to implement the Coalition Agreement itself. Similar language (in relation to the need for the public service to be familiar with the coalition agreements and to have processes in place to implement them) has been used in relation to other coalition agreements, for example in 2017, though it is worth noting that all coalition agreements could be more explicit about the constitutional framework (including Te Tiriti o Waitangi) within which such agreements sit. What is different in this case, as evidenced already by the actions of this Coalition Government, is that the ACT and New Zealand First parties that secured these measures in their respective Agreements with the National Party are exercising effective leverage to secure their implementation; and it is the substance of these measures, and the approach to implementing them, that is unprecedented. The leverage reflects the configuration of the coalition and the political dynamics among the parties.

48. The elevation of naked political power over Te Tiriti obligations has been blatant. These actions and omissions of kāwanatanga must be seen as part of a broader political and ideological platform that is hostile to Te Tiriti. The Coalition Government's contempt for Te Tiriti is evident in its many policies that have

[36] Andrew Kibblewhite, Wai 3300, #4.1.6 Transcript page 148 line 10-11, Lil Anderson Wai 3300, #4.1.6 Transcript page 52 lines 1-2.

dismantled agencies, practices and laws that have provided some recognition and space for Māori, albeit well short of rangatiratanga.

49. The erasure of Te Tiriti is symbolised by this Government's replacement of the Cabinet's Crown-Māori Relations – Te Arawhiti Committee, which had an oversight role on Tiriti policies, by a Social Outcomes Cabinet Committee whose terms of reference are to "consider matters relating to improving social outcomes, including healthcare, social housing access, and law and order." There is no reference to Te Tiriti. Yet that is the Cabinet Committee responsible for both these measures.[37] As a consequence of portfolio allocations and lead agencies made responsible for these measures, the Minister for Māori-Crown Relations has also been marginalised from these decisions.

50. The Crown, through this Government, has shown itself to be untrustworthy and self-serving and has acted systematically and blatantly in bad faith. This far exceeds any legitimate role for kāwanatanga under Te Tiriti.

(iii) Te mātāpono o te whakaaronui tētahi ki tētahi: the principle of mutual recognition and respect

51. This principle requires rangatiratanga and kāwanatanga to move forward together and beside each other, each recognising and respecting the values, laws, and institutions of the other. This includes respect for tikanga Māori. The Crown cannot advance Pākeha interests at the expense of Māori. This applies to Māori political and legal rights and not just to their property rights.[38]

52. Both Coalition Government measures do the opposite. There has been no engagement with tikanga or te reo Māori experts or with hapū, iwi, whanau, hāpori or Māori entities, aside from preliminary interaction with the Iwi Chairs Forum. The content or process of both measures show neither recognition nor respect.

[37] See details of the (SOU) Cabinet Social Outcomes Committee here: https://www.dpmc.govt.nz/cabinet-committees/sou-cabinet-social-outcomes-committee.

[38] Above at 32, *Te Paparahi o te Raki Stage 2* at p.86.

(iv) Te mātāpono o te houruatanga: the principle of partnership

53. Recognition of the other Tiriti party is commonly described as a partnership, although the *Lands* case devalued that into an unequal relationship where the Crown is superior and Māori are subordinate. The ACT Party does not even subscribe to that lesser standard. Dr Harris cites the ACT Party's rationale for the Treaty Principles Bill as directly disavowing the notion of "partnership" because it leads to the argument that there "are two types of people" in New Zealand with different rights, resulting in co-governance and racial quotas on which "New Zealanders were never consulted".[39]

(v) Te mātāpono o te mataporore moroki; the principle of active protection

54. The claimants have difficulty with this principle, as it implies the Crown has superior power that it must exercise in a paternalistic way towards Māori. Te Tiriti conferred no such power on the Crown. As Professor Mutu explained, the power granted to Queen Victoria was to control her own and protect Māori from them and from threats from other foreign powers.

55. Even on the Crown's interpretation, there is no active protection or vigilance regarding non-compliance in a Treaty Principles Bill that seeks to extinguish tino rangatiratanga, or a review where references to "Treaty principles" will potentially be expunged from legislation, and when the Crown is the sole determinant of what would constitute an adequate reference where it considers that appropriate. Both measures are the reverse of active protection; they involve active removal of rights and protections in both retrospective and prospective forms.

