IN THE WAITANGI TRIBUNAL

WAI 3300
WAI 3342
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 Matangireia **(WAI 3300)** – the Urgent Inquiry into the Proposed Treaty of Waitangi Principles Bill
AND	
IN THE MATTER OF	a claim by **Pita Tipene, Moana Maniapoto, Dr George Laking, Dr Veronica Tawhai, Donna Kerridge** and **India Logan-Riley** on behalf of **Ngā Toki Whakarururanga (WAI 3342)**
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)**

JOINT OPENING SUBMISSIONS

Dated this 1st 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)**

TĒNĀ E TE TARAIPIUNARA

Introduction

1. These opening 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; **(Ngati 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. The opening submissions are to be read in conjunction with the Affidavit[1] and Exhibits[2] of Colleen Skerrett-White dated 23 January 2024, the Affidavit and Exhibits of Elizabeth Jane Kelsey dated 30 April 2024, and the Brief of Evidence of Max David Noble Harris dated 1 May 2024.[3] **Statement of Issues**

[1] Wai 1194, #A1.
[2] Wai 1194, #A1(a).
[3] Filed with these opening submissions on 1 May 2024.

3. The Waitangi Tribunal has confirmed the below matters as issues to be investigated in the Wai 3300 Treaty Principles Bill Urgent Inquiry as follows:[4]

Treaty Principles Bill

1. 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?
    (a) What Treaty principles apply to the Crown's laws, policies, practices, actions and omissions in relation to the proposed Treaty Principles Bill?
    (b) In the context of the proposed Treaty Principles Bill, what are the Crown's duties and obligations to Māori arising from those Treaty principles?
    (c) What is required by the Crown to give effect to these Treaty principles in this context, including, in relation to engagement with Māori, and the process of developing the proposed Treaty Principles Bill?
    (d) To what extent, if at all, are the Crown's laws, policies, actions and omissions in relation to the Treaty Principles Bill inconsistent with te Tiriti o Waitangi and itsprinciples, and the Crown's legislative obligations relating to te Tiriti and its principles?
2. To what extent are Māori suffering or likely to suffer prejudice as a result of the Crown's policy and process in relation to the Treaty Principles Bill?
3. What findings and/or recommendations should the Tribunal make about any prejudice suffered, or likely to be suffered, by Māori as a result of Crown conduct in relation to the Treaty Principles Bill?

[4] Wai 3300, #1.4.2, Tribunal Statement of Issues.

Treaty Clause Review

4. 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 allsuch 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?
   (a) What Treaty principles apply to the Crown's policy to conduct a review of the Treaty clauses?
   (b) In the context of the Crown's policy to conduct a review of Treaty clauses, what are the Crown's duties and obligations to Māori arising from those Treaty principles,including in relation to the Treaty principles of tino rangatiratanga and partnership?
   (c) What is required by the Crown to give effect to these Treaty principles in this context, including in relation to engagement with Māori, and the process of conducting a review of Treaty clauses?
   (d) To what extent, if at all, are the Crown's actions and omissions in relation to its policy to review Treaty clauses, and the process it has undertaken, inconsistent with te Tiriti o Waitangi and its principles?
5. To what extent are Māori suffering, or likely to suffer prejudice, as a result of the Crown's policy and process to review Treaty clauses.
6. What, if any, findings and/or recommendations should the Tribunal make in relation to any prejudice suffered, or likely to be suffered, by Māori as a result of the Crown's review of Treaty clauses.

The Claimants' Position

4. The words "consistent with Te Tiriti o Waitangi and its principles" in both issues are the key to this inquiry. Te Tiriti o Waitangi, grounded in He Whakaputanga o te Rangatiratanga o Nu Turei, is the reference point, not The Treaty of Waitangi. The Report on Stage Two of *Te Raki* reiterated the Stage One finding there was no cession of sovereignty and 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.