(vi) Te mātapono o te whakatika; the principle of redress

56. Māori have the right to redress from kāwanatanga for breaches of Te Tiriti. A clear consequence of both the Coalition Government's measures is to remove access by Māori to redress for past and future breaches of Te Tiriti by the Crown.

[39] Wai 3300, #A9 at [74].

57. Both measures would remove several existing pathways for redress.

(i) The Treaty Principles Bill would effectively pull the Tiriti rug out from under the Tribunal and, by rendering it a mechanism to uphold Crown sovereignty, become a vehicle for further fundamental breaches of Te Tiriti. So, potentially, would a review of the Treaty of Waitangi Act 1975 as part of a Treaty Clause Review that removes references to the "principles".

(ii) The Treaty Principles Bill would fetter the jurisdiction of the courts and cast existing precedents into turmoil. The Treaty clause review would effectively remove or erode existing recourse to the courts where legislation refers to the "principles of the Treaty", and potentially to Te Tiriti and/or The Treaty.

(iii) Both measures could also have impacts on avenues for redress under local government, international treaties, and statutory bodies exercising delegated functions.

58. In sum, the Crown is manifestly in breach of all these principles. Indeed, the Crown has not even sought to justify its actions before the Tribunal. The measures are again in structural breach in the sense that entire pathways for redress are potentially mutilated if the Treaty Principles Bill and Treaty clause review are allowed to proceed.

59. Responses to more specific issues relating to each of the two measures are set out below.

The Treaty Principles Bill

60. The Treaty Principles Bill is a cynical political device to rewrite Te Tiriti o Waitangi, whatever its ACT Party sponsors may claim. The Bill denies and denigrates rangatiratanga by a garbled misuse of te reo Māori that strips out the essence of whakapapa and asserts that non-Māori have equal status to exercise rangatiratanga. That is a brutal violation of rangatiratanga, and the principle of rangatiratanga, in itself.

61. ACT's proposed Bill does not even acknowledge the existence of Māori. Mr Hone Sadler described the Coalition's commitment as demeaning, debasing and trivialising Te Tiriti me He Whakaputanga, and ACT's principles as contrived, disparaging and denigrating Ngāpuhi.[40] Professor Mutu called out the gratuitous violence done to te reo by cutting and pasting from Te Tiriti into the ACT Bill and the insult to those who have carried the rākau of the language throughout colonisation. She described the "slashing, hacking at the kawenata tapu covenant" as "very, very offensive, very hurtful, and very very harmful to our people ... who reel at this type of assault on something so tapu" and asked the Crown, "Why are you trying to hurt us so badly? What it is that you fear so much that you must attack us on something so important to us?"[41]

62. Senior Crown officials themselves conceded that the proposed Treaty Principles Bill would constitute a breach. Te Arawhiti's Deputy Chief Executive Warren Fraser was asked whether the Treaty Principles Bill in the coalition agreement and policy document is consistent with the Crown's Treaty of Waitangi obligations. He said simply: "No."[42]

63. The Tribunal heard the same evidence from every direction. Mr Kipa Munro in his concluding remarks to the Tribunal at the urgent hearing, asserted:

> Mātou me ērā atu o ngā kaikerēme e aru ana, e aru ana tēnā nohonga Taraipiunara ki tērā, ki tērā, ki tērā, ka piki ake tātou Ngāi Māori ka poro ō mātou waewae, ka piki ake anō ka poro ō mātou nei waewae. Tēnei pire he poro ūpoko, he poro ūpoko.[43]

64. From a western constitutional law perspective, Professor Geddis observed that a constitution is not a blank slate on which you can write just anything. ACT's Bill amounts to a legal fiction that would, by unilateral diktat, turn a compact between

[40] Wai 3300, #4.1.6 Transcript page 78 line 5.
[41] Wai 3300, #4.1.6 Transcript page 205 lines 2-11.
[42] Wai 3300, #4.1.6 Transcript page 47 line 31 – page 48 line 3.
[43] Wai 3300, #4.1.6 Transcript page 181 lines 25-30.

two authorities into a universal individualistic assertion of liberal rights that aims to allow the executive to escape its Tiriti obligations.[44]

65. The briefing from the Ministry of Justice on 14 December 2023 warned of a "significant risk that the Bill could generate division that undermines social cohesion and the Crown-Māori relationship" and that:

> Developing a Bill that purports to settle the Treaty principles without Māori participation could be seen as one partner attempting to define what the Treaty means and the obligations it creates. Failing to engage would be seen as failing to meet the obligation under the Treaty to act reasonably, honourably and in good faith.[45]

66. It is clear that this proposal was ideologically driven without any evidence base. In the Ministry of Justice documents and their oral evidence Mr Kibblewhite and Mr Chhana described ACT's Treaty Principles as "novel" and not supported by cases, legislation or expert opinion.[46] The briefing to incoming Associate Minister Seymour referred to the Bill of Rights Act, but contained no reference to te Tiriti.[47]

67. When asked, the officials could not provide any description of the purpose for the Bill beyond reiterating the words in the Coalition Agreement.[48] Discussing the normal process of policy reforms to address an identified problem, Mr Kibblewhite was asked his view of the policy problem the ACT Party's Bill was seeking to address. His reply pointed to the value of a constitutional conversation in an appropriate way, but "that problem doesn't necessarily lead you to the problem that the Treaty Principles Bill is offering". Tribunal Chair, Judge Fox, asked "if you didn't have the Coalition Agreement, what is the policy problem you would hope to identify that would need a bill of this type?", to which Mr Kibblewhite replied: "I don't have a policy problem that would need a bill of this type to finish."[49]

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[44] Wai 3300, #4.1.6 Transcript page 216.
[45] Wai 3300, #2.5.15 at [9] and [42].
[46] For example, #2.5.15 at [19].
[47] Wai 3300, #A23 *Appendix A: Briefing to the incoming Associate Minister of Justice* dated 25 January 2024.
[48] See Wai 3300, #4.1.6 Transcript page 112 lines 20-23.
[49] Wai 3300, #4.1.6 Transcript page 113 lines 2-8.

68. So the Crown is recklessly committed to pursuing this policy without any evaluation of its Tiriti implications, contrary to all of its own Treaty and "good regulatory practice" requirements.

69. The Cabinet paper is due to be discussed within days by the Social Outcomes Committee, which has no specific mandate to address te Tiriti. It remains totally unclear what that paper will discuss and how, or whether, Cabinet will address the many complexities it raises, let alone its Tiriti implications, because it is shrouded in secrecy. There has been no engagement with Māori, apparently even with the Iwi Chairs Forum under their special agreement with the Crown.

70. The consequential impacts of the Bill for other legislation have not been identified to the claimants, including the Treaty of Waitangi Act 1975, and the interface with the proposed review of Treaty clauses. Professor Kelsey briefly canvassed in her oral evidence the potential scope of the Treaty Principles Bill in the courts and tribunals, at all levels of government, and for delegated professional agencies whose mandates refer to the "principles of the Treaty", describing it as a potential "Pandora's box".[50]

71. A Treaty Principles Bill that acts as an omnibus amendment to all legislation that refers to Treaty principles through a schedule is utterly possible. That would effectively gut the Tribunal of its independence, powers and legitimacy without any engagement with Māori or compliance with the Crown's own procedural requirements, let alone with the Tiriti principle of rangatiratanga. With the stroke of a legislative pen, this short term coalition government could effectively kill off or neuter the Waitangi Tribunal. This also impacts on the principle of redress.

72. As noted earlier, this could happen overnight. There is real potential for this Bill to be moved very rapidly to bypass any scrutiny and Tiriti dialogue so as to achieve the ACT Party's political and ideological goals. Proposals for three rounds of Cabinet papers, an exposure draft and select committee hearings could easily become a one page Bill based on Act's template that is pushed through urgency or

[50] Wai 3300, #4.1.6 Transcript page 258 lines 1-10.

maybe a peremptory committee process. The Tribunal needs to recognise this as a real possibility.

73. Even on the options now being discussed, hapū, as the entities that signed te Tiriti, are likely to be totally disenfranchised. The Minister appears to have accepted, at best, the limited option of engaging with the Iwi Chairs Forum, who according to Mr Chhana would be the starting, and main, point of engagement.[51] The Iwi Chairs Forum is a recent construct that has no authority to speak on behalf of all hapū, let alone all Māori. Mr Chhana conceded a high level of risk given the limited time for consultation on the Bill. Whether it goes to hapū and the time line will be decided by Cabinet, with the Crown once again unilaterally determining the extent to which it will engage, let alone recognise rangatiratanga.