5. The Crown has continuously, systematically and deliberately denied the authority of rangatiratanga, the place of tikanga as the first law of Aotearoa, and the status of Te Tiriti as an international treaty. Since the 1980s the "principles of the Treaty" has been a major instrument for achieving that. These claimants are not here to defend the Crown's "principles of the Treaty" developed by the Crown through its politicians, executive, legislation, court decisions and Waitangi Tribunal reports, because they are fundamentally incompatible with Te Tiriti o Waitangi me He Whakaputanga and principles that are ethically and authentically derived from that. Their challenge is to the policies and practices of this Government that seek unilaterally to rewrite the Tiriti relationship agreed to in 1840, and literally Te Tiriti itself.

6. As the statement of claim from Ngā Toki Whakarururanga made clear, the right to make international treaties is an exercise of mana that Māori have never conceded to the Crown. It is a fundamental tenet of international law that a treaty cannot be arbitrarily rewritten by one of its parties. Judge Doogan recognised this in his report on Oranga Tamariki issues on 29 April:

It is a Treaty of Waitangi, not a proclamation of Waitangi, and the Crown does not have a unilateral right to redefine or breach its terms.

7. The pact between the National Party and ACT New Zealand intends to introduce a Treaty Principles Bill that would effectively write Te Tiriti o Waitangi out of existence for the purposes of the Crown. The National Party's political deal with New Zealand First would potentially purge the statute book of references to the "principles of the Treaty", and potentially of references to the Treaty altogether aside from Treaty settlement legislation.

8. These are not principled acts of any kind, whether they are judged by the Crown's principles or principles derived from Te Tiriti. They are political horse-trading between three minority political parties to form a Coalition that has a temporary majority in Parliament during which they seek to rewrite the constitutional foundations of this nation. On that basis alone, the answers to both issues 1 and 2 is clearly "no".

9. The Crown's breach is therefore as fundamental as it can be: the denial of Te Tiriti o Waitangi itself and the attempt to rewrite it to deny the fundamental duties, responsibilities, rights and interests of Māori and the equally fundamental obligations of the Crown to ensure the exercise of tino rangatiratanga and tikanga Māori. That is the prejudice. From that flows the perpetuation of harms that have been caused by the denial of rangatiratanga, the exercise of tikanga, and the social, economic, cultural, spiritual and developmental benefits that flow from exercising those responsibilities and rights.

10. In the immediate sense, even if the proposed Bill and review do not proceed to implementation, they will have caused great emotional harm to Māori and fostered a toxic environment in which such views are considered legitimate.

Evidence

11. The claimants have filed two briefs of evidence to support these arguments from Dr Max Harris and Professor Emeritus Jane Kelsey.

12. Dr Harris's evidence will be that:

    (i) The Waitangi Tribunal has a broad jurisdiction and set of functions and powers and has fashioned its own approach to assessing policy and actions of the Crown. The Tribunal is well used to addressing claims about concurrent policy, such as in the foreshore and seabed claim.

    (ii) The key touchstone for the Tribunal is plainly Te Tiriti / the Treaty and its principles, but the Tribunal is also not bound to strict legalities and has looked at norms of sound policy-making, other legal standards, and whether policies achieve their own expressed rationales.

    (iii) Case law on Treaty principles makes clear that the concept of Treaty principles is tied to the Crown-Māori relationship. More recent decisions of the highest courts have shown a greater willingness to refer to the terms of Te Tiriti directly, and to consider how to delineate spheres of authority of Māori and the Crown.

    (iv) It would be open to the Tribunal to review whether the Treaty Principles Bill and the Treaty Clauses Review fail as policies on their own terms. They claim to address problems that do not exist or are overstated. It would also be open to the Tribunal to consider other legal shortcomings of these policies.

    (v) It would further be open to the Tribunal to make a number of findings of breaches of Te Tiriti o Waitangi and its principles, including in particular: a breach of active protection; a breach

of tino rangatiratanga; a breach of good faith (in consultation and process, given these are major issues); a breach of the preamble; and a structural breach that shows hostility to the promise in Te Tiriti itself.

(vi) Lastly, it would be open to the Tribunal to note that these proposed actions contort the relationship that is at the heart of the concept of the principles, and risks disfiguring and rupturing Crown-Māori relationship with long-term effects.