74. A select committee is no substitute for Te Tiriti-compliant engagement. As Professor Geddis said, a politically partisan select committee from one party to the Tiriti relationship is not the appropriate place to address such issues.[52] Nor is an "exposure draft" put out for limited or broader public consultation. In policy terms, an "exposure draft" is a generic process that, according to officials, considers whether the drafting converts the stated purpose into legislation, not whether the purpose itself is valid or constitutional.[53] To rely on an exposure draft for Tiriti compliance would not justify the Crown's unilateral exclusion of Māori from decisions that are fundamental to the Tiriti relationship.

75. In response to a question on this from the Tribunal, Pita Tipene said:[54]

> We need to be very clear that the threshold for engagement with Māori is not consultation, and even if it were, reducing Māori to submitters in a public process does not constitute consultation with Māori. For the Crown to provide tino rangatiratanga, there needs to be space for the exercise of rangatiratanga at every step of the policy design and process. This means first and foremost that Māori need to be able to make their own decisions about policies which affect them.

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[51] Wai 3300, #A23 *Brief of Evidence of Andrew Kibblewhite and Rajesh Chhana* at [28.2].
[52] Wai 3300, #4.1.6 Transcript page 224 line 2.
[53] See Wai 3300, #4.1.6 Transcript page 97.
[54] Wai 3300, #A11(b).

76. Finally, the Tribunal cannot assume that the Bill will not proceed beyond select committee. It is clear that its future fate would be a political decision, not Tiriti obligations. It is obvious that ACT leader Mr Seymour is leveraging his power within the coalition to secure the passage, and de facto entrenchment, of his Party's Treaty Principles Bill, and the National Party coalition partner has been facilitating that.

77. For reasons that are unclear, two months after the Government was formed and ministerial positions were allocated, Mr Seymour was appointed the Associate Minister in charge of the Bill on 26 January 2024. The Secretary for Justice described it as unusual to have an associate minister delegation with one responsibility.[55] The terms of his delegation as an Associate Minister are those within the Justice portfolio "relating to the **development and passage** of the Treaty Principles Bill and associated policy" (emphasis added).[56] It is significant that the delegation refers to the passage of the Bill, not to its introduction and referral to select committee.

78. Since that appointment, Associate Minister Seymour has exercised unitary control of the process: he directs the preparation for the Bill, including the extent of engagement with Māori, and the details of the Cabinet paper. As the Associate Minister he explicitly asked for advice on the risks of not consulting at all, which suggests he was seriously considering that option.[57] All this has occurred without any decision of Cabinet.

79. Associate Minister Seymour has been empowered by decisions of Prime Minister Luxon, wearing a second hat as the leader of the National Party that depends on ACT to maintain its coalition government. Public statements (and policy documents) show that Associate Minister Seymour is intent on this Bill proceeding to a binding referendum, despite statements from Mr Luxon in his capacity as National Party leader that it will not support the Bill beyond the select committee.

[55] Andrew Kibblehite, Wai 3300, #4.1.6 Transcript page 104 lines 32-35.
[56] Wai 3300, #3.2.8 *Memorandum of Counsel for the Crown filing material arising from the urgent hearing* dated 17 May 2024 at [2.5].
[57] Wai 3300, #2.5.15 at [33].

80. Associate Minister Seymour has displayed a single-minded determination to secure the implementation of the Bill and to rewrite te Tiriti in a potentially irreversible way. To date, his successful political manoevering suggests he may well secure his goal. Whether that extends to a referendum may be a matter of logistics and timing. But a referendum is not essential for prejudice to be caused. The introduction of an ordinary Bill, even without its adoption, would still have a massive impact.

Treaty Clauses Review

81. As with the Treaty Principles Bill, the review of statutory clauses that refer to the Principles of the Treaty is driven by political positioning and ideology. The origins of the review in the coalition agreement between the National and New Zealand First parties mean there is no clear rationale. The Coalition Agreement's commitment has not followed the Crown's standard process for considering the repeal of a Treaty clause, which would start with identifying a specific priority or problem.[58]

82. At its narrowest, the review of Treaty clauses in existing legislation would remove any reference to the "principles of the Treaty" from statutes and replace them with specific references of an unspecified kind or remove them altogether. As most references to Te Tiriti in statutes involve the "principles", that would potentially remove many or most statutory references that currently recognise some form of Māori Tiriti responsibilities and rights across a swathe of matters that are governed by legislation. While these references are inadequate, they are something. It is unclear who would make these decisions using what criteria, what understanding of te Tiriti their would apply and how they would understand the context of the individual statutes.

83. To appreciate the full implications of this coalition commitment to New Zealand First, it needs to be read alongside the statement of Deputy Leader Shane Jones that there will be no Treaty references – not just references to the "principles of the

[58] Wai 3300, #4.1.6 Transcript page 58 lines 32-35.

Treaty" – in new legislation,[59] and the absence of any Tiriti reference in the Fast Track Approvals Bill 2024. If that is to inform the review, as well as prospective legislation, as is entirely possible, the Te Tiriti could effectively be excised from statute law.

84. Whether this review ends up with a narrow or broad application, it would continue to deny rangatiratanga, because it is not authentically recognised in references to Treaty principles or other statutes; far exceed the authority of kāwanatanga, by unilaterally deciding to remove statutory references; offer no recognition of Tiriti relationships or mutual respect; make no pretence of partnership; and deliver no active protection, except in the unknown instances where the Crown may accept that some specific recognition is justified.

85. The timing of this proposal is on a different trajectory from the Treaty Principles Bill, reflecting the politics of the National–New Zealand First Coalition arrangement and the complexities of the proposal. The political imperatives, and contempt for the Crown's Te Tiriti obligations, are the same. So are the risks to Te Tiriti and its principles.

86. Te Arawhiti had been working on a stocktake of statutes under the previous government with a view to improving "consistency" of statutory references, while recognising the importance of context. The stocktake list of statutes that refer to Treaty "principles", The Treaty and Te Tiriti was provided to the Coalition Government on a preliminary basis in Te Arawhiti's 4 December 2023 briefing.[60]

87. The Chief Executive Lillian Anderson says she did not see such a review as damaging in itself, but there would be concerns about the process and outcomes.[61] She cited Natalie Coates' evidence in support. Ms Coates clarified that she is very concerned about the review itself, given its clear, pre-determined and harmful objective to remove or limit Tiriti provisions, the opposite of active protection. Any such review needs to be Māori-led or at least jointly conducted.

[59] Wai 3300, #3.1.82(c)(i) – *New Zealand First article 'Shane Jones: No more Treaty clause 'mission creep''*.
[60] Wai 3300, #A22(a).
[61] Wai 3300, #4.1.6 Transcript page 26 lines 1-6.

88. The conflict of Tiriti and Crown responsibilities is evident in officials' approach to "wait[ing] and see[ing] the policy destination" of the Treaty clause review,[62] which falls far short of active protection at the policy stage. It is no excuse for the lack of non-Crown Māori participation that there is nothing to engage on yet. That discussion needs to take place before the first decisions are made, not after the fact of the Coalition Agreement or a Cabinet decision. Whatever oral messages may be conveyed to Ministers, the unconstitutionality of the proposals need to be on the record so there is some accountability where at present there is none.

89. In her oral evidence Ms Anderson agreed there was already concern among Māori about the proposal and that Te Arawhiti should have front-footed the advice about the Crown obligations under Te Tiriti when the 4 December briefing was provided, but was not given.[63] That role was then taken from them.

90. There was a political decision to marginalise Te Arawhiti and the Crown's Māori Minister and Te Arawhiti from this review, despite their work on statutory references to te Tiriti. For reasons that remain unknown, there was a decision at Prime Ministerial level that the lead agency should no longer be Te Arawhiti, which convenes the Treaty Provisions Oversight Group established in 2022 to advise on Treaty references in legislation and reports to the Minister for Crown Māori Relations. The role of lead agency was transferred to the Ministry of Justice that reports to the Minister of Justice.[64] This decision was conveyed to officials on 10 April. That transfer comes on top of the replacement of the Crown Māori Relations Committee with the Social Outcomes Committee that does not refer to Te Tiriti in its terms of reference.