13. Professor Kelsey will argue, drawing on extensive research, that:

(i) Since the 1980s the concept of the "principles of the Treaty of Waitangi" has been consciously developed by the Crown in bad faith to redefine Te Tiriti o Waitangi/The Treaty of Waitangi so as to legitimise its unitary exercise of sovereignty.

(ii) The device of the "Treaty principles" has become the principal means by which the Crown circumvents Te Tiriti o Waitangi, including the guidance it provides to Crown officials and agencies to perpetuate the violation of Te Tiriti.

(iii) The proposed Treaty Principles Bill is the most recent and most blatant step in this continuum. It has been developed unilaterally by political agents of the Crown through a process that has excluded Māori rights to determine decisions that fundamentally affect them, as per the principle of rangatiratanga, has exceeded the authority of kāwanatanga, and that breaches the principles of mutual recognition and respect and partnership;

(iv) The fact that it also abrogates the Crown's own "best practice" requirements for policy and legislation, and the ACT Party's proposed principles for regulatory

responsibility, confirms the lack of good faith.

(v) The proposals to review legislation that references the "principles of the Treaty" have the same objectives as the Bill, to marginalise and potentially remove any references to the Treaty. This also follows a pattern that was set during the 1980s and, again, reflects a persistent exercise of bad faith and disregard for any obligations under Te Tiriti and its principles.

14. The claimants have further addressed the failings in the Crown's process in the Joint Memorandum of Counsel of 9 April on urgency. Judging by the three papers the Crown did release it seems likely that the refusal to release documents was born of concern that they would expose a pre-determination and deliberate exclusion of Māori from effective engagement on these most fundamental of Tiriti issues. By refusing to provide that documentation they seek to shield the Crown from accountability and justify adverse inferences being drawn.

Findings and Recommendations

15. This claim is a matter of utmost urgency and must set a precedent that prevents future breaches by this Government. Just as the Tribunal finally considers the constitutional form that te Tiriti o Waitangi should take in Aotearoa today the Crown, in the form of a Coalition Government, has launched a direct attack on Te Tiriti and treated its relationship with the other party to Te Tiriti with contempt.

16. The claimants urge the Tribunal not to fail them by succumbing to threats from the Crown and retreating from the tika position on the constitutional relationship of tino rangatiratanga and kāwanatanga adopted in recent inquiries. The stakes are far too high. If the breach of the principle of rangatiratanga and mutual recognition and respect are legitimised by the Tribunal it would create a precedent for the Crown to

ignore Te Tiriti and its principles in any and all actions in the future. That go to the very heart of Te Tiriti o Waitangi itself.

17. The Claimants seek definitive findings that:

(i) 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 operating in its sphere of authority;

(ii) The proposed Treaty Principles Bill and the review of statutory references to the "principles of the Treaty" – that could remove references to the Treaty altogether from statute, aside from Treaty settlements – constitutes a unilateral rewriting of Te Tiriti itself, and is intrinsically inconsistent with Te Tiriti and its principles; and

(iii) reiterating the findings in Te Raki Stage Two, Te Tiriti o Waitangi is an international treaty between two sovereignty states in which Māori did not cede their sovereignty, and which created a relationship of rangatiratanga and kāwanatanga within a unitary state.

18. The Claimants seek the following recommendations:

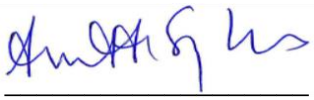
(i) To establish a review of the "principles of the Treaty" that genuinely represents the mana and authority of both rangatiratanga and kāwanatanga to determine whether the concept of "principles" is of any value, in light of the existence of te Tiriti itself, and if so to propose what steps should be taken to articulate and protect those principles;

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

(iii) consultation with Māori groups, acknowledging that Māori are not a homogeneous bloc, on whether the Crown should proceed with the Treaty Principles Bill and the Treaty clauses review; and

(iv) Jointly conduct an urgent revision of Crown documents that refer to the "principles of the Treaty" that misrepresent the Crown's obligations and Māori rights, responsibilities, duties and interests under Te Tiriti o Waitangi to accurately represent Te Tiriti o Waitangi and its principles.

DATED at Rotorua this 1st day of May 2024



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