91. Nothing appears to have happened since then. After six months of Coalition Government the scope and meaning of the review is unclear. There is still no decision on its scope and whether it only applies to "Treaty principles" or more broadly; which "Treaty" will be the reference point; the relevance of the Treaty Principles Bill/Act; the criteria for assessing the relevance of the Treaty to the

[62] See Wai 3300, #4.1.6 Transcript page 64 lines 11-28.
[63] Wai 3300, #4.1.6 Transcript page 68 lines 12-32.
[64] Lil Anderson, Wai 3300, #4.1.6 Transcript page 30, lines 15-25.

legislation (some officials even think that some existing statutory reference might remain[65]); assessment of the subject matter and context; engagement processes with Māori on the many matters the legislation refers to; engagement with Crown agencies responsible for each statute; timelines and resources; and more. Costs have not been assessed.[66] It is also unclear whether these amendments would be through an omnibus Bill, which would prevent effective scrutiny of each affected law or regulation.

92. While recourse to the courts is within the parameters of the Crown's common law, including recent recognition of "tikanga", Māori have increasingly sought to use courts as a forum to protect their responsibilities, duties, rights and interests. The movement secured over several decades is the result of concerted advocacy and growing awareness in the courts of the Tiriti relationship.

93. Removing legislative references could eliminate this option, depending on how the courts respond. There is no clarity about the implications for judicial precedents and how the opinion in *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* that the courts can presume Parliament intends to honour the Treaty, and will interpret legislation accordingly, stand in light of such a clear contrary intention from Parliament.[67]

94. A further, fundamental question, not yet addressed, is how this would affect the Treaty of Waitangi Act 1975, including current claims before the Tribunal if the legislation changes mid-inquiry. Professor Mutu addressed that dilemma in her evidence on behalf of Ngāti Kahu.[68]

95. There has been zero engagement with Crown or non-Crown experts. The Crown's Treaty Provisions Oversight Group established to advise on statutory references has been side-lined. No Māori outside the Crown appear to have been involved,

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[65] Warren Fraser, Wai 3300, #4.1.6 Transcript page 37 lines 6-7.
[66] Lil Anderson, Wai 3300, #4.1.6 Transcript page 51 line 4, Warren Fraser, Wai 3300, #4.1.6 Transcript page 51 lines 20-29.
[67] *Trans-Tasman Resources Ltd v Taranaki Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR at [8] and [151].
[68] Wai 3300, #4.1.6 Transcript page 206 line 26 to page 207 line 9.

including experts in te reo Māori or tikanga, or those with constitutional authority to exercise rangatiratanga. While there have been preliminary discussions with the Iwi Chairs Forum these appear not to be substantive and they have no authority to speak on behalf of hapū.

96. It was suggested that the proposed review might improve legislation by fewer variables and greater clarity of application, and potentially create opportunities for more Tiriti-compliant references. For the review to be Tiriti compliant the Crown would need to agree to recognition of Te Tiriti in statute. Professor Kelsey's evidence shows the Crown has systematically rejected that option and that decisions on terminology have been driven by its desire legal risk or tokenism, resulting in what was referred to as "over-reliance" on Treaty clauses. Despite their variations, Treaty clauses are largely performative and designed to minimise legal risk.[69] None are allowed to give effect to te Tiriti or genuinely provide for its "active protection".

97. The wording of the Coalition Agreement provides two alternatives: greater specification or removal of references to the "principles of the Treaty". It does not cater for expansion or addition of Te Tiriti clauses. This indicates that Treaty compliance is not a purpose of the review, as Dr Harris noted. The Crown will decide which statutory references are dispensable. There is again a risk that these changes would be advanced through some kind of omnibus bill that pre-empts effective examination of the implications for each statute. That is, once more, the antithesis of active protection.

Prejudice

98. The claimants point to the following prejudices that Māori are suffering and are likely to suffer as a result of the Crown's policy and process in both regards:

98.1 The violence committed to the tapū and mana of Te Tiriti is prejudice, whether or not either of these measures advances to the point of implementation. The denial of Te Tiriti o Waitangi itself and the attempt to rewrite it seeks to expunge the ability of Māori to exercise their duties, responsibilities, rights and interests,

[69] Wai 3300, #A9 at [21].

and the equally fundamental obligations of the Crown to ensure the exercise of tino rangatiratanga and tikanga Māori. Natalie Coates described it as wiping away foundational Māori rights with a legislative pen,[70] or what Pita Tipene described as going backwards from slow and incremental progress to build trust and faith over recent years.[71]

98.2 From that abrogation of Te Tiriti flows the perpetuation of harms from the denial of rangatiratanga and tikanga, and of the social, economic, cultural, spiritual and developmental benefits that flow from exercising those responsibilities and rights.

98.3 In the immediate sense, even if the proposed Bill and Treaty clause review do not proceed to implementation, they will have caused great emotional harm to Māori and fostered a toxic environment in which hostile, anti-Tiriti and anti-Māori views are legitimised, even normalised. As noted earlier, Ms Anderson accepted that these commitments have already caused great distress.[72] To repeat the concluding words of Dr Harris:

> I end just by underscoring the depth and gravity of what the Crown is doing. This disfigures Te Tiriti and Te Tiriti relationships; and it dishonours the people and work who contributed to He Whakaputanga and Te Tiriti, and who have worked tirelessly to uphold Te Tiriti. Defending Te Tiriti has aged people; it has sapped lives; and taken away time that people should have to live and thrive. These initiatives will do the same. They will set us back decades as a country if allowed to proceed. These initiatives are unprecedentedly ill-informed and irreversible in their damaging effects. The Tribunal should recommend that they are abandoned.[73]

98.4 A fourth prejudice arises from the fact that the Crown is removing the foundation for its own legitimacy – what could be likened to the mythical snake eating its own tail. Dr Harris noted:

[70] Wai 3300, #4.1.6 Transcript page 190 lines 19-21.
[71] Wai 3300, #4.1.6 Transcript page 126 lines 5-12.
[72] Wai 3300, #4.1.6 Transcript, page 52, lines 28-30.
[73] Wai 3300, #A9(b) at [13].

> In departing even from its own requirements, the Crown has cast itself adrift from its own moorings and the potential for a good faith constitutional reconcilation. Both the Treaty Principles Bill and statutory review fail on their own terms: the policy problems that have been identified are either non-existent or not justified, or there is no logical connection between these initiatives and these policy problems. initiatives violate other norms: from the Cabinet Manual, the Public Service Act, the United Nations Declaration on the Rights of Indigenous Peoples.

98.5 While that is not a prejudice directly to the claimants, there is an indirect effect, as the breach of the kāwanatanga principle undermines the prospects for genuine Tiriti-based relationships and joint decision-making through the exercise of rangatiratanga. These commitments between political parties in a coalition agreement also set a precedent for future coalition deals to override even the Crown's internal constitutional processes.

98.6 Finally, by advancing such ideologically-driven political commitments into Parliament, with requirements that its bureaucracy provides advice and support on how to implement them, the Crown is conferring legitimacy on current and future moves to abrogate te Tiriti.

98.7 Professor Kelsey referred to this as a moment of constitutional crisis. The ideological platform to which these measures belong is already fuelling attacks on tikanga Māori in legal education, Māori wards, local government and other spaces to deny any recognition of Te Tiriti of Waitangi. The precedent set by allowing the Treaty Principles Bill, especially, to proceed even to select committee would trigger a constitutional crisis whose form and outcome are uncertain, but are likely to deepen societal divisions, and challenge Māori and the Crown to find new pathways to honouring Te Tiriti.

Findings

99. The Claimants seek definitive findings that:

(i) Te Tiriti o Waitangi is an international treaty between two sovereign states in which Māori did not cede their sovereignty, and which created a relationship of rangatiratanga and kāwanatanga within a unitary state. The proposed Treaty Principles Bill and the review of statutory references to the "principles of the Treaty" – that could remove references to te Tiriti altogether from statute, aside from Treaty settlements – constitutes a unilateral and unconstitutional rewriting of Te Tiriti itself.

(ii) The constitutional authority and responsibilities of Mana Motuhake and Tino Rangatiratanga in Te Tiriti o Waitangi – including in relation to laws, values, governance arrangements, political institutions and processes, economic systems, and treaty making, and the principles drawn from it – need to be exercised on equal terms with kāwanatanga. That has not occurred as a result of deliberate, unilateral and bad faith decisions by the Coalition Government. The Government has committed to pursue policies and processes that are in breach the Crown's Tiriti obligations and that, if implemented, would prevent a genuine Tiriti relationship operating in the future.

Recommendations

100. The Tribunal's recommendations must include the termination of all work towards both measures. They must also reflect the context of this constitutional Kaupapa inquiry and the findings of several recent Tribunal reports that there was no cession of sovereignty.

101. The claimants do not support the alternatives that were raised during the hearing that would leave the future of these measures in the hands of the Crown.

102. One option proposed by Te Arawhiti[74] and seemingly favoured by some Tribunal members, was to refer the review of Treaty clauses to the Law Commission. The

[74] Wai 3300, #A22(a) at [21](b).

Law Commission is a Crown entity. The terms of any reference from the Minister of Justice would be determined by the Crown.

103. Even if it initiated its own inquiry, the Law Commission does not have a Tiriti mandate. Its functions under Article 5(2)(a) of the Law Commission Act 1985 are, when making recommendations, to "take into account te ao Māori (the Māori dimension) and shall give consideration to the multicultural character of New Zealand society". The fact it has a Māori President and a Māori advisory committee are very positive, but that does not make it any less of a Crown entity. As with the Waitangi Tribunal, it only has recommendatory powers but it has less constitutional significance and moral leverage than a Tribunal report and recommendation.

104. The same critique applies to the courts, whose power resides within the Crown's domain. Professor Geddis saw some potential for the courts to finesse these obstacles, perhaps even asking the courts to declare a Principles of the Treaty Act, if passed, unconstitutional.[75] Whether such a case might be brought, let alone succeed, is highly speculative.

105. Professor Kelsey emphasised the pivotal role the courts have played in redefining Te Tiriti through the ideology of Treaty "principles". While recent cases have advanced the recognition of Te Tiriti and tikanga they stop well short of any genuine recognition of rangatiratanga.

106. Even if a legal challenge to a Treaty Principles Act of the kind Professor Geddis alluded was brought before His Majesty's judges, it would rely largely on common law constitutional principles and on interpretations of Te Tiriti that could be accommodated within that jurisdiction. The court could not, as a matter of constitutional logic, recognise that the Crown does not have sovereignty.

107. Professor Kelsey warned the Tribunal against treating the Crown's courts as the source of remedies on such a fundamental constitutional question that goes to the legitimacy of the sovereignty of the Crown, not just the constitutional separation of powers between Parliament and the courts within the Westminster system.

[75] Wai 3300, #4.1.6 Transcript page 220 line 32, page 221 lines 1-12.

108. Any inclination by the Tribunal not to stop these proposals now, but to wait for future decisions of Cabinet, select committee or political party leaders would ignore the political realities set out above. It would also send a message that these proposals could be reframed as compliant with te Tiriti. They cannot be. These measures are irredeemable; and the harm they stand to cause is potentially irreparable. Legitimising the power of the Crown to determine the future course of these measures and trust in processes that have to date shown utter bad faith would betray the claimants and the Tribunal's responsibilities to them.

109. Further, the options of referring the Treaty clause review to the Law Commission, treating an exposure draft of the Treaty Principles Bill as adequate compliance with Tiriti obligations, or taking comfort in a hypothetical court case that argues the unprecedented constitutional proposition that a Treaty Principles Act is unconstitutional and invalidates the Act of Parliament, would all legitimate the Crown as the arbitrator of Tiriti-compliant legislation, contrary to the principles of rangatiratanga, kāwanatanga and recognition and mutual respect. Making such compromises so would totally undermine the future constitutional kaupapa inquiry.

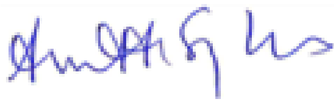
110. Without pre-empting the broader inquiry, the Tribunal needs to recommend the establishment, jointly by rangatiratanga and kāwanatanga, of a mechanism to develop ethical guidance for decision-makers on, and exercise oversight of, the Crown's obligations and the responsibilities, duties, rights and interests of Māori under Te Tiriti. Māori were discussing such mechanisms in the early 1980s and periodically thereafter, building on historical precedents. Such a recommendation could convert a devastatingly negative assault on Te Tiriti into a positive step towards constitutional transformation and reconciliation.

111. The Claimants seek the following recommendations:

(i) the immediate cessation of work on the proposed Treaty Principles Bill and the review of statutory references to the "principles of the Treaty";

(ii) for the Crown to commit to undertake a te Tiriti-consistent dialogue of rangatiratanga and kāwanatanga, based on agreement between the two parties to initiate such discussions and on a tikanga-consistent process, with a view to giving proper effect to Te Tiriti o Waitangi in a manner that upholds the mana and authority of both.

DATED at Rotorua this 22nd day of May 2024



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